

IN THE HIGH COURT OF FIJI (WESTERN DIVISION)
AT LAUTOKA
CIVIL JURISDICTION
ACTION NO. HBC0034 OF 2003

BETWEEN : NEW ZEALAND PACIFIC TRAINING CENTRE
PLAINTIFF

AND : FIJI ISLANDS REVENUE AND CUSTOMS AUTHORITY
DEFENDANT

S C Maharaj for the plaintiff
Ms R Ali for the defendant

Dates of Hearing and Submissions : 10 February, 11, 18 April 2002, 13 October 2004.
Dates of Judgment : 21 October 2004.

J U D G M E N T

1. On the 27th of January 2003 the plaintiff issued an originating Summons against the Defendant seeking the following Orders and Declarations :

- (1) A Declaration that the Defendant is stopped from acting contrary to the advice, assurance and representations made by the Fiji Labour Government in 1999 that no Vat is payable by educational institutions in Fiji.
- (2) A Declaration that the assessments made by the Defendant amounting to \$346,610.82 are arbitrary and wrong and not recoverable and should not be the basis for an issue of Recovery Process by way of Garnishee proceedings or otherwise.
- (3) An Order that the Defendant be restrained from exercising any power vested in it to recover the amount of \$346,610.82 until the determination of this action, or until further order of this Court.
- (4) A Declaration that the Defendant has acted unreasonably and is wrong to assess that Value Added Tax (VAT) is payable in respect of the period December 1998 to the end of December 2002.
- (5) An Order that Garnishee Notice registered by the Defendant on Bank Account Numbers 402 339 and 402 340 (International Account) with Bank of Baroda Limited, Nadi be uplifted or removed forthwith.
- (6) An Order that the sum of \$10,000.00 presently being paid monthly by the plaintiff be suspended until the termination of the Action.
- (7) An Order that the sum of \$70,000.00 already paid by the plaintiff to the Defendant under the recovery process instituted by the Defendant be refunded to

- the Plaintiff or alternatively be applied or off-set against future VAT becoming payable from 1,1/03 onwards.
- (8) Any other order that this Honourable Court deems fit to make.
 - (9) That the Defendant pay the costs of this action on a solicitor/client basis.

2. On the 24th of January 2003 the Plaintiff issued a Notice of Motion seeking the following orders :

- (1) that The Garnishee Notice registered by the Defendant on Bank Account Numbers 402 339 and 402 340 with Bank of Baroda, Nadi be uplifted or removed forthwith.
- (2) That the sum of \$10,000.00 presently being paid monthly by the Plaintiff be suspended until the determination of the Action.
- (3) That an injunction order be granted restraining the Defendant and/or his servants/agents, from demanding payment of \$180,000.00 or payment of \$10,000.00 by monthly instalments until the determination of the action.
- (4) That the Defendant and it's servants or agents be restrained from exercising any power vested in the Defendant to recover the said amount of \$346,610.82 until the determination of this action or until further Order of this Court.
- (5) That costs in the application be costs in the cause.

3. On the 20th of February 2003 I granted an interim injunction against the Defendant and ordered the Bank of Baroda at Nadi not to operate on the Garnishee given to it by the Defendant in respect of Account Numbers 402 339 and 402 340 in the name of the Plaintiff until further order. On the 11th of April 2003 the Defendant issued a Notice of Motion seeking the following orders :

- (1) A Declaration under Order 12 Rule 7 paragraph (1) (g) of the **High Court Rules** that in the circumstances of the case the Court has no jurisdiction over the Defendant in respect of the issue raised on the assessments and the relief sought on the Garnishee in the action by the Plaintiff.
- (2) An Order that the relief sought by the Plaintiff with regard to the assessment of the VAT returns and the Garnishee be dealt with by the VAT tribunal.
- (3) An order under **Order 15 Rule 6** paragraph (2) (a) of the **High Court Rules** that the Defendant who has been improperly made a party to cease to be a party.
- (4) An Order that Bank of Baroda, Nadi Branch operate on the Garnishee given to it by the VAT Section of the Inland Revenue Services in respect of the account numbers 402 339 and 402 340 in the name of the Plaintiff until the Plaintiff brings an action in the name of the proper Defendant(s).
- (5) Alternatively should the Court determine that it has the jurisdiction to hear the action pertaining to the issues raised with regard to the VAT assessments and the Garnishee, then it be ordered pursuant to **Order 15 Rule 6** paragraph [h 2(b) (i) of the **High Court Rules** that the Ministry of Finance and the Attorney- Generals Office be added as a party who ought to have been joined as a party and whose presence before the Court is necessary to ensure that the matters relating to the

issue of representing made by the Labour Government may be effectually and completely determined.

The Affidavit in Support of the Garnishee Summons sworn by Sacket Dashputra the Finance Controller of the Plaintiff states so far as the relevant the following :

- (6) That the Plaintiff is an educational institutional operating training centres at Lautoka, Ba, Nadi, Suva, Nausori, Levuka, Rakiraki, Labasa, Sigatoka, and Savusavu
- (7) That the Defendant is a body corporate constituted under the provisions of the **Fiji Islands Revenue and Customs Authority Act No. 9 of 1998** and is the Authority responsible for the collection of taxes including Value Added Tax, Revenue and Income Tax and Customs Duties throughout the Republic of Fiji.
- (8) That the defendant is headed by the Chief Executive Officer and the VAT Unit is under the control of the Director of VAT who reports to the Chief Executive Officer .
- (9) That the plaintiff provides training in various facets of computing and other relate fields and awards Diplomas and Certificates to successful students.
- (10) That the plaintiff is affiliated to the Box Hill TAFE College (Trade and Further Education) in Melbourne Victoria is registered with the Ministry of Education in Fiji as an educational institution.
- (11) That since its incorporation and commencement of operations the Plaintiff has been registered to pay VAT with the VAT Office and paid VAT as required under the VAT Decree until the end of November 1999.

In 1999 there was a change of Government In Fiji. The Fiji Labour Party was elected headed by it's Prime Minister the Honourable Mahendra Chaudhary.

4. Since it came into power the new Labour Government stated that once one of it's policies was the removal of all Value Added Tax on education. There was much publicity given in the media about this and the Plaintiff relied on the publicity and representations made by the then Chaudhary Government that VAT was removed from all educational services throughout Fiji.

5. That relying on these representations the Plaintiff stopped charging VAT to it's students throughout Fiji and reduced school fees by 10% from December 1999 which it had hitherto been charging it's students. The 10% reduction represented the percentage of VAT payable by the Plaintiff.

6. Two examples were annexed to Mr. Dashputra's affidavit of reduction given in the fees of two students. Thus the beginning of December 2002 the institution did not charge

any VAT to any of its students relying on the previously mentioned representations by the Chaudhary Government.

7. In February 2001 the Defendant wrote a letter dated the 2nd of February to the Plaintiff demanding VAT Returns for the period of December 1999 to December 2000 and stated that the demand was made under Section 33(1) of the VAT Decree of 1999. It also stated that if payments were not made penalties of up to a fine of up to \$1500 or imprisonment for a period of not exceeding one year or both fine and imprisonment could be imposed on the plaintiff under **Section 71 (e) and 72 (2)** of the **VAT Decree**.

8. On the 6th March 2001 the Plaintiff replied to this letter admitting that it had not been paying VAT since December 1999 and giving as its resource:

(12) That it was an Educational Institute to which VAT did not apply.

(13) That the Plaintiff had been receiving an education (VAT) concession for all its educational imports.

9. Various correspondence then was exchanged between the parties but to no avail because the Defendants maintained that it had the legal right to demand VAT from the plaintiff. It is claimed by Mr Dhashputra that the Director of VAT TOLD THE prime Minister's Office that Education was exempted from VAT. However it seems that the Director's Office did not bring it to the attention of the Prime Minister's Office the full provisions of paragraph 6 of the First Schedule of the VAT Decree 1991 which purports to exempt various educational institutes but not such institute which is carried on for the purposes of commercial profit or gain any proprietor or member shareholder. It seems that the Defendant is relying on paragraph 6 in making its claim against the Plaintiff.

10. The Plaintiff claims that the Defendant demanded payment of \$116,734.01 and the Plaintiff was forced to pay \$20,000.00 immediately and then \$10,000.00 per month thereafter to settle this claim. Up to the 23rd of January 2003 the plaintiff had paid \$70,000.00 to the Defendant.

11. In November 2002 despite the fact that the Plaintiff was making its regular payments, the Defendant again threatened to reactivate the Garnishee proceedings where upon the plaintiff consulted its then solicitors who wrote to the Defendant on the 22nd of November 2002 alleging that the attempt to reactivate the Garnishee was a breach of good Faith and requested the Department to reconsider its position.

12. There was apparently no reply by the Defendant to the letter from the Solicitors but in early January 2003 the Defendant demanded immediate payment of \$180,000 and again registered its Garnishee on the Bank Account of the Plaintiff with the Bank of Baroda.

13. The Plaintiff states that it cannot afford to pay \$180,000 because of its ceasing to charge students the amount of VAT payable under the Decree but it states that it is willing to charge its students VAT from the plaintiff because of the representations it made publicly on the question.

14. No evidence is before the Court of the nature of these representations although I recall a statement made to the media by the Chaudhary Government relating to the proposed exemption from VAT fees payable to educational institutes. In any event (although I have heard no submissions on this) I would have thought that unless there was legislation specifically exempting such institutes from VAT, all other things being equal , the plaintiff would be liable to pay such tax. The question is whether all other things are equal and I should shortly attempt to answer that question when discussing the constitutional validity of the VAT Decree under the tax is claimed by the Defendant.

15. Before doing so I shall discuss two Notices of Motion by the Plaintiff and the Defendant seeking respectively to amend the Originating Summons by adding the Commissioner of Inland Revenue and the Attorney-General of Fiji as Defendants and, Inter-alia a Declaration that this Court has no jurisdiction in the matter. Regardless of the question of whether the VAT decree is constitutional I am of the opinion that Section 120 of the Constitution Amendment Act 1997 grants jurisdiction to this Court in this matter. Section 120 (1) of the Constitution states that the High Court has unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any Law and such other jurisdiction as is conferred on it under this Constitution. In my view nothing could be wider so that for this reason alone I reject the submission by the Defendant that the present proceedings should be dealt with by the VAT Tribunal. I will say more about this Tribunal when considering the constitutional questions which were argued before me before me on 13th October. As to the edition of parties sought in the Plaintiff's motion in view of my decision on the Constitutional question a ruling on this will not be necessary.

17. When I read the papers in this case I was somewhat surprised that the Plaintiff did not make any submissions on the validity of the VAT Decree and so I invited Counsel to address me on this on the 13th of October 2004. I requested further submissions because it seemed to me that prima facie the VAT Decree of 1991 was unconstitutional. The submissions I have received confirmed me in that view for reasons which I shall now give.

18. Mr Maharaj for the Plaintiff argued that the crux of this question hinged on what is to be held the Law of Fiji.

19. Section 45 of the Constitution reads as follows “ **The power to make Laws for the State vests in a Parliament consisting of the President, the House of Representatives and the Senate.**”

20. I would have the thought that nothing could be clearer. The Section does not say that it is a subject to any other Sections of the Constitution but particularly **Sections 194 and 195** which bear on the present proceedings. **Section 194(1) states :**

“ In this Constitution, unless the contrary intention appears : Act means an Act of the Parliament or a Decree.”

Section 195(2) paragraph (e) reads :

“Despite the repeal of the Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990.....

(14) all written laws in force in the state (other than the laws referred to in subsection (1) continues in force as if enacted or made under or pursuant to this Constitution and all other law in the state continues in operation.”

The Act of Decrees mentioned in **Section 195(1)** are irrelevant to the instant proceedings.

21. Counsel for the Plaintiff argues that this case concerns a tax decree purporting to impose tax on citizens and others by a non-parliamentary purports to impose penalties for non-payment. Thus says counsel, when Parliament passes a law it means an Act which has gone through the parliamentary process. He also submits that section 45 is not stated to be subject to Sections 194 and 195 and that if we were the intention to make exceptions to Section 45 that should have been clearly stated in the three Sections mentioned. Furthermore Counsel submits that the term “subordinate legislation” is defined in Section 194(1) to mean **“any instrument of a legislative character made in exercise of a power to make the instrument conferred by an Act.”** (my emphasis). As Parliament has the power to make Acts it follows that the VAT Decree must be unconstitutional. I mention that in passing this Decree purported to come into force on 1st of July 1992.

22. Counsel submits that the Decree which imposes such heavy consequences for offences must as a matter of fairness and Democracy be passed by Parliament as though it were a bill. It cannot be authorised under the Doctrine of Necessity.

23. Mr Maharj referred me to the decision of the Court of Appeal delivered on the 19th of March 2004 in **ABU 0050/2003S Attorney- General of Fiji and the Minister for Sugar Industry v Marika Vuki Silimaibau and National Farmers Union.**

24. There the court was considering an appeal from a judgment of Gates J who on the 17th of July 2003 made the following declaratory orders :

- (1) The purported appointments of the Minister for sugar and the acting Minister for Sugar are null and void and contrary to the provisions of the 1997 constitution.
- (2) The Sugar Industry (Amendment) Decree 1992 is invalid and of no legal effect
- (3) The exercise of powers by the purported Minister of Sugar in nominating eight members to the Sugar Cane Growers Council is null and void and of no Legal effect.

The hearing took place before the Judge on the 6th of June and 19th of July 2001 and the Court appeared to be critical of the Judge’s delay in not delivering his judgment until 17th July 2003 because of the fact that the next election to the Sugar Industry Council was to

take place in April 2004, that is the month following the delivery of the judgment of the Court of Appeal. It is not my function necessarily to come to the defence of a brother judge but I am forced to wonder whether the members of the Court of Appeal had any notion of the case load under which Mr Justice Gates labouring when he was in Lautoka.

25. Miss Ali for the Defendant made only brief submissions. She relied on the **Section 195** of the **Constitution** which she said validated the VAT Decree and relied on the Court of Appeal; judgment on **Silimaibau**. She also said that until the VAT Decree was ruled invalid FIRCA was entitled to rely on it, which it did in this case. I accept that statement but I cannot accept Miss Ali's submission that the validity of the VAT Decree was not an issue in this case for the simple reason that the assessment made against the Plaintiff were all made pursuant to the **VAT Decree of 1991**.

26. In his decision in *Koroi v Commissioner of Inland Revenue HBC179/2001L* Gates said in page [3]:

“ In the circumstances, it is essential that the incoming Parliament review all of the Decree made since 1987 and subject them to the normal processes of a bill. Only then will Parliament be true to it's constitutional pact with the people of Fiji. A reference tucked away at the end of the Constitution [Section 195] to all written laws continuing in force, does not amount to a parliamentary process complying with such a pact. Parliament should seek to complete such a process within as short a time as possible, perhaps 12 month. Parliament, setting its own procedure, will no doubt extend that time it thinks fit. But it is desirable to maintain constitutionality in Fiji's public Life , and to restore its rolling stock to the tracks as soon as possible.”

27. Commenting on this the Court of Appeal stated at page 4 of it's judgment :

“We're unable to agree with this reasoning. We can state our reasons quite shortly. First as we consider in more detail shortly, s 195(1)(e) of the Constitution clearly validates the decree. That section is not to be written down simply by reference to where it appears in the Constitution. Secondly, there are no possible grounds for the Judge finding that all decrees have to be “reviewed” by Parliament (whatever they may mean). There are no statutory provisions requiring Parliament to adopt that course. It is not for the court to legislate what Parliament is required to do. But, perhaps more significantly, the Constitution is the ultimate legal authority in Fiji. If, as we find to be the case, the Constitution validates the decree, there is not only no obligation on Parliament to “review” the decree, if it attempted to do so other than by a properly enacted amendment or repeal, it would be acting contrary to the Constitution.”

I venture to make respectful comments on that passage. The Court was never referred to in **Section 45** either in argument or on it's own initiative and so in my judgment acted per incuriam. Secondly, I would have the right that when Gates J used the verb “review” he meant that Parliament should look over these Decrees again with the view to correction

or improvement then the meaning given to the verb in the Shorter Oxford Dictionary. It seems to me that Gates J was doing , was to liken Decrees to Bills which, once there was re-established would go through the normal parliamentary process of first,second and third readings in the House of Representative and the Senate before being finally submitted to the President for his signature.

28. As to the claim by the Court that there are no statutory provisions requiring Parliament to adopt that course with respect I would have thought there was an obvious statutory provision, namely **Section 45**. I cannot understand how, given the unqualified wording of **Section 45**, any Decree could be considered to be a valid Law and I am reinforced in this opinion by the definition of Subordinate legislation in Section 194 (1).I also note the statement in the passage I have quoted that, **“the Constitution is the ultimate legal authority in Fiji”**

29. It is true that the court of Appeal rejected a submission from the respondents that subordinate legislation can only mean legislation made pursuant to powers contained in an Act but, as I have said there is nothing in it’s judgment to show that any mention was made of **Section 45 during the hearing**

30. I have been critical of Decrees in the past. So to have Shameem J and Gates J **In State v Audie Pickering (unreported) No.HAM 007/2001S** in a judgment delivered on the 30th of July 2001. Shammem said in page 13 :

“All laws passed before the passing of the Constitution must measure up to the requirements of the Constitution.”

Then at page 22-23 she said :”

“ The judiciary has a traditional deference to Parliament. It is for Parliament to pass LAWS, AND TO judiciary to give effect to them. Most legislation we have a valid constitutional purpose because it would have been passed after much research , discussion and debate. A recommendation for legislative change normally comes from a group or department after a need for a change has been acknowledged. A minister, having discussed the matter with his/her own Ministry will then present a Cabinet paper. The matter will be discussed in Cabinet before it is prepared in Bill form. Once in Bill form, it is published so that the public and concerned parties can discuss it and make representations to their member of Parliament. The Bill, if it is not channelled to a sector Committee for Parliament to hear further representation from the public and from government,will be debated in Parliament, both in the Lower and Upper House. It is only after this process that a Bill might become a Law. The Law when passed by Parliament, and assented by the President, has the status of a law passed through a democratic process. There is an assumption that Parliament speaks for the people and passes laws with the assent of the people. This is the essence of democracy. It is powerful reason why the judiciary should defer to the will of Parliament. Legislation passed by Parliament reflects in principle, the will of the people.

However as counsel for the Human Rights Commission submitted , the mandatory minimum sentence under the drugs Act was not imposed by the legislature. It was imposed by an executive act. It was passed by decree. There was no public discussion, no Parliamentary debate, and no opposition.

In the context of a decree, not only is it more difficult to ascertain a legislative purpose, but the customary defence to legislation must surely give way to a very close scrutiny of the constitutional effect of what is an executive act, albeit acknowledged and saved by section 195 of the Constitution.”

I respectfully agree with Her Ladyship’s remarks and can only comment that the VAT Decree never went through such a review process. It could not because there was no Parliament, that having been abolished by the coups of 1987.

31. In my judgment in Ghim Li Fashion (Fiji) Pte. Ltd v Commissioner of Inland Revenue HBC 403/1998 delivered on the 16th of August 2001 I said of Section 89 of the VAT Decree a page 2 of my judgment “that it could only have been passed into law after very little fanfare, research, discussion and debate” Of Section 89 the last Section of the VAT Decree I also said at page 35 of my judgment :

I said at the beginning of this judgment that I would leave until last comments which I think have to be made about Section 89 of the Decree which deals with Amendments and Repeals. It is appropriate that this is the final Section of the Decree because it purports to render invalid all existing Acts, Decree, Laws, rules, regulations, or other related legal instructions which contravene the provisions of the Decree insofar as they relate to the payment of tax in Fiji. To put the matter beyond doubt, on the words of the Section itself “for clarity”, the Decree purports to supersede every other Act, Decree, Law, Rule, Regulation, or other legal instruction, instrument or document.

For gargantuan widens I have never seen any such similar section in all my experience. Its presumptuousness is self-evident for here we have a Decree, not an Act of Parliament, purporting to repeal and supersede legislation passed by Parliament. It is frightening in its implications”

32. When the case went to the Court of Appeal in its judgment in ABU55/2001S Counsel for the Appellant urged the Court to comment on the language I used in describing the nature and the reasonableness of the Decree. The court declined to do so but stated that they were not to be taken as in any way endorsing my remarks.

33. Of course the Court was entitled to say but I make no apology for what I said. It would be a bad day for justice in Fiji if I were to do so. Every Judge on assuming office makes an oath or affirmation in which he says among other things: “ I will in all things uphold the Constitution: and I will do right to all manner of people in accordance with the laws and usages of the Republic, without fear or favour, affection or ill will.” There are times when judges feel compelled to speak out. This was one of them for me.

34. For the reason I have given I hold that the VAT Decree of 1991 is unconstitutional. There will be judgment for the plaintiff and I make the following Declarations and Orders:

- (1) I declare that all assessments of Value Added Tax made by the Defendant to the Plaintiff are illegal.
- (2) I order that the sum of \$70,000.00 already paid by the Plaintiff to the Defendant as Value Added Tax be refunded to the Plaintiff.
- (3) I order that the Defendant pay Plaintiff costs of \$1,000.00

John E Byrns
JUDGE

At Lautoka
21st October 2004.