IN THE HIGH COURT OF FIJI

At Suva

Civil Jurisdiction

MISCELLANEOUS ACTION NO. 0053 OF 2007

IN THE MATTER of an application by THE ATTORNEY GENERAL OF FIJI, for an Order of Committal.

AND

IN THE MATTER of one TUPOU TAKAIWAI SENIREWA DRAUNIDALO, at all material times the Vice President of the Fiji Law Society and Legal Practitioner

Counsel	:	Mr. C. Pryde & Mr. S. Sharma for the Applicant Mr. R.K. Naidu & Ms. N.S. Basawaiya for the Respondent
Dates of Hearing	:	2nd and 14th November 2007
Date of Ruling	:	20th November 2007

RULING UPON APPLICATION TO DISCONTINUE ACTION AND COSTS

[1] "No wrong is committed by any member of the public who exercises freely the ordinary right of criticising temperately and fairly, in good faith, in private or in public, any episode in the administration of justice. Provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are

genuinely exercising a right of criticism and not acting in malice, or attempting to impair the administration of justice, they are immune from proceedings for contempt of court", (headnote to Ambard v. Attorney General for Trinidad and Tobago [1936] A.C. 322.

[2] "Every person has the right to freedom of speech and expression including freedom to seek, receive and impart information and ideas ..." This is section 30 of the Constitution of Fiji.

[3] Subsection 2 of section 30 states,

> "A law may limit, or may authorise the limitation of, the right of freedom of expression in the interests of :
> (a)-(d) ...
>
> (e) Maintaining the authority and independence of the courts ;
>
> (f)-(g) ...
>
> but only to the extent that the limitation is reasonable and justifiable in a free and democratic society."

[4] "The confidence of lawyers in the judicial system, let alone the public, is shattered."

[5] These were the words, with others, allegedly uttered by the respondent, Tupou Draunidalo, in a Fiji One Television broadcast on One National News on 14th May 2007.

[6] Section 120 of the Constitution states "The Supreme Court, the Court of Appeal and the High Court have power to punish persons for contempt of Court in accordance with law".

[7] On 15th June 2007 an application was filed for leave to apply for an Order of Committal against Tupou Draunidalo in respect of this statement. The allegation was that by these and accompanying words she had "scandalised" the Court and was undermining the respect, integrity and authority of the Judiciary and the Courts of Fiji. Leave was granted on 22nd of June. The Court found on the face of the papers then before it that "there is an arguable case".

[8] After directions hearings, the affidavits of eight persons were filed on behalf of the respondent on 21st of September. They were served on the applicant the same day. They covered all the evidence to be adduced by the respondent. An extension of time was given to the respondent to file her affidavits and a similar extension was granted to the applicant for affidavits in reply. No affidavits in reply were filed.

[9] The dates of 14th and 15th of November were fixed for the hearing of the Attorney General's application. This is an important case and like all important cases should be heard as speedily as possible consistent with justice. On 2nd of November, at a final preparation hearing, counsel for the applicant stated that he wished to discontinue the proceedings. Counsel for the respondent did not oppose the application but informed the Court that indemnity costs would be sought. The Court required a formal application with supporting affidavit to be made in accordance with Order 21 Rule 3 of the High Court Rules.

[10] The application to discontinue was made by counsel for the Attorney General on 14th November. It was not opposed, but indemnity costs of the respondent were sought. I have before me the affidavits of Kalpana Arjun and Ajay Singh for the applicant. I have the affidavits of Daniel Fatiaki, Joni Madraiwiwi, Prem Narayan, Angenette Heffernan, Hamendra Nagin, Resina Senikuracini, Shayne Sorby, Robinson Prasad and Grahame Leung for the respondent. I have written submissions on

costs and related orders from the Respondent. I have heard oral submissions. There are also the formal documents concerning the initiation and progress of these proceedings.

[11] The first question I must decide is whether or not to grant leave to the applicant to discontinue these proceedings. The respondent does not object. That in itself is not the end of the matter. Had the agreement of all parties been sufficient to discontinue then that would have been stated in the Rules. It was not. The Order confers a discretion on the Court and that must be exercised judicially. It is of course likely that if both parties do agree then the Court will grant leave. The practical difficulties of requiring parties to conduct litigation which they do not wish to pursue are obvious.

[12] Order 21 Rule 3 states,

> "(1) Except as provided by the Rule 2, a party may not discontinue an action (whether begun by Writ or otherwise) or counterclaim, or withdraw any particular made by him therein, without the leave of the Court, and the Court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued, or any particular claim made therein to be struck out, as against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of the subsequent action or otherwise as it thinks just.
>
> (2) An application for the grant of leave under this rule may be made by summons or motion or by notice under Order 25, Rule 7."

[13] Counsel for the respondent, in addition to costs, seeks an order that the applicant be precluded from bringing any subsequent actions in respect

of the words spoken by the respondent which are the subject matter of these proceedings.

[14] I grant leave for the applicant to withdraw these proceedings. There is no reason in principle or in practical terms for their continuation. I turn to the question of costs.

[15] In the morning of 14th November, counsel for the respondent put forward the written submissions in support of the applications. Counsel spoke to these submissions. Counsel for the applicant was then granted an adjournment until the afternoon so that they might consider the submissions and prepare a response. No further time was requested in which to prepare a response.

[16] Ms. Draunidalo seeks "a generous gross sum of costs, made in terms of Order 62 Rule 7(4)(b) of the High Court Rules, which reflect :

> "(a) Applicant's irresponsible conduct in bringing this action.
>
> (b) Applicant's delay, in the face of the evidence, in seeking to withdraw it."

[17] Counsel accept that costs awards are to compensate and not punish a party in a manner of damages. Mr. Naidu stated the authorities are clear that a party's conduct is a relevant factor in the exercise of the court's discretion on awarding costs, particularly if that conduct resulted in needless costs being incurred by a party. Counsel for the applicant accepted these principles.

[18] Counsel continue that it is recognised an award of costs may be made on a basis other than the standard basis on the particular facts and circumstances of the case. He quoted by way of example the case of

Czerwinski v. Syrena Royal Pty Limited [2000] VSC 135 at pages 1 to 2 of her judgment where Warren J. stated,

> "A review of the authorities reveals that there are a number of grounds whereby the Court in the exercise of the discretion should award [indemnity] costs. These grounds may be briefly set out as follows :
>
> 1. Where the bringing of the application was high-handed,
>
> 2. If the application had no chance of success,
>
> 3. If the application was hopeless,
>
> 4. If the application was unnecessary,
>
> 5. If the application was not brought for a bona fide purpose but to achieve an ulterior purpose,
>
> 6. If the application was commenced in willful disregard of known facts or contrary to well-established law,
>
> 7. If the justice of the case warrants ... indemnity costs and
>
> 8. If there are special or unusual features that warrant the exercise of the discretion to award ... indemnity costs."

[19] Counsel for the applicant accepted these are the correct principles which I should apply when considering this application. He did not seek to argue that the matters advanced in support by the applicant are irrelevant to my considerations. He did challenge them and did strongly oppose the application.

[20] In oral submissions counsel for the Attorney General stated he had brought these proceedings after numerous complaints from members of the public and senior lawyers. He stated that the proceedings were not designed to "stymie the freedom of expression on the Courts". He continued the application had been made in the public interest, it was not an abuse of process as the Court had safeguards, namely the grant of leave, and there was no reprehensible conduct in bringing the application. It could not be said the applicant's conduct was so unsatisfactory as to merit indemnity costs and once a decision was made there was no further waste of the Court's or anyone's time. He continued there was no prejudice to the respondent, and her counsel was informed in reasonable time. He suggested costs should be summarily assessed at $1,000.00. He pointed out that in the similar case of Mahendra Pal Chaudhry v. The Attorney General of Fiji (Court of Appeal, 4th May 1999) that a sum of $500.00 had been awarded.

[21] The relevant billing work sheet of Ms. Draunidalo's solicitors was annexed to the submissions. That shows a total billable time of just over $40,000.00. Counsel suggested that fair assessed costs would be $20,000.00. Ms. Draunidalo states she didn't expect to be charged the full commercial hourly rate, but she did not expect them to work for nothing. I do note that Mr. Pryde has not sought to suggest that her counsel would not have charged had she been unsuccessful. Nor has it been suggested that, even in broad terms, the Bill of Costs nor the items are unreasonable. Accordingly, I accept that $40,000.00 of billable time was expended.

[22] I have carefully considered the submissions of both parties and I am of the opinion that they can best be addressed by adopting the headings utilised by counsel for the respondent.

Conduct of the Applicant in Bringing these Proceedings

[23] I must proceed on the face of the evidence before me. Why were the proceedings brought ?

[24] On 11th of July, the Attorney General issued a public statement (annexe TD1 to the respondent's affidavit) in which he stated,

> "Following this statement, I received complaints from a number of prominent legal practitioners on the contents of the statements made by Ms. Draunidalo. After considering these complaints and the contents of the statement made by Ms. Draunidalo, I exercised my discretion in the public interest as the Attorney General and applied to the Court for leave to apply for an Order of Committal against Ms. Tupou Draunidalo for contempt of Court.
>
> ...
>
> In bringing this proceeding, as the Attorney General, I am acting in the public interest to ensure that the Judicial arm of the State is not scandalised and that the respect, integrity and authority of the Judiciary and the Courts in Fiji are not undermined by such statements.
>
> Contempt proceedings by the Attorney General in the public interest to safeguard the Judiciary and the Courts against scandalous and scurrilous comments are not new. In 1998, the then former Attorney General brought similar proceedings against the current Minister of Finance Mr. Mahendra Chaudhry, for contempt of Court in relation to certain statements made by him.

Mr. Chaudhry was found guilty of contempt by the High Court and this finding was upheld by the Court of Appeal. Similarly, in 1972, the Attorney General brought proceedings for contempt of Court against the late Mr. Vijaya Parmanandam, who was found guilty of contempt by the High Court and committed to prison for six months."

[25] It is pertinent to note that the only affidavit in support of the application was one that referred to the broadcast and produced a transcript of what was said. There have been no affidavits from any of the prominent lawyers or members of the public referred to in the Attorney General's statement or indeed any one else.

[26] In assessing the conduct of the applicant in bringing these proceedings there is a question to consider. Was there a genuine debate about the administration of justice ? In addressing this issue it must not be taken in any way that I am stating any opinion upon the Constitutional and other cases of importance currently before the Courts.

[27] At the time of her remarks the respondent was Vice Present of the Fiji Law Society. Counsel in written submissions advances the argument "clearly, since the events of 5th December 2006 and the purported suspension of the Chief Justice there have been controversial acts by judges that are worthy of public comment and debate, in particular by those in positions of leadership among the law profession". Many examples are given in the affidavits and annexes. Counsel set out some as,

"(a) The removal from office of the Chief Justice.

(b) The purported meeting of the Judicial Service Commission appointing Justice Anthony Gates as Acting Chief Justice.

(c) The visit to the High Court at Lautoka by Justice Gates and Mr. Sayed Khaiyum (the Attorney General).

(d) Reports of Law Asia and the Pacific Forum Eminent Persons Group and

(e) Mr. Sayed Khaiyum's own comments critical of Justice Gordon Ward."

[28] Counsel for the respondent concedes that some of the respondent's comments may have been stronger than some deponents would have liked although the tenor of another deponent's affidavit, Joni Madraiwiwi, is that her comments were not too strong.

[29] Counsel continues it was clear Ms. Draunidalo's statement was fair comment by a responsible citizen with a legitimate interest, if not a duty, in making them.

[30] Counsel for the applicant responded that the Attorney General had made a considered and measured decision that the public interest required the bringing of proceedings and that the court itself had granted leave for those proceedings to be brought.

[31] There is no dispute that a meeting or purported meeting of the Judicial Service Commission was held on 15th January 2007 when Justice Nazhat Shameem, the Senior Judge, by date of appointment in this jurisdiction, sat together with Davenesh Sharma, the President of the Law Society and Rishi Ram, the Chairman of the Public Service Commission. The last had been appointed since the events of 5th December 2006. I have assumed for the purpose of these proceedings that the appointment of Rishi Ram was lawful. I have also assumed for the purpose of these proceedings that the appointment of the interim

Attorney General was lawful. Both are directly or indirectly the subject of other proceedings. By making these assumptions it must not be taken that I am expressing any opinion as to the lawfulness of their appointments.

[32] The meeting on 15th January was unanimous in recommending to the President that Justice Anthony Gates be appointed Acting Chief Justice. The President subsequently signed a document appointing or purportedly appointing Justice Gates as Acting Chief Justice. There were many who considered these actions were Constitutional, lawful and right and that no criticism can be made of them. It is pertinent to note that a legal opinion concerning the legality of this course was placed before the "Commission" but, according to the face of the documents before me, has never been published. It is perhaps unfortunate this advice has not been published.

[33] Tupou Draunidalo made the remarks the subject of these proceedings on 14th of May. Between 15th January and that time there was much scrutiny of the legality of those events. Between 29th of January and 1st of February 2007 the Forum Eminent Persons Group visited Fiji. At paragraph 48 of its Report it stated,

> "The continuing independent functioning of the Judiciary has been compromised by the process and manner in which the Chief Justice was requested to take leave and then suspended and an Acting Chief Justice appointed."

[34] An Observer Mission from Law Asia visited Fiji between 25 and 28 March. Their report was published on 12 April and states at paragraph 1(a),

"The rule of law in Fiji may be compromised by the ongoing uncertainty as to the status and future of suspended Chief Justice Fatiaki and by the ongoing public perception, right or wrong, that the judiciary is politicized and divided."

[35] James Crawford SC, Wherwell Professor of International Law at the University of Cambridge, in his published opinion dated 20th February 2007 at paragraphs 34 and 35 stated,

"34. For these reasons, in my opinion, the recommendation conveyed by Justice Shameem on 16 January 2007 was invalid.

"35. It follows from this that the President did not appoint the Acting Chief Justice on the basis of a valid "recommendation of the Judicial Service Commission", within the meaning of section 132(3) of the Constitution."

[36] In an advice dated 30th of March 2007, James Dingemans QC and James Hawkins of the Temple, London came to the conclusion at paragraph 27 that,

"The meeting of the JSC on 15th January 2007 was not properly constituted according to the Constitution, and the doctrine of necessity does not apply."

[37] The factual bases upon which these opinions were arrived at is set out in the relevant documents. They are all public documents.

[38] I reiterate that I do not pass any judgment as to the correctness of any of the views stated. However, on the 14th of May 2007 there was clearly a

genuine and responsible debate concerning the administration of justice in Fiji.

[39] Counsel for the respondent continues that "almost every fact disposed to in affidavits filed for Ms. Draunidalo was known to the applicant before he commenced the proceedings in June. Any reasonable person in the applicant's position would have known that these facts laid the factual foundation for the comments allegedly made by Ms. Draunidalo and, on the Chaudhry test (from the Fiji Court of Appeal), would be fair comment".

[40] Importantly, counsel for the applicant did not seek to point out any pertinent facts or incidents on the face of the respondents evidence which came about after the initiation of these proceedings.

[41] I have carefully read through all the affidavits and their annexes. It is right that almost every fact relied on by Ms. Draunidalo in her defence must have either been known to the Attorney General or could with reasonable diligence have been ascertained. When any lawyer commences a case he or she will collect and assess all the evidence that can be gathered in favour of the case and also research, collect and assess all the evidence which a respondent can reasonably be expected to advance in opposition. In this case before me, I do not know if such assessments were either not made or, if made, how, if at all, they influenced the decision to issue proceedings.

[42] When counsel for the applicant was asked to address this issue he could do no more than state that the proceedings had been brought in the public interest and, with virtually no change in the circumstances, were being withdrawn in the public interest. He did not advance any argument to show how the defence of "fair comment" could be met. This is an unsatisfactory state of affairs.

[43] The net result of all this is that the respondent has been subjected for five months to the worry of proceedings which might have ended up with a fine or imprisonment. It would appear that she has continued to exercise her right to freedom of expression yet states that the knowledge of these pending proceedings has had a "chilling effect" upon her.

[44] In these circumstances, on the face of the evidence and arguments before me I am driven to the conclusion that the Attorney General was irresponsible in bringing these proceedings.

Was There Delay in Withdrawing the Proceedings ?

[45] All the affidavits in support of the respondent were filed and served on 21st September. In three instances faxed copy affidavits of deponents were exhibited to affidavits of a legal executive. The originals were filed shortly afterwards. It therefore means that the applicant was in possession of all the evidence being put forward by the respondent on 21st September.

[46] On 18th of October the Solicitor General wrote a letter to the Acting Chief Registrar of the High Court stating at paragraph 4 that two affidavits were served on the 25th of September and one on 2nd October. A further two weeks was sought to respond. On 25th of October counsel for the applicant informed counsel for the respondent that the proceedings would be withdrawn. That application was made orally on the 2nd of November. The respondent states that during that period, from 21st of September to 2nd of November a total of over $10,000.00 was expended in billable time preparing for the hearing.

[47] Counsel for the applicant rejects the suggestion there has been delay in notifying the respondent that the proceedings were being withdrawn. He pointed out that there were some ten affidavits, that the issues were not

straightforward and that the Attorney General himself had been overseas on important business for part of the time.

[48] I find there was delay in bringing these proceedings to a conclusion. Whilst it would require some seven to fourteen days to read, digest and consider the affidavits, consider alternative courses and arrive at a decision it in fact was thirty four days before a decision was notified. Further, once that decision had been made, given the nature and seriousness of these proceedings, an application for withdrawal with supporting affidavit should have been issued promptly and could have been made returnable on 2nd November. This again necessarily raises the question of how responsible the applicant has been in the conduct of these proceedings.

Factors Concerning Indemnity Costs

[49] The Respondent's counsel state that indemnity costs should be awarded for the following reasons,

"(a) That the Attorney General was high-handed in bringing the application bearing in mind his own conduct in the criticism of an individual judge.

(b) Case has no chance of success, it was hopeless and was launched in wilful disregard of known facts or contrary to established law.

(c) The proceedings were unnecessary as there was no "public interest" in bringing the action.

(d) There is a reasonable cause to suspect that the proceedings were brought for an ulterior purpose namely to punish Ms.

Draunidalo for expressing views with which the applicant did not agree.

(e) That the justice of the case and its special features require indemnity costs in the light of the matters set out above and given it is accepted that constitutional rights including the right of freedom of expression are still intact and this was an abuse of power by which the Attorney General purported to punish an opponent of the Government who takes a different view from his own. He knew he was putting Ms. Draunidalo at risk of imprisonment."

[50] On 2nd of November, the Court required a formal application be made to withdraw the proceedings together with an affidavit setting out reasons. To this end, a formal application was lodged on 8th November together with the affidavit of Ajay Singh.

[51] It is startling that in a matter as important as this that the affidavit setting out reasons why the proceedings were being discontinued was made by a litigation officer. It should have been made by a senior member of the Attorney General's Office. Counsel for the applicant was asked if he wished to comment upon this and stated he did not wish to do so.

[52] Ajay Singh, the litigation officer, in his affidavit states he is authorised to make the affidavit and does so from facts within his own knowledge or from those he verily believes to be true. Ajay Singh states,

"8. I have been informed by the applicant and do sincerely believe that the applicant has noted that some of the issues raised by various deponents of the affidavits in this proceeding, are already before the High Court in other separate Court proceedings. I have been further informed by the applicant that

these are being addressed in separate Court proceedings, and do not need to be addressed in these committal proceedings.

9. I have been informed by the applicant and do sincerely believe that following further consideration of these proceeding, after taking into account the various documentary materials filed in this Honourable Court, and after taking the public interest into account, the applicant has decided not to proceed with this application and to wholly discontinue the same.

10. I have been informed by the applicant that after carefully assessing the nature of these proceeding, the applicant has decided that it is in the public interest that this proceeding be wholly discontinued."

[53] The reasons advanced by the Attorney General for applying to discontinue the proceedings can be summarised as follows, first, that it is in the public interest to do so and second, that "some of the issues raised ... are already before the High Court in other separate Court proceedings ... are being addressed in the separate Court proceedings, and do not need to be addressed in these committal proceedings."

[54] No other reasons have been put forward for the discontinuance of these proceedings.

[55] It is difficult to understand how it could be in the public interest to bring committal proceedings against someone who was scandalising the Court, yet be in the public interest to withdraw those proceedings saying some of the issues were already before the High Court in other proceedings. If indeed Ms. Draunidalo had been scandalising the Court, and making public remarks which were outside her right of freedom of expression then those are the very circumstances in which the

proceedings should have been continued. If such important matters are before other Courts then those are the very circumstances in which the authority and independence of the Court should be maintained. This specific point was put to counsel for the applicant. He was unable to respond other than to reiterate the concern over the "public interest".

[56] It is difficult to understand how it is in the public interest to bring contempt of court proceedings against a person yet with no material change in facts it is in the public interest to discontinue those proceedings.

[57] I will now address in turn as sub-points the issues raised by the respondent's counsel concerning indemnity costs.

(a) Was the Attorney General "High-Handed" in Bringing these Proceedings ?

[58] Counsel for the respondent states this factor is supported by the applicant's own conduct in the criticism of an individual judge. These proceedings were filed on 15th of June. Counsel for the respondent says that literally a few days earlier the Attorney General had made a "direct personal attack on the sitting President of the Court of Appeal". He continues "it is hard to conclude that this attack was aimed at anything other than undermining confidence in the President ... but this evidence must illustrate that he (The Attorney General) considered a certain level of criticism of judges to be appropriate. Why then were Ms. Draunidalo's comments worthy of contempt proceedings when his own were not ?"

[59] The remarks made by the Attorney General were published in two newspapers, The Fiji Times and The Fiji Sun of 11th of June. Counsel for the applicant was given time, as I have stated earlier, to consider these submissions made by the respondent's counsel.

There has been no suggestion from counsel for the Attorney General that he was in any way misquoted in these articles.

[60] In The Fiji Times the Attorney General is quoted as saying, when referring to the President of the Court of Appeal,

> "He has completely compromised his position, that of an independent judge.
>
> "All these matters are before the Courts and the Senior Judge making such pronouncements indicates that he is not independent, is partisan and clearly unfit to hear any such matters that concern the Government, FICAC and indeed other members of the Judiciary.
>
> "Under these circumstances it would appear that the only honourable and professional option he has available is to immediately hand in his resignation and save our Judiciary and our nation at large from the onslaught waged by those such as him, (a named person), and others of their ilk."

[61] Identical words were quoted in The Fiji Sun and the words,

> "It is also of grave concern that he has brought the July session of the Fiji Court of Appeal forward given, what can only be now termed as his very public political and legal leanings, in particular when two of the appeal matters which were to be heard in the July Session involved the acting Chief Justice and a former Prime Minister and Commander of the RFMF.

[62] Counsel for the applicant responded the point was misconceived and the words out of context. It was not the applicant who was on trial.

[63] I have considered how there might be an explanation which reconciles the Attorney General's remarks to the press when only a few days later he filed proceedings against the respondent for words which referred to a concern over the independence of the Judiciary in the context of a genuine debate about the administration of justice and by comparison were in temperate and measured tones. I have not been able to find any explanation.

[64] The Attorney General's remarks clearly imputed improper motives to a senior judge, the President of the nation's Court of Appeal ; they were not temperate and on their face they do not appear to be a genuine exercise of the right of criticism and certainly should have given rise to consideration of the filing of committal proceedings.

[65] It is beyond understanding how the Attorney General could put Ms. Draunidalo at risk of fine and imprisonment for words she uttered when he himself had publicly used far stronger words only a few days earlier.

(b) Was there no Chance of Success ? Was the Case Hopeless ? Was it Brought in Wilful Disregard of Known Facts or Contrary to Established Law ?

[66] Counsel for the respondent states that in the light of the case of Mahandra Chaudhry v. The Attorney General of Fiji the applicant had a high evidential hurdle to cross to meet the defence of fair comment. Counsel continues that the justification for withdrawing the proceedings provided by the applicant falls well short of meeting these complaints.

[67] Counsel for the applicant responded that the Court had been satisfied there was an arguable case. It was pure speculation as to whether the case would fail or succeed upon the evidence.

[68] I cannot say the case had no chance of success or was hopeless when viewed at the outset. In the light of the facts then known or which ought to have been known there was an arguable case but one which would have stood little chance of success. I do find that there was a disregard of known facts and law or a failure to ascertain them. Given the established law, particularly concerning the constitutional right to freedom of expression and the Mahendra Chaudhry and Ambard cases, proper assessment before the commencement of these proceedings would have arrived at the conclusion that there was little, if any, chance of success.

(c) Was the Application Unncessary ?

[69] The bringing of proceedings for contempt of Court against those alleged to have "scandalised the Court" has disappeared in many jurisdictions. The administration of justice is robust enough to withstand and accommodate criticism. It can be argued that in smaller jurisdictions there is a need for the retention of this kind of proceeding. In Fiji this is recognised in the Constitution by the limitation upon the right to freedom of expression for a law which "maintain(s) the authority and independence of the Courts but only to the extent that the limitation is reasonable and justifiable in a free and democratic society".

[70] Had there been an evidential basis which provided these proceedings with a reasonable chance of success then I would be in a position to assess whether or not they were necessary. In the absence of such a basis I cannot come to a conclusion on this issue.

(d) Was there an Ulterior Purpose ?

[71] Counsel for the applicant argues that there is reasonable cause to suspect that these proceedings were brought principally to punish Ms.

Draunidalo for expressing views with which the Attorney General did not agree.

[72] Counsel for the applicant responded that there simply was no evidence there was any intention of the Attorney General to punish the respondent. He continued that in the absence of credible evidence such a suggestion should be ignored.

[73] The Court asked Mr. Pryde that if it appeared that no reason was forthcoming as to why the proceedings were withdrawn then what conclusion should the Court come to on this point. Further, he was asked to be specific as to what "public interest" Ajay Singh was referring to in his affidavit when he stated that the Attorney General had withdrawn these proceedings in the "public interest".

[74] Counsel for the applicant replied that the affidavit was clear that the Attorney General had made his assessment and decided it was in the "public interest" to commence the proceedings and it was not in the "public interest" to continue them. He stated he could add no more than that .

[75] In my judgment, no acceptable reason has been put forward for the withdrawal of these proceedings. Constant reference is made to the "public interest". It has not been particularised in any way what is being referred to by those words. It is also difficult to discern how the public interest was served by the bringing of these proceedings, yet it was not in the public interest to continue with them when the respondent's affidavits relying on ascertainable facts had been received and considered.

[76] In my judgment it would be wrong to speculate as to why these proceedings were commenced then withdrawn. I cannot say on the

evidence before me it was specifically done to punish Ms. Draunidalo. The plain fact is that there must have been a purpose for the commencement of these proceedings and for their withdrawal. We simply don't know what that purpose was. The Oxford English Dictionary defines "ulterior" as "beyond what is obvious or admitted, kept in the background". I can only conclude these proceedings were commenced for an "ulterior purpose".

(e) Does the Justice of the Case Require Indemnity Costs ? Were there Special Features ?

[77] Counsel for the respondent states that no one has suggested that Constitutional rights, including the rights of freedom of expression are otherwise than intact. Mr. Naidu continued that Ms. Draunidalo was exercising her right of free speech on a highly relevant matter and if the applicant had been mindful of the public interest than this should have been taken into consideration before the proceedings were launched. Counsel suggests it was nothing more than an abuse of power to punish an opponent of the Government who takes a different view from that of the Attorney General. He knew that he was putting Ms. Draunidalo at risk of fine and imprisonment.

[78] Counsel for the applicant stated that the Attorney General had acted at all times in the public interest in raising the issue.

[79] Mr. Pryde did not challenge the fact that all the rights set out in Chapter 4 of the 1997 Constitution were at all times intact.

[80] The Court could speculate as to why these proceedings were brought but that would be wrong. I cannot in the circumstances before me state that this was an abuse of power to punish an opponent of the Government. I cannot say that was not the purpose. The plain fact is that I do not know.

[81] There is no evidence or even argument before me to show that Ms. Draunidalo was doing other than exercising her right to freedom of expression. What she said was arguable stronger than others might have accepted, including some of her own supporting witnesses. Nowhere is there evidence or argument that she went outside the bounds of her constitutional right.

[82] In her affidavit Tupou Draunidalo states that these proceedings have had "a chilling effect" upon her. She accepts she has continued to speak out her views but has felt constrained by the fact these proceedings were on foot.

[83] Counsel for the applicant responds that these proceedings have not in any way curtailed Ms. Tupou Draunidalo and, in any event, on matters of costs this is not relevant.

[84] In my judgment, it would be unlikely for any person in the position of Ms. Draunidalo not to feel, at the very least, apprehensive about the pending proceedings. Those proceedings would be an ever present thought whenever she wished to exercise her right to freedom of expression and speak publicly about matters which concerned her. I accept that these proceedings have had a "chilling effect" upon her. I do find that under the "justice of the case" consideration when deciding upon indemnity costs, this is a relevant factor.

Conclusion

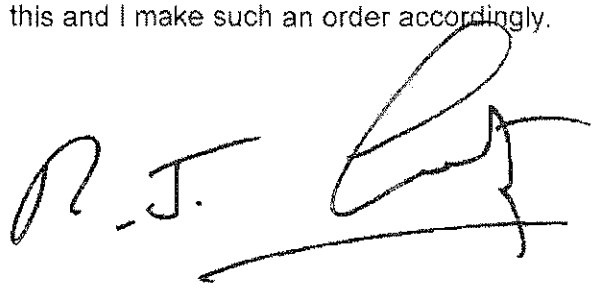
[85] Accordingly in my judgment, for the reasons set out above, jointly and severally, indemnity costs can and should be awarded in the respondent's favour against the applicant. Both parties are content that costs be assessed.

[86] I find that in assessing the sum of costs to award that I can and should take into account the factors raised by counsel for the respondent in so far as I have found that they are made out.

[87] Further it is clear that much careful and detailed effort has been put into collecting evidence for Ms. Draunidalo's defence and putting it into affidavits and annexes thereto. I have a clear detailed chargeable bill of costs from Ms. Draunidalo's lawyers. That comes to approximately $40,000.00. Counsel very properly has suggested that if costs are to be assessed, even on an indemnity scale, there is likely to be some reduction from the total. He has halved the figure.

[88] I find this approach and the sum suggested reasonable and in accordance with principle. Accordingly I award indemnity costs of $20,000.00 against the Attorney General, to be paid by 3.00 p.m. on 11th of December.

[89] Counsel for the respondent also asks for an order that no further proceedings are brought against Ms. Draunidalo over the remarks she allegedly made on 14th May 2007. Counsel for the applicant very properly does not oppose this and I make such an order accordingly.



(R.J. Coventry)

JUDGE