

**IN THE HIGH COURT OF FIJI AT LAUTOKA  
[CIVIL JURISDICTION]**

**Judicial Review No. 01 of 2012**

**IN THE MATTER** of an Application for Judicial Review under Order 53 of the High Court Rules 1988 as amended by High Court (Amendment) Rules 1994.

**AND IN THE MATTER** of:

- (i) the resolution or decision of the Council of the University of Fiji meeting on 8 December 2011 to exclude the Applicant in attending the Council meeting.
- (ii) the appointment by the Council of the University of Fiji meeting on 8 December 2011 to appoint Dr. Mahendra Kumar as Vice-Chancellor of the University of Fiji.

**BETWEEN** : **SANMUGAM GOUNDAR** of Saweni, Lautoka, University Lecturer.

**Applicant**

**AND** : **COUNCIL OF THE UNIVERSITY OF FIJI** as established pursuant to S.12 of the University of Fiji Decree 2011.

**1<sup>st</sup> Respondent**

: **BHUWAN DUTT** Pro-Chancellor of 1 Ono Street, Samabula, Suva.

**2<sup>nd</sup> Respondent**

: **KAMLESH ARYA** Council Member and President of Arya Pratinidhi Sabha of Fiji of 1 Ono Street, Samabula, Suva.

**3<sup>rd</sup> Respondent**

: **MAHENDRA KUMAR**

**Party-Interested**

**Counsel**

Mr C B Young for the Applicant

Mr S Krishna for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

Mr A Patel for the Party-Interested

Date of Hearing : 15 March 2013  
Date of Judgment : 28 March 2013

## J U D G M E N T

1. This is an application for judicial review on motion dated 09 January 2012 by the applicant. The motion is supported by an affidavit from the applicant-Mr Sanmugam Goundar dated 09 January 2012.
2. The applicant, who is a member of the academic staff of the University of Fiji (the university), got elected to the Council of the University of Fiji (the Council) as a non-professorial member at an election held on 02 December 2011. The election of a non-professorial member of the academic staff to the Council by the non-professorial academic staff members is provided for under Section 13 (3) of the University of Fiji Decree No 26 of 2011 (the Decree).
3. The application for judicial review is sequel to the events that took place on 08 December 2011 at the Council Meeting of the university where the applicant was in attendance for the first time after his election. The complaint of the applicant is that he was excluded from taking part in the proceedings of the Council Meeting where one Dr Mahendra Kumar was appointed as the Vice-Chancellor. Dr Mahendra Kumar is now before court as a party interested in these proceedings in the circumstances set-out in paragraph 9 below.
4. The events complained of by the applicant as having taken place at the Council Meeting on 08 December 2011 are not disputed. Instead, the respondents frankly and in an accurate disclosure of the events have tendered to court the Minutes of the Council Meeting marked as KA 7(i) and KA 7(ii) and annexed to the affidavit of the 3<sup>rd</sup> respondent-Kamlesh Arya in opposing the application for judicial review.
5. Minutes of the Council Meeting, as borne-out by KA 7 (i) and KA 7 (ii), insofar as they are relevant to these proceedings need be reproduced verbatim for a better understanding of the matters complained of. They read as follows:

**KA 7 (i):**

- **Exclusion of the applicant from the Council Meeting**

***2. The Election of the Non-Professorial Member of the Academic Staff to Council***

***2.1 Pt. Kamlesh Arya informed Council that***

- (a) *a staff member had raised grievances about the conduct of the election which had elected Mr. Sanmugam Goundar and that there had been no response from the University to these grievances; and*
- (b) *Mr. Sanmugam Goundar should not therefore be allowed to sit on the Council until this matter has been discussed by the Council and resolved.*

*2.2 At this point Mr. Sanmugam Goundar was requested by the Chair to excuse himself from the meeting to allow the Council to discuss the matter.*

*2.3 Pt. Kamlesh Arya questioned the procedures, the validity and confidentiality of the election and asked whether the ethical standards were followed. He requested that the Registrar inform Council of*

- (a) *who had authorized the election;*
- (b) *who had approved the election procedures that were used;*
- (c) *if those who voted by email were asked to send their votes to his email address.*

*2.4 The Registrar informed Council that with regard to the issues in sub-paragraph 2.3*

- (a) *section 13(3) of The University of Fiji Decree 2011 provides for non-professorial members of staff of the University to elect one of their members to represent them on Council;*
- (b) *the Vice-Chancellor had approved the procedures that were used for the election; he (the Registrar) had developed the election procedures after he had been advised by the previous Registrar that the University had no such procedures;*
- (c) *the election procedures had provided for (i) all the Suva based staff and (ii) the Savani based staff who were on approved leave on election day to cast their votes by email by sending them from their UniFiji email address only to the Registrar's UniFiji email address; he, the Registrar had asked that staff voting by email send their votes to his UniFiji email address because he was under the election procedures and returning officer and he could not see who else should receive the email votes; the provision in the election procedures for the use of the UniFiji email addresses was to make it easy to authenticate the votes in case there was a dispute.*

*2.5 The Chair then asked Ms Vasantika Patel, a lawyer and a co-opted member of Council, to provide Council with a legal advice on the matter at hand.*

*2.6 Ms Vasantika Patel advised Council that the UniFiji Decree does not provide the procedures for the conduct of the election. She then referred the Council to Section*

23(3) of the Decree and said that any defect in the election of Mr. Sanmugam Goundar will not invalidate any decisions of the Council if he were to be present.

2.7 At this point Pt. Kamlesh Arya asked whether the Council should knowingly condone a defective election procedure that has no approval of the Council.

2.8 Pt. Devendra Pathik, (a lawyer/former Fiji High Court Judge) with the permission of the Chair, said that, there should be a proper procedure drawn and be approved by the Council before election is held and the Council should not condone anything that is irregular or defective. He further said if the results are not challenged now it could be challenged later. He was also concerned as a member of the founder A P Sabha of Fiji on the matter under discussion.

2.9 The Chair then said he would be guided by the members of the Council.

2.10 In rebuttal the Vice-Chancellor defended the actions of UniFiji Administration with regard to the election process.

2.11 Mr Agni Deo Singh stated that if a grievance was raised by a staff member then necessary steps should have been taken to redress the grievance according to laid down policies and procedures.

2.12 Dr Goundar asked whether the election procedure should be approved by the Council. The Chair responded in the affirmative.

2.13 Dr K L Sharma, with the permission of the Chair, enquired on the nature of the grievance. The Chair informed Dr. Sharma that the grievance was about the procedure followed in the conduct of the election of the Council member from the non-professorial academic staff and further, requested Dr Sharma to stay and follow the proceedings of the meeting.

2.14 Pt Arya said that the concern has been that there was a lack of response from the office of the Registrar to whom the grievance was addressed.

2.15 The Registrar responded as follows-

(a) the letter containing the staff member's grievances about the election was received only yesterday (the day before this meeting of Council) and there had been no time for him (the Registrar) to attend to these as

(i) he was also tied up yesterday with the University's lawyers who were dealing with the employment dispute between the University and SAUF which the Employment Tribunal was due to hear at 12 o'clock today (the day of this meeting of Council);

(ii) last minute consultations with the lawyers for the case in (i) were held at 10.30 this morning (the morning of this Council meeting) and he had come to the Council from the meeting with the lawyers;

*(b) the staff member who had complained about the election was not the losing candidate.*

*6.16 **Resolution of Council** The Chair put the motion again to the floor that the recent election of the non-professorial representative to Council and its result be declared null and void. It was seconded. As there were no dissenting voices, the Chair declared the motion approved.*

**KA 7 (ii):**

- **Appointment of the Dr Mahendra Kumar as the vice-chancellor**

***Agenda Item 2 – Appointment of Next Vice-Chancellor***

*5.1 The Council received and considered the Report of the Joint Committee of the Council and the Senate for the appointment of the next Vice-Chancellor.*

*5.2 The Council **NOTED** that the Joint Committee had recommended 3 candidates in order of priority*

- (1) Prof. Dennis Gayle*
- (2) Prof. Prem Misir*
- (3) Prof. Mahendra Kumar*

*6.3 [sic] After a lengthy discussion the Council **RESOLVED***

- (a) That the findings of the Council Subcommittee absolves Prof. Mahendra Kumar of any wrong doing.*
- (b) That complaint issues raised in the Joint Committee Report with respect to Prof. Mahendra Kumar be disregarded in view of (a) above.*
- (c) That Prof. Mahendra Kumar be treated as an equal candidate for the Vice-Chancellor position.*

*6.4 Pandit Kamlesh Arya (a Joint Committee Member) moved that Professor Mahendra Kumar be appointed the next Vice-Chancellor as he is a local candidate and equally competent to replace Prof. Muralidhar. The motion was seconded by Ravindra Varman.*

*6.5 The Chairman then put the motion to vote. Of the 17 Council Members present 3 members registered their dissent. The motion was passed on the assent of 14 Council members and Prof. Mahendra Kumar was therefore, appointed the next Vice-Chancellor of UniFiji.*

6.6 The Council further **RESOLVED** that

- (a) *the effective date of appointment be 17 December 2011 for a five year term with annual review.*
- (b) *the Council Chair, Chairman of Finance Committee and Chairman of Physical Planning and Development meet Prof. Kumar and determine the Terms and Conditions of Employment including the VC's salary.*
- (c) *the period 12 to 16 December 2011 be used by Prof. Kumar to understudy Prof. Muralidhar.*
- (d) *the handing over to be done on 16<sup>th</sup> of December.*
- (e) *Prof. Muralidhar invite Prof. Kumar to accompany him to the vice-Chancellors meeting to be held the following week.*

6. The complaints of the applicant, as formulated in his affidavit, are thus based on the above factual settings; and, the two resolutions adopted by the Council form the basis for plea for judicial review. Specific reliefs sought by the applicant, when he moved court for leave, were that:

1.

- (a) **AN ORDER OF CERTIORARI** to remove into this Honourable Court and quash the said resolution and the said appointment.
- (b) **A DECLARATION** that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had acted unfairly and/or against the Rules of Natural Justice and/or acted arbitrarily and/or unreasonably and/or acted in breach of the Applicant's Legitimate Expectations and/or made errors of law and/or exceeded their jurisdiction in passing the said resolution.
- (c) **A DECLARATION** that the Council of the University of Fiji meeting of 8 December 2011 held in the absence of the Applicant is invalid.
- (d) **A DECLARATION** that the said appointment is invalid and not binding on the University of Fiji.
- (e) **A DECLARATION** that the 1<sup>st</sup> Respondent whether by itself or through the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have acted unfairly and/or arbitrarily and/or without lawful justification and/or in bad faith in the manner or by the tactics in arriving at the decision to appointing Dr. Mahendra Kumar as Vice-Chancellor of the University of Fiji.
- (f) **ALTERNATIVELY** a declaration that the 1<sup>st</sup> Respondent in appointing Dr. Mahendra Kumar as the Vice-Chancellor of the University of Fiji was contrary to s.10(8) of the University of Fiji Decree 2011 and is therefore illegal, void and of no effect.

(g) **A DECLARATION** that Bhuwan Dutt the 2<sup>nd</sup> Respondent as the Chair of the 1<sup>st</sup> Respondent and Kamlesh Arya the 3<sup>rd</sup> Respondent as a Council member on 11 December 2011 failed in their respective duties to:

(a) *act honestly and in the best interest of the University of Fiji;*

(b) *exercise reasonable skill, care and diligence;*

(c) *disclosed to the meeting the conflict of interest that arose between their respective personal interest and personal relationship and/or the association of Dr Mahendra Kumar to have Dr. Mahendra Kumar as the next Vice-Chancellor of the University of Fiji;*

(d) *made improper use of their respective positions to gain directly or if not indirectly an advantage for Dr. Mahendra Kumar to acquire the position of Vice-Chancellor of the University of Fiji by orchestrating the events that led to the said resolution and the said appointment.*

(h) **AN ORDER OF MANDAMUS** directing the 1<sup>st</sup> Respondent within 7 days of the date of the order of this Court to convene a meeting of the Council of the University of Fiji to appoint a Vice-Chancellor of the University of Fiji in accordance with the Joint Committee of Council and Senate recommendation dated 4 December 2011 in the following order of priority:

(i) *Professor Denis*

(ii) *Professor Prem Misir;*

(iii) *Professor Mahendra Kumar.*

7. Her Ladyship Justice Dias Wickramasinghe, by her interlocutory judgment dated 16 March 2012 after an *inter-partes* hearing, granted the applicant leave to apply for judicial review holding that ‘*in the circumstances [court] was satisfied that there [were] arguable causes relating to both the issues that must be further considered by court.*’ (Paragraph 55 of the judgment).

8. Thus, the two issues upon which leave was granted for judicial review were:

(i) *[T]he resolution or the decision of the Council of the University of Fiji [M]eeting on 08 December 2011 to exclude the applicant in attending the Council [M]eeting; and,*

(ii) *[T]he appointment of Dr Mahendra Kumar as Vice-Chancellor of the University of Fiji.*

(Paragraph 7 read with paragraph 55 of the interlocutory judgment; underlined for emphasis)

9. Dr Mahendra Kumar was not initially cited as a respondent even though his appointment was called in question in these proceedings when leave was sought. However, Dr Mahendra Kumar was joined as an interested party at the intervention of court on 12 February 2013

when the applicant and the respondents purported to have come to a settlement on the basis that they had agreed '*in the interests of the University of Fiji that the current Vice-Chancellor, Dr Mahendra Kumar's appointment and employment as the Vice-Chancellor should be brought to an end with effect from 31 December 2012 ...*' (Vide drafts terms of settlement dated 22 October 2012).

10. The proposed terms of settlement dated 22 October 2012, although they had a direct bearing on Dr Mahendra Kumar as the holder of the office of the vice-chancellorship, were not served on him. Court, therefore, refused to accept and proceed with the purported settlement. Instead, the applicant and the respondents were directed to serve a copy of the proposed terms of settlement on Dr Mahendra Kumar and move court on 29 October 2012.
11. On 29 October 2012, Dr Mahendra Kumar appeared before court by counsel and intimated to court of his opposition to the proposed settlement. Later, he filed summons dated 16 November 2012 for setting-aside of the proposed terms of settlement supported by an affidavit dated 16 November 2012 in which he filed his response to the application for judicial review as well.
12. As the case was called on 28 November 2012, learned counsel for the applicant and for the respondents informed court that they would not be proceeding with the proposed settlement and moved for time to respond to the affidavit of Dr Mahendra Kumar.
13. No response, however, was filed by the applicant. The respondents filed their response by way of an affidavit from the 3<sup>rd</sup> respondent-Kamlesh Arya dated 26 January 2013. Both the applicant and the respondents agreed to the joinder of Dr Mahendra Kumar as a 'party-interested' to these proceedings. Court, in light of the concession of the applicant and the respondents in regard to the joinder on 12 February 2013, fixed the matter for hearing on 15 March 2013.
14. The response by the respondents brought to light that Dr Mahendra Kumar had ceased to hold office as the vice-chancellor under the terms and conditions of his contract of employment. Learned counsel for the applicant and for Dr Mahendra Kumar confirmed the termination of his contract as this matter was taken-up for hearing on 15 March 2013.
15. Thus, there is a significant and substantial change of circumstances with Dr Mahendra Kumar's appointment as the vice-chancellor coming to an end. The effect of the change is such that the challenge to his appointment has become purely academic or more precisely moot. The exclusion of the applicant from the proceedings at the Council Meeting is also intrinsically interwoven with the appointment of the vice-chancellor. Mr C. B. Young, learned counsel for the applicant, however, submitted that he would be seeking only declaratory orders as prayed for in paragraph 1 (b); or, in the alternative, an order in paragraph 1 (f) of the motion dated 09 January 2012 but not orders for *certiorari*. He urged that such declaratory orders were necessary for good governance.



16. Mr Young submitted that the reliefs that the applicant is now seeking are:

1 ...

(b) *A DECLARATION that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had acted unfairly and/or against the Rules of Natural Justice and/or acted arbitrarily and/or unreasonably and/or acted in breach of the Applicant's Legitimate Expectations and/or made errors of law and/or exceeded their jurisdiction in passing the said resolution;*

...

(f) *ALTERNATIVELY a declaration that the 1<sup>st</sup> Respondent in appointing Dr. Mahendra Kumar as the Vice-Chancellor of the University of Fiji was contrary to s.10(8) of the University of Fiji Decree 2011 and is therefore illegal, void and of no effect.*

17. O 53 of the High Court Rules, which governs the applications for judicial review, provides that:

1. (1) *An application for an order of mandamus, prohibition or certiorari shall be made by way of an application for judicial review in accordance with the provisions of this Order.*

(2) *An application for a declaration or an injunction may be made by way of an application for judicial review, and on such an application the court may grant the declaration or injunction claimed if it considers that having regard to-*

(a) *the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari;*

(b) *the nature of the persons and bodies against whom relief may be granted by way of such an order; and,*

(c) *all the circumstances of the case, it would be just and convenient for the declaration or injunction to be granted on an application for judicial review.*

18. The applicant, nevertheless, is not now seeking reliefs by way of orders for *certiorari* in order to quash the said resolution and the said appointment, as prayed for in paragraph 1 (a) of the motion dated 09 January 2012. Instead, he is seeking only declarations as prayed for in paragraphs 1(b) and (f) of the motion, as set-out above, in spite of Dr Mahendra Kumar ceasing to hold office as the vice-chancellor.

19. Declaratory Orders in terms of O 53 of the High Court Rules, in my view, are not usually meant to be granted independently or in isolation of the orders for prerogative writs [of *certiorari*, *prohibition* and *mandamus*]. They are correlated to the application for orders of *certiorari* etc. and contingent upon the possibility of the grant of such orders when O 53 (2) stipulates that:

*‘the court may grant the declaration ... claimed ... if it considers that having regard to the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari;*

...

20. As the applicant has now chosen not to proceed with the application for the relief of *certiorari*, I am of opinion that it is undesirable for court, in the circumstances of this case, to grant declarations [under O 53], which the High Court may otherwise grant in the exercise of its ordinary civil jurisdiction. That is because court is hamstrung from considering any of the grounds such as illegality, irrationality or procedural impropriety and so forth – the ever expanding bases which courts from time to time discover for judicial control of administrative action in order to issue orders in the nature of writ of *certiorari*.

(i) Firstly, leave was granted by this court on 16 March 2012 to judicially review only of *‘the resolution or the decision of the Council of the University of Fiji [M]eeting on 08 December 2011 to exclude the applicant in attending the Council Meeting;’* as noted in paragraph 8 above. (This was, in fact, what the applicant had sought, according to the caption of his application). The petitioner, too, is not seeking a declaration in respect of his rights but a declaration in general terms concerning the conduct of the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

(ii) Secondly, the exclusion of the applicant from the Council Meeting, as contended by the applicant, was intended to culminate in the appointment of Dr Mahendra Kumar as the vice-chancellor, which is now moot after the end of the contract of Dr Mahendra Kumar.

(iii) Thirdly, a declaration on the appointment of Dr Mahendra Kumar is sought *alternatively* to the declaration respecting the exclusion of the applicant from the Council Meeting. An alternative remedy could be sought based on the same facts and criteria. The two declarations, if at all, could be considered independent of each other; and, one declaration cannot possibly stand alternative to the other. Therefore, declaration under 1 (f) is not rightly sought and it is misconceived.

21. Lord Scarman in the case of *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd.* H. L. [1981] 2 All ER 93 stated at 109 that:

*Rule 1(2) [the corresponding rule to the relevant High Court Rule in Fiji] enables the court to grant a declaration or [an] injunction instead of, or in addition to, a prerogative order where to do so would be just and convenient. This is a procedural innovation of great consequence, but it neither extends nor diminishes the substantive law. For the remedies (borrowed from the private law) are put in harness with the prerogative remedies. They may be granted only in circumstances in which one or other of the prerogative orders can issue. I so interpret Ord. 53 r 1 (2) because to do otherwise would be to condemn the rule as ultra vires.*

22. I am of the view that the applicant's decision not to pursue the exclusive public law relief of *certiorari* takes the case away from the realm of public law contemplated under O 53. The grant of declarations without a plea for *certiorari* is vested with the ordinary civil jurisdiction of the High Court where the procedure, as well as the onus of proof etc., substantially differs [for the grant of such declarations]. If it is otherwise, the applicant is placed at an advantageous position with no such stringent procedures and the onus of proof etc. while the respondents are placed at a disadvantaged position having had to forgo them.
23. In light of the above analysis, I am of the view that the declarations sought by the applicant are neither *just* nor *convenient* to be granted as prescribed under O 53 r (2) (c) of the High Court Rules for judicial review is a discretionary a remedy.
24. In the circumstances, I hold that the applicant is not entitled to declarations under O 53 (2) of the High Court Rules after abandoning his claim for *certiorari* under r (1) in these proceedings. In the result, I refuse to grant the reliefs sought under paragraphs 1 (b) and 1 (f) of the motion dated 09 January 2012 and dismiss the application for declarations. In all the circumstances of this case, I do not award costs. Parties shall bear their own costs.

Priyantha Nāwāna

Judge  
High Court  
Lautoka  
28 March 2013