

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Judicial Review No. 01 of 2016

IN THE MATTER of the Procurement Regulations 2010 issued under the Financial Management Act 2004 of Fiji

A N D

IN THE MATTER of a decision of the Solicitor-General and Acting Permanent Secretary for Communications dated 24 December 2015 to award and approve the Sun (Fiji) News Limited – Fiji Sun as the Approved Print Media–Newspaper Organisation for Publication of Government Advertisements and Government Notices for 2016

BETWEEN : THE FIJI TIMES LIMITED, a limited liability company having its registered office at 20 Gordon Street, Suva

APPLICANT

A N D : THE SOLICITOR-GENERAL

1ST RESPONDENT

THE PERMANENT SECRETARY FOR COMMUNICATIONS,
Ministry of Communications, Suva, Fiji.

2ND RESPONDENT

A N D : SUN (FIJI) NEWS LIMITED

INTERESTED PARTY

Counsel : Mr. Apted J. for the Applicant
Ms. Prasad P. with Ms. Mani R. for the Respondents
Mr. Narayan E. for the Interested Party

Date of Hearing : 1st September, 2016

Date of Ruling : 8th September, 2016

RULING

INTRODUCTION

1. The Applicant is a limited liability Company that is engaged inter alia in the business of publishing the daily news paper 'Fiji Times'. It had made submission to a call for Expression of Interest (EOI) for 'Advertising for the Fijian Government Newspapers and Magazines' published by the Ministry for Communication. The Applicant and the Interested Party submitted their respective EOIs. The Applicant states that without proceeding to call tenders in terms of the Procurement Regulation 2010 (the Regulation), the Interested Party was selected as the 'approved print media (News Paper) for Government Advertising' for year 2016. The selection of the Interested Party was communicated to the Applicant on or about 24th December, 2015. The Applicant seeks a declaration that the said decision was null and void and a certiorari to quash the said decision and mandamus to compel the Second Respondent to request the Director of the Fiji Procurement Office pursuant to Regulations 35-37 of the Regulations to conduct a government tender process in accordance with the Regulation.
2. After a hearing on 13th May, 2016 the leave for Judicial Review was granted on 17th June, 2016. The Originating Motion pursuant to leave was filed.
3. The Fiji Times sought several remedies in said Originating Motion
 1. A declaration that the Decision is unlawful, null and void and of no effect.
 2. An order of certiorari to remove into this Court and quash the Decision.
 3. An order of mandamus to compel the Second Respondent to request the Director of the Fiji Procurement Office pursuant to Regulations 35-37 of the Regulations to conduct a proper government tender process in accordance with the Regulations.
 4. A Declaration that any tender process for government advertisements and notices and any resulting award must be limited to those published by ministries and departments, and

not those published by statutory corporations and limited liability companies owned or controlled by the Government.

5. Costs.
6. Such further or other relief as this Honourable Court considers just.”
7. The Applicant filed the Originating Motion seeking Judicial Review on 23rd June, 2016. The hearing of the Judicial Review was fixed for 22nd August, 2016 since this date was declared a holiday subsequently by the government, the hearing was re-fixed on 1st September, 2016. The Respondents did not file an affidavit in reply to the affidavit in support of the Originating Motion till 22nd August, 2016, but since the date was vacated, for unavoidable circumstances, an affidavit in reply was filed and the same affidavit is used as affidavit in support of the strike out.
8. The Respondents filed their Summons to Strike Out on 26th August, 2016 supported by the said affidavit.
9. In their Summons to Strike Out, the Respondents seek an order that the Notice of Originating Motion and Supporting Affidavits be struck out on the grounds –
 - (i) That it discloses no reasonable cause of action;
 - (ii) That it is frivolous and vexatious; and
 - (iii) That it is otherwise, an abuse of Court process.
10. The summons for strike out was brought under O.18 r18(a), (b) and (d) of the High Court Rules 1988 and the inherent jurisdiction of the Court.
11. From the submission in support of the strike out it can be deduced that the basis for the said application was the change of fiscal year and the re-advertisement of the tender for print advertising which was done on 16th August, 2016. The issue of change of fiscal year was an argument that could have raised at the hearing of the application for leave for judicial review as the change of fiscal year was not a sudden event and adequate notice given for all government institutions as the budget for the new fiscal year was also announced.

ANALYSIS

12. Order 18 rule 18 of the High Court Rules of 1988 states

"18.-(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court.

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1)(a).

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading."

13. "Pleading" is defined in Order 1 rule 2 of the High Court Rules of 1988 as :

"Pleading includes any petition or summons, and also includes the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any counter-claim of a defendant; but does not include a petition, summons or preliminary act."

14. The summons for strike out, sought strike out of Originating Motion and the supporting affidavit and Order 18 rule 18 has no application for such an application. No Originating Motion can be struck off in terms of the Order 18 rule 18 of the High Court Rules of 1988. Though there is provision for striking out of an affidavit, Order 18 has no application.

15. The Court's power to strike out affidavits is contained in Order 41 rule 6 of the High Court Rules of 1988. It states:

"The Court may order to be struck out of any affidavit any matter, which is scandalous, irrelevant or otherwise oppressive."

16. There is no specific mention of any averment in the affidavit supporting Originating Motion that is 'scandalous, irrelevant or oppressive'. So the above cannot be applied.
17. The Applicants conceded that the Court's inherent jurisdiction to strike out any document including Originating Motion. Since I have granted leave for Judicial Review the court had already decided that the application for judicial review is not an abuse of process.
18. The principles and practice of the Court's inherent jurisdiction are described in paragraphs 18/19/26 to 18/19/39 of the Supreme Court Practice 1999 at paragraphs 18/19/26 to 18/19/27, the White Book states –

"Apart from all rules and Orders, and notwithstanding the addition of para (1)(d), the Court has an inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of its process (see Reichel v Magrath (1889) 14 App. Cas. 665). In such cases, it will strike out part of an indorsement of a writ (Huntly v Gaskell (No.1) [1905] 2 Ch. 656), or set aside service of it (Watkins v NA Land Co (1904) 20 TLR 534), or will stay, or dismiss before the hearing, actions which it holds to be frivolous or vexatious (Metropolitan Bank v Pooley (1885) 10 App. Cas. 210; Lawrence v Norreys (1890) 15 App. Cas. 210 at 219 (Haggard v Pelicier Freres [1892] AC 68; The Manar [1903] P. 95 at 106; Boulter v Power [1910] 2 KB 229, CA; Shackleton v Swift [1913] 2 KB 304; Norman v Mathews (1916) 85 LJ KB 859), and removes from its files any matter improperly placed thereon (Nixon v Loundes [1909] 2 Ir.R.1). And this jurisdiction is in no way affected or diminished by this rule."

The power to stay or dismiss an action under the inherent jurisdiction of the Court on the ground that it is obviously frivolous or vexatious is discretionary, just as it is under O.18, r19 (Gleeson v J Wippell & Co Ltd [1977] 1 WLR 510; [1977] 3 All ER 54, following Carl-Zeiss Stiftung v Rayner & Keeler Ltd (No.3) [1970] Ch. 506; [1969] 3 All ER 897). The jurisdiction is not limited to cases in which the facts are not in dispute (Lawrance v Lord Norreys (1890) 15 App. Cas. 210 – a very strong case). A judicial discretion must be used as to what proceedings

*are vexatious; for the Court must not prevent a suitor from exercising his undoubted rights on any vague or indefinite principle (Higgins v Woodhall (1890) 6 TLR 1; Boswell v Coaks (1902) 6 R 167, 86 LT 365n.). The jurisdiction will not be exercised except with great circumspection and unless it is perfectly clear that the plea cannot succeed (see *Lawrance v Lord Norreys* (1890) 15 App. Cas. 210; *Goodson v Grierson* [1908] 1 KB 766; *El Dev Co v Att.-Gen for Ontario* [1919] AC 687)."*

19. It is arguable whether an application for judicial review can be struck off, after leave has been granted. If the circumstances has changed, sometimes it may lead to a declaration which would not have any pragmatic application (or 'utility') or simply academic or moot. The issue is in such an instance whether the court can strike out. In my judgment this issue cannot be decided in the abstract manner and needs to be decided on the facts and the circumstances of the case at the moment when such application is made. The main contention is with the advertisement of fresh tenders, this application became superfluous. The Fiji Court of Appeal had considered the issue in *Naidu v Attorney-General* [1999] FJCA 55: Abu0039u.98s (decided on 27 August 1999)(unreported).
20. In the case of *Naidu* (supra) the appeal was from the decision of the High Court refuse leave as the events have taken passed at the time of the hearing of the application for leave for judicial review. The High Court dismissed the application for leave on the grounds that the matter was moot as by the time of the hearing of the application for leave, the event that relate to the decision under review had taken place. So there was nothing that could be done other than a declaration, but in appeal the Fiji Court of Appeal held:

"The issue therefore becomes whether there was, at the time of the determination of the application for leave, a sufficiently arguable case that the issue raised in the proceedings was alive, or to use Casey J's phrase in Turner, whether there was an arguable case that the making of a declaration may be of some utility. It was not for the High Court on the application for leave, nor for this court on the hearing of the appeal, to determine those issues. They can only be properly determined when the court is considering the substantive grounds upon which the direction is sought to be challenged." (underling is mine)

21. In Naidu (supra) the appeal to Fiji Court of Appeal was due to the High Court's refusal to grant of leave for Judicial Review. In the appeal, the Fiji Court of Appeal not only granted leave but also stated that issue of 'utility' of the declaration is not a matter for determination at the time of the application for leave and that is part of the ratio of the case. What should be considered at the final hearing was not an issue before the Fiji Court of Appeal in that case and that part of judgment is *obiter*. Since there was no application for strike out in that case what should be left for substantive determination is not binding and I do not agree that that passage precludes the present application for strike out.

22. In the analysis of the issue before the Fiji Court of Appeal in Naidu (supra) considered some UK authorities in the following manner:

In R v The Birmingham City Juvenile Court, ex parte Birmingham City Council [1988] 1 WLR 337, justices determining an interim care order refused to hear evidence. The correctness of that decision was challenged by an application for judicial review. By the time the application came on for hearing, a final order had been made, so the issue in that particular case had lost its relevance. The court observed that the particular problem posed in respect of that child was no longer outstanding. But in the interest of clarifying the law, the court considered the issue and came to a decision. In R v Leicester Crown Court, ex parte Director of Public Prosecutions [1987] 1 WLR 1371 the police had applied for an order granting access to an accused's bank account. The Judge ruled that the application should be made inter partes. The Director of Public Prosecutions sought judicial review of that ruling. By the time the case came on for hearing the accused had been convicted, so the ruling could have no relevance to that case. But because of the concern of the police and the Crown Prosecutor that if an application of the similar kind were made to the same Judge, he would adhere to that view, the court made a declaration as to the proper construction of the relevant provision.

These are but illustrations of the general principle that even though the actual issue between the parties may no longer be outstanding, the courts will nevertheless make a decision where there is a practical advantage in doing so, or where the issue is one of general public interest. (emphasis added)

23. The ratio of the Court of Appeal decision in Naidu (supra) is stated in the above quoted passage. Accordingly even though the actual issue between the parties may no longer be outstanding, the court can make a decision in certain instances.

24. In the Naidu (supra) there was an issue of public importance and also the interpretation of a law relating to the decision. It was held in Court of Appeal as;
- “In the present case there clearly is. As the Judge accepted, the extent and legality of the Minister’s powers in the field of broadcasting are matters of great public importance. Later he observed that the proceedings may have had some peripheral value in highlighting a number of important issues to which s.10 of the Decree may give rise.”(emphasis added)*
25. In this case there is no evidence of quashing the decision, to appoint the interested party as the government approved print media though a subsequent tender was advertised on 16th August, 2016. What is the position till the tender process is completed and a fresh print media is selected is not explained. How long that process would take and what would be the new time period is also not explained. Since the fiscal year had already started when the advertisement was published, the commencement date for new appointment can be any date.
26. The decision for such appointment was earlier advertised in papers and that was for the general public as well as for the government institutions and organizations.
27. If the notice is ineffective due to the fiscal year being changed it should be communicated in the same manner as done in the earlier occasion. Apart from the government institutions and organizations the targeted group would be the general public who read these government notices for their requirements. The general public who desire to read government notices are not being informed of any decision contrary to the previous advertisement of the selection of Interested Party as the exclusive print media organization. So there is an element of public importance attached to the issue under judicial review. This judicial review would affect their right to information regarding notices of the government including vacancies, tenders, other notices, etc.
28. So in the absence of such advertisement clarifying the position of the advertisement published earlier, it cannot be considered the issue between the parties are no longer outstanding, though a tender was called on 16th August, 2016.

29. At the hearing the counsel for the Respondents could not explain why the tender was advertised on 16th August, 2016 when the financial year ended in 31st July, 2016. These are issues that cannot be determined in summary manner in a strike out application, without a substantive hearing.
30. As regard to the orders no. 1, and 2 of the Originating Motion dated 23rd June, 2016 relate to the declaration that the decision appointing the Interested Party as 'approved print media' was unlawful, null and void and quashing order of the said decision. These issues have not been resolved by the change of fiscal year and or advertisement of the tender on 16th August, 2016. The order no. 3 that was sought in the said Originating Motion relates to a *Mandamus*, to compel the 2nd Respondent to request the Director of the Fiji Procurement Office to conduct the tender process according to the Regulations. Though there is evidence of a tender being advertised the relief sought by the Applicant is not limited to call for a tender, but it desired directions for the said tender to be done in a particular manner.
31. As regards to the declaration sought in no 4 of the Originating Motion, regarding the government statutory bodies and corporations the position of the Respondents, is that the advertisement does not obligate such institutions but the rates offered would be accessible to them. If so there cannot be any objection to a declaration clarifying the position as it would not affect the position of the Respondents. While taking this position at this stage for strike out the Respondents object to grant of a declaration clarifying the position of the government corporations and statutory bodies as to the advertisements. There is no communication other than the advertisement in the news papers regarding the selection of the Interested Party to any government body. So these are issues that need clarification at the hearing.

CONCLUSION

32. Despite the advertisement of 16th August, 2016 there are unresolved issues that need determination at the substantive hearing. Fiji Court of Appeal had held even when there is no 'utility' of the orders made in judicial review, the court can determine an issue of public importance. The announcement of selection of 'approved print media' for government notices and the selection process for procurements have public importance. They should know where to look when they seek information


regarding government notices. The change of fiscal year and advertisement of the tenders on 16th August, 2016 had not made the declarations sought in the Originating Motion superfluous or irrelevant. The issues need the determination of the court. The application for strike out is dismissed. Considering circumstances of the case I do not award costs for this application.

FINAL ORDERS

- a. The application for strike out is dismissed.
- b. No cost awarded considering the circumstances of the case.

Dated at Suva this 8th day of September, 2016




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Justice Deepthi Amaratunga
High Court, Suva.