IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

JUDICIAL REVIEW NO.7 of 2015

IN THE MATTER of an application by **KULWINDER KAUR** for a Judicial Review under Order 53 of the High Court Rules 1988.

AND

IN THE MATTER of the decision of the **AGRICULTURAL TRIBUNAL** dated 13th July, 2015 in Agricultural Tribunal Reference No. WD 04 of 2011 and the decision of the Secretary of the Agricultural Tribunal dated 31 July, 2015.

BETWEEN : **KULWINDER KAUR** of 10971 Anemone Circle, Moreno Valley, Ca, 92557, United States of America.

APPLICANT

AND : **AVINESH VIKASH PRASAD** of Maro, Sigatoka.

FIRST RESPONDENT

AND : **DIRECTOR OF LANDS**

SECOND RESPONDENT

AND : **AGRICULTURAL TRIBUNAL**

THIRD RESPONDENT

AND : **SECRETARY OF THE AGRICULTURAL TRIBUNAL**

FOURTH RESPONDENT

JUDGEMENT

INTRODUCTION

1. Before me is an application seeking leave to institute judicial review proceedings filed on 13 October 2015. The hearing of the application was conducted on 18 May 2016.
2. The decision in question was that made by the Secretary of the Agricultural Tribunal on 29 July 2015 by which the Secretary had refused to accept a Notice and Grounds of Appeal ("**Notice of Appeal**") which

the applicant had tried to file. The said Notice of Appeal related to a decision of the Tribunal which was handed down on 13 July 2015.

SECRETARY'S DECISION

3. The Learned Tribunal was legal counsel in the Office of the Attorney-General immediately before he was appointed Tribunal in 2013. Whilst he was still yet counsel in the A-G's Office, he had drafted and signed the statement of defence against a particular application for a declaration of tenancy that had been filed before the Tribunal. On 26 May 2015, at the hearing of the substantive matter, the Learned Tribunal raised the issue as to whether or not he might be conflicted in sitting and adjudicating on the particular reference before him, given his prior involvement in having drafted and signed the defence. Subsequently, he heard arguments from both counsel on the issue and on 13 July 2015, the Tribunal ruled that there was no conflict of interest.

4. The Tribunal's ruling was headed **"INTERLOCUTORY RULING"**. The main point of objection to the Tribunal hearing and adjudicating on the reference was that the defence he had drafted raised issues of fact and law upon which the Tribunal would already have made up its mind. In his INTERLOCUTORY RULING, the Tribunal conceded that there were issues of fact and law raised by the defence. However, he refuted the allegation that he had already made up his mind. Notably in particular, the Tribunal refuted that he would have spoken to witnesses and analysed documents before drafting and filing the defence. The Tribunal then went on to reason as follows:

> The 2nd Respondent has also informed this Tribunal in paragraph 2 of its Amended Statement of Defence filed on the 23rd of March 2015 that the subject lease had expired o the 1st of January 2015.
> The case cannot be transferred to another Tribunal as suggested ...as he post of Deputy Agricultural Tribunal is still vacant. The case is already 5 years old. In light of these developments, I hold the view that the public interest would be well served if the matter is resolved by this Tribunal.
> For the reasons given herein, I find no conflict of interest.

5. On 29 July 2015, the applicant's solicitors tried to file Notice of Appeal Secretary. The Notice and Grounds of Appeal that the applicant had attempted to file at the Tribunal on 28 July 2015 reads as follows:

> **TAKE NOTICE** that the Central Agricultural Tribunal will be moved for **AN ORDER** that the final (my emphasis) orders of the Honourable Tribunal Mr. Jeremaia N. Lewaravu (delivered on 13th of July 2015) refusing to recuse himself from presiding over the matter be wholly set aside and revoked and that this Central Agricultural Tribunal Order a trial and/or make any other orders that deems just and expedient and the costs of this appeal and all costs below be paid to the Respondents **UPON THE FOLLOWING GROUNDS**:- (grounds follow)

6. However, the Agricultural Tribunal Secretary would not accept the said Notice. Instead, he would require of the applicant to amend the word **"final"** (see underlined above) to **"interlocutory"** in their Notice & Grounds of Appeal.

7. On 31 July 2015, the substantive reference was called for mention before the Tribunal wherein the Tribunal again directed counsel of the need to make the same amendment. He then granted the applicant one month to do so.

8. However, instead of amending the Notice & Grounds of Appeal, the applicant would file the current application to seek leave for judicial review.

APPLICANT'S ARGUMENT

9. The applicant argues that the Secretary has no statutory authority to decline the Notice and Grounds of Appeal. He submits that there is nothing under Regulation 7 of the Agricultural Landlord & Tennant (Tribunal Procedure) Regulations or under sections 42, 43, 44 and 48 of the ALTA Act which confer upon the Secretary any power to refuse a Notice of Appeal.

10. The applicant draws my attention specifically to section 48(3) and argues once a Notice of Appeal is filed, the tribunal is obliged to refer the matter to the Central Agricultural Tribunal.

11. The decision to refuse a Notice of Appeal lies with the Central Agricultural Tribunal as it is a matter of substance beyond the competence of the Secretary. Any decision as to whether the decision in question was a "final" or was an "interlocutory" decision is one that cannot be made

without an opportunity being afforded to the applicant to argue its case. In this case, so the argument goes, the Secretary has determined that the Tribunal's decision was an interlocutory decision and in doing so, he acted *ultra-vires* his powers.

RESPONDENT'S ARGUMENT

12. The respondents argue that the Secretary's duty is to check all applications presented before the authenticating stamp of the tribunal is affixed on the documents. The decision itself states that it is an "INTERLOCUTORY RULING" hence the correct reference has to be made to the decision under appeal. If one is aggrieved with the decision of the Secretary, one has to appeal to the Tribunal. That avenue was not exhausted.
13. The Respondents also submit that the lease had expired on 01 January 2015 and all rights have since reverted to the State.
14. Also, the respondents have filed an amended statement of defence on 23 March 2015, hence the rights of the parties have changed significantly since.

THE LAW

15. The general principle, as stated by Lord Diplock in **O'Reilly v Mackman** [1983] 2 AC 237, at 279 is that an application for judicial review must show on the evidence, that one or more of the common law or statutory rights or obligations of the applicant has been adversely affected by the decision complained against.
16. At leave stage, the threshold is low. What needs to be established is **'an arguable case'** to be resolved only by a full hearing of the application for judicial review. A full review of the facts is unnecessary, however, a court is obliged to sufficiently pursue the material provided to determine whether an applicant raises an issue arguably involving: an error in law, a serious error in fact, a violation of natural justice or procedural fairness, or an excess of jurisdiction by the decision-maker the subject of the application (see also **R. v. Legal Aid Board** ex parte Hughes (1992) 24 HLR 698. At pp. 702-703 as per Lord Donaldson MR).
17. The decision in question was that made by the Secretary on 29 July 2015.

18. The Secretary had merely asked the applicant to substitute the word "final" with the word "interlocutory" in the Notice of Appeal. He had done nothing to obstruct or impede the appeal. It was a simple request to the applicant to amend the Notice of Appeal to be consistent with what the heading of the Ruling of the Learned Tribunal. Had the applicant obliged, his appeal would have been processed. The Secretary's direction posed absolutely no prejudice to the applicant's intended appeal. The question is whether there is an arguable case that the Secretary's direction might constitute an error in law, a serious error in fact, a violation of natural justice or procedural fairness, or an excess of jurisdiction?

ERROR OF LAW

19. The substantive matter before the Tribunal was an application for a declaration of tenancy and a cross application for eviction. These issues were in no way at all determined by the Tribunal's decision to not recuse himself. The decision was therefore an interlocutory decision. Notwithstanding, Mr. Padarath argued that the decision was final and determinative of the narrow issue of whether or not the Tribunal had a conflict of interest.

20. The question of whether or not the Tribunal's decision was final or interlocutory was not a material issue that was even remotely relevant to the applicant's intended appeal. It was neither here nor there to the substantive appeal. It only became an issue when the applicant, instead of complying with the Secretary's direction, refused to do so because his counsel were of the view that the decision was a final one and not an interlocutory one.

21. The Fiji Court of Appeal's ruling in **Goundar v Minister for Health** [2008] FJCA 40; ABU0075.2006S (9 July 2008) is the current authority in Fiji on the issue of whether a ruling is interlocutory of final. **Goundar** actually endorsed the approach in an earlier Fiji Court of Appeal ruling in **Charan v Shah** [1995] Fiji LwRp 12; [1995] 41 FLR 65 (8 March 1995) which favoured the *"application"* approach than the *"order"* approach.

22. In **Charan**, the Court, in distinguishing the two approaches, had laid out that under the application approach, the order was treated as final only if

the entire cause or matter would finally be determined whichever way the court decided the application:

> The "order approach" required the classification of an order as interlocutory or final by reference to its effect. If it brought the proceedings to an end, it was a final order, if it did not, it was an interlocutory order. The "application approach" looked to the application rather than the order actually made as giving identity to the order. The order was treated as final only if the entire cause or matter would be finally determined whichever way the court decided the application.

23. The ALTA Act does not define "cause" or "matter". However, both the Magistrates Court Act (Cap 14) and the High Court Rules 1988 define these words in similar terms as follows, with only a slight extended definition for the word "cause" in the Magistrates Court Act:

> **"cause"** includes any action, suit or other original proceeding between a plaintiff and a defendant [and any criminal proceeding[1]].

and **"matter"** is defined as:

> **"matter"** includes every proceeding in court not in a cause.

24. Applying **Charran**, the FCA in **Goundar** said:

> 37. This is the position. Where proceedings are commenced in the High Court in the Court's original jurisdiction and the matter proceeds to hearing and judgment and the judge proceeds to make final orders or declarations, the judgment and orders are not interlocutory.
> 38. Every other application to the High Court should be considered interlocutory and a litigant dissatisfied with the ruling or order or declaration of the Court needs leave to appeal to that ruling order or declaration. The following are examples of interlocutory applications:
>
> 1. an application to stay proceedings;
> 2. an application to strike out a pleading;
> 3. an application for an extension of time in which to commence proceedings;
> 4. an application for leave to appeal;
> 5. the refusal of an application to set aside a default judgment;
> 6. an application for leave to apply for judicial review.

25. Based on the above and in relation to the Tribunal, one might say that where proceedings are commenced in the Agricultural Tribunal's statutory jurisdiction and the matter proceeds to hearing and ruling and the Tribunal proceeds to make final declaratory orders, the orders or

[1] This is the extra bit that the definition in the Magistrates Court Act contains.

declarations are not interlocutory. Every other application to the Tribunal should be considered interlocutory.

26. The application to the Tribunal to recuse himself was indeed an interlocutory application. I am of the view that the Learned Tribunal was correct to have headed his ruling as an "INTERLOCUTORY RULING". The Secretary had not made any decision to characterise the ruling as such. He was simply trying to get the applicant to amend his application accordingly. There is no arguable point of appeal on this aspect of the matter.

DID SECRETARY HAVE POWER TO RETURN THE NOTICE OF APPEAL?

27. The procedures for the appeal of a decision of the Tribunal are set out under section 48 of the Agricultural Landlord and Tennant Act.

> **PART VI-APPEALS**
>
> *Appeals from tribunals*
>
> **48.**-(1) Where a landlord or a tenant is aggrieved by an ..... order ..... of a tribunal made or issued under the provisions of this Act the landlord or tenant may appeal against such ... order ... to a central agricultural tribunal .....
>
> (*a*) .....
>
> (*b*) .....
>
> (2) Within twenty-one days after the slaking of any ... order .... the appellant shall-
>
> (*a*) pay such fee as may be prescribed to the secretary of the tribunal;
>
> (*b*) lodge with the tribunal written notice of the appeal, with a receipt for the fee paid under the provisions of paragraph (*a*);
>
> (*c*) serve a copy of the written notice of appeal upon the opposite party.
>
> (3) Upon receipt of the notice of appeal in accordance with the provisions of subsection (2), the tribunal shall transmit to the central agricultural tribunal-
>
> (*a*) one copy of the evidence recorded by the tribunal under the provisions of this Act;
>
> (*b*) one copy of the reasons for the decision of the tribunal;
>
> (*c*) two copies of the award, order or certificate issued by the tribunal;
>
> (*d*) the original notice of appeal,
>
> all of which documents shall be authenticated by the tribunal.

28. Notably, under section 48, all the above documents (i.e. written Notice of Appeal, copy of the evidence recorded by the Tribunal, copy of the reasons of the Tribunal, two copies of the award, order or certificate issued) must be authenticated by the tribunal before they are forwarded to the Central Agricultural Tribunal.

29. However, Regulation 7(3) of the Agricultural Landlord and Tennant (Tribunal Procedure) Regulations, in its relevant part, provides that the Secretary may also authenticate copies of record of proceedings of a tribunal.

> 7(3) The certificate of a tribunal specifying ..... copies of the record of proceedings of a tribunal may be authenticated by the tribunal or the secretary thereto

30. In my view, the above provisions are clear in that they give power to the Secretary to authenticate the "copies of record of proceedings" which, in my view, includes all the relevant documents stipulated by section 48 which, I am of the view, includes the Notice of Appeal. I do not think there is an arguable case in this regard

CAN THE SECRETARY REFUSE TO AUTHENTICATE ANY DOCUMENT?

31. The Regulations clearly anticipate that the Secretary may make a decision to refuse to authenticate an application. Regulation 29 of the Agricultural Landlord and Tennant (Tribunal Procedure) Regulations provides that in such a case, an aggrieved party may appeal to the Tribunal against such refusal:

> *Appeal against secretary's refusal*
>
> **29.**-(1) Any applicant to a tribunal who is aggrieved at the decision of a secretary to refuse to authenticate an application may appeal to the tribunal against such refusal.
> (2) On such appeal the tribunal may reject the appeal, allow the appeal or allow the application to be amended, as it may consider just.

32. The Secretary, in this case, had returned the Notice of Appeal when it was filed at the Tribunal because he required the applicant to first amend his notice as stated above. Had the Secretary accepted the Notice of Appeal, then he would either have authenticated it himself or he could have placed it before the Tribunal for authentication. If the applicant was aggrieved by that decision, he "may" appeal to the Tribunal. The word "may" is simply to say that the aggrieved party may or may not appeal to the Tribunal. I do not think that there is an arguable case that the Secretary had acted in excess of his jurisdiction. And I do not think that the Secretary was necessarily under any obligation to present the Notice of Appeal to the Tribunal to again have to determine whether the Ruling was an

interlocutory ruling or whether it was a final ruling. As I have said, this issue is a creation of the applicant's own inflexibility. It was not an issue that was remotely relevant to the intended appeal.

DID SECRETARY ACT IN VIOLATION OF NATURAL JUSTICE OR PROCEDURAL FAIRNESS?

33. The procedure to appeal to the Tribunal the Secretary's decision to return the Notice of Appeal is provided for under Regulation 29 (see above). That was not exhausted by the applicant.

34. Also, the opportunity to appeal to the Central Agricultural Tribunal was not at all lost or in the least affected by the Secretary's requisition. All that the applicant was to do was amend his application.

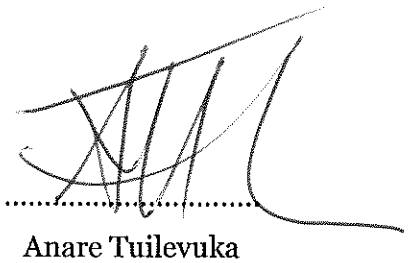
35. It would have been a denial of natural justice if the question of whether the Tribunal's decision to refuse to recuse himself depended in part (or in full) on the question of whether the Secretary's refusal was an interlocutory or a final decision. But as I have said, that was a non-issue. It only became an issue when the applicant refused to amend his Notice of Appeal as urged by the Secretary.

CONCLUSION

36. Order 53 Rule 3(1) of the High Court Rules 1988 sets down the requirements for leave. One of the principal reasons why leave is required is **"to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error"** (see **R v Inland Revenue Commissioners ex-parte National Federation of Self-Employed and Small Businesses Ltd** [1981] 2 All ER page 105 as per Lord Diplock) and to **"eliminate frivolous, vexatious or hopeless applications"** and to ensure **"that an applicant is only allowed to proceed to a substantive hearing if the court is satisfied that there is a case fit for further investigation at a full *inter partes* hearing"** (see Supreme Court Practice 1995 (The White Book).

37. I am of the view that this application is an abuse of process. The Secretary's requisition was not a substantive decision. The Tribunal had

headed his decision – INTERLOCUTORY RULING. It was in fact, an interlocutory ruling. The Secretary was merely asking the applicant to amend his Notice accordingly. Even if the applicant had appealed the Secretary's decision under Regulation 29 to the Tribunal, he would have been responsible for that diversion away from the intended main appeal proper because the question of "final or interlocutory" was simply a non-issue. I think this is the kind of "misguided or trivial complaint of administrative error" that Lord Diplock had envisaged. Application dismissed. Costs to the 2nd, 3rd and 4th defendants which I summarily assess at $900 (nine hundred dollars only).



Anare Tuilevuka
JUDGE
05 October 2016.