

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Judicial Review No. HBJ 08 of 2012

IN THE MATTER of an application by
RAMESH CHAND for Judicial Review
under Order 53 of the High Court Rules
of Fiji

AND

IN THE MATTER of the decision
made by the Permanent Secretary for
Finance dated 26th April, 2012 to uphold
the surcharge action against the
applicant for the sum of \$87,530.69

THE STATE : **PERMANENT SECRETARY FOR FINANCE**
RESPONDENT

EX-PARTE : **RAMESH CHAND**
APPLICANT

Counsel : **Mr. Nagin H. for the Applicant**
Ms. Daunabuna S. and Mr. Nair D. for the Respondent

Date of Hearing : **11th November, 2013**
Date of Judgment : **14th March, 2014**

Catch Words

Illegality- surcharging- Finance Management Act 2004 – Finance Instructions 2010 – procedural irregularity

J U D G M E N T

INTRODUCTION

1. The applicant sought to apply for judicial review pursuant to the leave granted by this court by a brother judge of this court and the hearing was allocated to me for logistical reasons. The application was filed on 9th August, 2013 pursuant to Order 53 of the High

Court Rules (1998) in respect of the decision of the Respondent dated 26th April, 2012 in purporting to uphold the surcharge of \$87,530.69 against the applicant. This surcharge was relating to a sum awarded against the Applicant in 2005 in an action for negligence. The basis of award was the negligence of the Applicant in 2001 where the state became the vicariously liable. The Respondent decided to surcharge Applicant in 2011, though the said sum was awarded in 2005. The Applicant seeks for an order of certiorari to quash the said decision to surcharge him and a declaration that the decision of the Permanent Secretary for Finance was illegal, irrational and procedurally improper.

FACTS

2. The Applicant was employed as a Senior Assistant Co-operative Officer in the Co-operative Department in Labasa. On or about 30th May, 2001, while on official duty, driving government vehicle GM332, the Applicant was involved in an accident, injuring one Mr. Abdul Gani.
3. The said Mr. Gani sought compensation for personal injuries he suffered as a result of the accident. The said claim for damages were against three Defendants of the said action namely the Applicant, Co-operative Department and the Attorney General.
4. The matter was heard in the High Court Labasa Civil Action No. 88 of 2002 and an award of FJ \$62,273.02 was granted as compensation against the three Defendants of the said action and a cost of additional \$4,000 was also awarded. The judgment was delivered on 25th October 2005.
5. On 22nd March 2011, the Applicant received a Memorandum seeking an explanation as to why a surcharge of \$87,530.69 should not be imposed on him. This is presumably the judgment sum including the interest. **The Memorandum was signed by David Kolitagane ‘for the Permanent Secretary for Finance’.**
6. The Applicant responded to the said memorandum by way of a letter dated 8th April 2011, providing his explanation as to why he should not be surcharged. On 9th June

2011, David Kolitangane again ‘for the Permanent Secretary for Finance’ wrote a reply (RC3) to the letter of the Applicant and intimated to surcharge in terms of Section 68(1) of the Finance Management Act, 2004 for a sum of \$87,530.69, being the total amount compensated to Mr. Abdul Gani. The Memorandum further stipulated the Applicants right to appeal against the surcharge to the Permanent Secretary for Finance within the period of one (1) month after the receipt of notification.

7. The Applicant appealed on 4th July, 2011 to the Permanent Secretary of Finance (RC4). In response to the said appeal, the Deputy Secretary on behalf of the Respondent, the Permanent Secretary Finance, by way of memorandum dated 26th April, 2012 dismissed the appeal and upheld the surcharge sum of \$87,530.69. In the said memorandum further stated;

‘After carefully considering the submission leading to the surcharge and the grounds of appeal against it, the Permanent Secretary for Finance has decided that the surcharge should be upheld’

Despite the above statement there is no evidence of Permanent Secretary for Finance dealing with this appeal. In all communications relating to surcharge, only David Kolitangane had dealt the matter ‘for the Permanent Secretary for the Finance’. The decision to surcharge as well as the decision to dismiss the appeal was signed by the Deputy Secretary ‘for the Permanent Secretary for Finance’.

8. In De Smith’s Judicial Review (6th Edi) (Thompson Sweet & Maxwell 2007) at p500 states as follows (10-006):

‘The principle expressed in the maxim *nemo iudex in sua causa* (no one should be a judge in his own cause) refers not only to the fact that no one shall adjudicate his own case; it also refers to the fact that no one should adjudicate a matter in which he has a conflicting interest. In order to give effect to those two aspects of the principle , the concern is not only to prevent the distorting influence of actual bias, but also to protect the integrity of the decision-making process by ensuring that , however disinterested the decision-maker is in fact, **the circumstances should not giver rise to the appearance of bias.** As has been famously said;”justice should not only be done, but should manifestly and undoubtedly be seen to be done”. (footnotes deleted and emphasis added)

De Smith’s Judicial Review (supra) at p 516(10-38) states:

‘Normally a decision will be invalid for bias if the decision-maker takes part in a determination or appeal against one of his own decisions, or one in which he has participated, **unless he is expressly authorized to do so by statute**. At best he is likely to incline towards affirming his earlier decision; at worst he can be depicted as judge in his own cause. In general, a decision maker must not participate or indeed give the impression of participating in such an appeal.’(emphasis added and footnotes deleted)

9. In contrary, the statutory provisions in Finance Management Act 2004 law as well as the regulations made under Section 81 of Finance Management Act 2004 stipulate clear dichotomy in the issue of surcharge in the first instance and dealing with the appeal subsequently by two distinct authorities.
10. The Finance Instructions 2010 issued in pursuance with the Section 81 of the Finance Management Act 2004 states as follows:

“SURCHARGES

Authority to impose a surcharge

62. - (1) The Deputy Secretary of the Ministry of Finance has the authority to surcharge officers, other than the Permanent Secretary of an agency.

(2) If the Permanent Secretary of an agency is to be surcharged, action will be taken by the Public Service Commission through the Act and these Regulations.

When a surcharge may be imposed-

63. A surcharge must be imposed on an officer who is directly or indirectly responsible for-
 - (a) expenditure which has not been properly authorised in accordance with the law;
 - (b) the destruction, damage, theft or other loss of property; or
 - (c) the loss of money, including public money, other money and trust money;”

The Section 67 of the Finance Management Act 2004 states as follows

*“Division 2 - Surcharges
Interpretation*

- 67.** In this Division-
"surcharge appeal authority", in relation to a surcharge, means-
- (a) the chief executive officer of the Ministry of Finance, unless paragraph
 - (b) applies; or
 - (c) the Minister, if the surcharge was imposed by a chief executive officer;

"surcharging authority", in relation to a surcharge imposed or proposed to be imposed-

(a) on a person who was an officer of a budget sector agency at the relevant time, means an officer of the Ministry of Finance authorised to impose surcharges of the relevant kind by or under the Finance Instructions, unless paragraph (b) or (c) applies;

(b) on a person who is, or was at the relevant time, a chief executive officer (other than the chief executive officer of the Ministry of Finance), means the chief executive officer of the Ministry of Finance; or

(c) on a person who is, or was at the relevant time, the chief executive officer of the Ministry of Finance, means a chief executive officer designated for the purpose by the Minister.”

11. The Applicant argues that he cannot be surcharged for damages awarded by the Court against him and the State. This cannot be accepted as it falls within 63(c) of Finance Instructions 2010 as it is a loss of money to State where the officer (Applicant) is directly responsible for the said loss of money.
12. From the above mentioned regulations 62 and 63, it is the Deputy Secretary who should surcharge a person except when the surcharging is against the Permanent Secretary. The communication of the surcharge was communicated through a memorandum signed by David Kolitagane, for the Permanent Secretary for Finance. It is procedurally wrong, as the said communication was signed not as the ‘Deputy Secretary’ but for ‘Permanent Secretary for Finance’. The contention for the Respondent was that since the signatory of

the letter was Deputy Secretary there was no irregularity. If so, then by the same token when he signed the decision to dismiss the appeal, again 'for Permanent Secretary' he should be considered as Deputy Secretary and if so there is no evidence of a determination by the decision of the Permanent Secretary for Finance rejecting the appeal. So, the contention of the Respondent cannot be accepted.

12. From the time of the decision to surcharge the Applicant only David Kolutagane's name appears till the rejection of the appeal and in all the correspondence he had signed the memorandums 'for the Permanent Secretary for the Finance'. This indicates a clear violation of the provisions in the Financial Management Act 2004 and the Financial Instructions 2010. The authority to surcharge was done by the Deputy Secretary (only exception is when the surcharge is against the Permanent Secretary). In the present case there is no proper surcharge in terms of the Section 67 of Finance Management Act 2004 and Financial Instructions 2010 Regulation 62. There is no proper determination of the appeal by the Permanent Secretary for Finance in terms of Section 68(2) of Financial Management Act 2004 and the decision made through the communication dated 26th April, 2012 dismissing Applicant's appeal is quashed.

CONCLUSION

13. The Respondent had failed to follow the procedure laid down to the Financial Management Act 2004 as well as the regulations contained in Financial Instructions 2010 in pursuant to Section 81 of the Financial Management Act 2004. The decision to surcharge was not taken by the proper authority. The Deputy Secretary was functioning in twin capacities, and all his correspondence relating to surcharge are ambiguous. So there is ambiguity as to under what authority he had acted in each occasion. This may not be important in majority of decisions taken, but in surcharging, when law clearly defines an authority to surcharge to Deputy Secretary, he cannot do that duty 'for the Permanent Secretary'. If so what is the independence of the appeal vested with the aggrieved party to the Permanent Secretary. In this instance there is no evidence of determination of the appeal of the Applicant regarding the surcharge by the Permanent Secretary. The person who had acted on behalf of the Permanent Secretary in the

surcharging in contravention of regulation 62, again signed the dismissal of the Appeal ‘for the Permanent Secretary’. There is more than an apprehension of bias. As the actions are procedurally illegal the decision needs to be quashed. The absence of determination or even a consideration by the Permanent Secretary substantiates the bias. The decision to reject the appeal is quashed. Considering the circumstances of the case I would not grant a cost.

FINAL ORDER

- a. The decision dated 26th April 2012 upholding the surcharge action that was imposed on the applicant on 9th June 2011 is quashed.
- b. No cost awarded.

Dated at **Suva** this **14th** day of **March, 2014**.

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Justice Deepthi Amaratunga
High Court, Suva