

published in Fiji on the 22nd October 2004 there was a full page paid advertisement by the Defendant headed **“Press Release”**. This advertisement appeared under the name of Solomone Sila Kotobalavu, Chief Executive Officer, Fiji Islands Revenue and Customs Authority in which Mr Kotobalavu set out the history and policy behind the **VAT Decree of 1991**. He also criticized my judgment and said that I had not referred in it to three important provisions validating the existence of the VAT Decree. These were **Section 6 of Act No.1 of 2001** and **Sections 175 and 195(2)(e) of the 1997 Constitution (Amendment) Act of Fiji**. Never in my almost 50 years as a lawyer have I seen similar advertisements in any newspaper either here or overseas. In his penultimate paragraph Mr Kotobalavu states:

“For the above three reasons the judgment misconceived”.

I am unaware whether Mr Kotobalavu has any legal qualifications but I would have thought that whether my judgment was misconceived or not was a matter at least initially, for the Court of Appeal, although for reasons which I shall give later, I hope also the Supreme Court of Fiji. I consider the sentence probably amounts to contempt of court but I have no hesitation in saying that the last paragraph constitutes contempt of court. That reads thus:

“In light of the above, the Fiji Islands Revenue and Customs Authority does not propose in any way to desist from, halt or modify its enforcement of the Value Added Tax Decree and its collection of Value Added Tax thereunder.”

3. Here the Chief Executive Officer of the Defendant is saying as clearly as any words can that the Defendant intends to disobey my judgment. I consider this to be an invitation to other who may have similar inclinations but who are not the Chief Executive Officer of the Fiji Islands Revenue and Customs Authority to disobey court orders if they are dissatisfied with them. When I asked Mr Scott, who appeared to assist Ms Tagicaki, on the first day of the hearing, if he knew the author of this advertisement, he said it was he himself and added for good measure, “I did, My Lord and I stand by it”. Mr Scott would not agree that the last paragraph of the advertisement appeared to be in contempt of court but stated that he also relied on

Act No. 1 of 2001, Section 3(6) of which he said validates the **1991 VAT Decree**. He could not tell me whether Parliament had debated the effect of **Section 89** of the **VAT Decree** when the Bill for **Act No.1 of 2001** was submitted to it.

4. I wish to make it clear that were it not for the fact that my term as a Judge expires at midnight on the 30th of November I would cite Mr Kotobalavu for contempt of court. This of course is not to say that he may not yet be cited but that will be a decision to be made by another Judge or possibly the Attorney-General.
5. The Defendant applies for a stay of execution on two grounds, first what I will call “the floodgates” argument, that unless I grant a stay of my judgment the country will be ruined and secondly that my judgment raises a very important question on constitutional law on which at least the Court of Appeal if not the Supreme Court should rule. I now consider these arguments.

The Floodgates Argument

6. As I listened to Ms Tagicaki making this argument I was reminded of a poem of Monsignor John Lonergan who was a Catholic Priest in some of the rural areas of Australia in the mid-1880's up to the early part of the 20th century. He wrote a poem called “Said Hanrahan” which is included in an anthology of his poems entitled “Around the Boree Log”. Monsignor Lonergan was obviously a good judge of character and in the poem “Said Hanrahan” he writes about a farmer who was clearly a born pessimist. If it rained for four days Hanrahan had no doubt there would be floods – “We’ll all be ruined,” said Hanrahan, afore the year is out”.
7. Similarly if there was a spell of dry weather Hanrahan had no doubt that this would be followed by a drought. “We’ll all be ruined” said Hanrahan “afore the year is out”.
8. There will always be prophets of doom in the world, those who say that tomorrow the sky will fall, yet it never does. I cannot understand, although I have tried hard to,

how this country will be ruined economically if I were to order the Defendant to pay the Plaintiff the fruits of its judgment, but the argument of the Defendant goes further and into the realm of prophecy in an affidavit of Lepani Rabo the Chief Assessor of Inland Revenue Services of the Defendant.

9. In paragraph 9 of an affidavit he re-swore on the 19th of November 2004 he states that the Defendant will be prejudiced if a stay is refused. If the Defendant succeeds in its appeal it will be an ineffective success because there will be no existing legal entity against which the Defendant can satisfy its claim.
10. Mr Rabo believes that the Plaintiff is likely to dispose of itself because it is owned by three Directors of whom two are not registered with the Fiji Integrated Tax System and the third, being a resident of Fiji, is also operating two other legal entities as a sole trader. In addition there are six other businesses in Fiji which operate under the name 'NZPTC Ltd'. The business objectives of all these six other businesses are identical to those of the Plaintiff's business objectives. Furthermore, the resident Director Subash Chandra happens to be one of the Directors of all six businesses while the two other Directors Ram Sami and Som Naidu are Directors with Subash Chandra for some of the six businesses but not for others. In paragraph 11, what was a probability and a likelihood in paragraph 9 and 10 suddenly becomes a possibility of the Plaintiff disposing of itself between now and the determination of the Defendant's appeal. To me, this is pure speculation and insufficient in law to justify a stay on the ground of possible disposal of itself by the Plaintiff.
11. This uncertainty, or, to put it more bluntly, guessing by Mr Rabo is repeated in paragraph 13 of the affidavit in which he says that the two Directors who are not registered with the Fiji Integrated Tax System are most probably non-residents of Fiji. This is because according to Mr Rabo one is only obliged to pay income tax to the Defendant when one's source of income is in Fiji and also when one is not paying taxes in another jurisdiction. He goes on, "The fact that the said two Directors are not registered with the Fiji Integrated Tax System substantiates the assumption that they are residents of a Jurisdiction other than Fiji, as they would in

be usual requirement of being a Resident in that jurisdiction, be paying taxes thereto”. Assumption Is thus the only ground on which the Defendant relies for its claim that the Plaintiff will liquidate itself and so be able to avoid the consequences if it loses the appeal.

12. If the Plaintiff did liquidate itself then the Defendant fears that the three Directors of the Plaintiff will have a continued source of revenue in Fiji from the other five businesses I am surprised that the Defendant should have made such a claim when its own statement there is no tangible evidence supporting the probability that the Plaintiff will go into liquidation to avoid judgment if the appeal is upheld.
13. In addition Mr Rabo exhibits to his affidavit information relating to the tax assessments of Subash Chandra the Chairman and Chief Executive Officer of the Plaintiff which Mr Rabo claims reflects “the existence of the two sole trading businesses of Mr Chandra”.
14. Not unnaturally Mr Chandra complains about this disclosure of his personal tax details **Act No 9 of 1998** establishes the Fiji Islands Revenue and Customs Authority **Section 52** binds to secrecy any employee or former employee of the Authority from disclosing any information relating to any person which has been obtained by him in the performance of his duties except:
 - (a) as may be necessary for the performance of his duties or
 - (b) as may be necessary for any of the purposes of the laws specified in the First Schedule.

Two of these laws are the **Income Tax Act Cap. 201** and the **VAT Decree of 1991**. Assuming for a moment the validity of the Decree , which of course I have held is invalid. I consider the information disclosed in Mr Rabo’s affidavit of Mr Chandra’s personal tax details is at the best of dubious value to support his argument but more likely, in my judgment of no value at all.

15. The Plaintiff denies its inability to satisfy any judgment which may be obtained against it on appeal and says that the Defendant has simply made wild allegations of such inability and that the Plaintiff has continued to expand its services of providing education to the students of Fiji and has most recently undertaken major extensions of classrooms and lecture halls to cater for increased demands. For the reasons I have given above I do not consider the Defendant can justify a stay of execution on the ground which it claims. I am also troubled by the fact that, in a determined effort to defeat the Plaintiff's claim, the Defendant has seen fit to disclose in a public document details of the person tax records of Mr Chandra. This serves only in my judgment to confirm the length to which the Defendant is prepared to go to defeat the Plaintiff's claim. I accordingly reject the Defendant's argument for a stay on this ground.
16. I turn now to the constitutional validity of the Decree. During arguments Counsel for the Defendant submitted that although in my judgment I had stated that in its judgment in **Attorney-General of Fiji and the Minister for Sugar Industry v Marika Vuki Silimaibau and Anor**, the Court of Appeal had *acted incuriam* in not referring to **Section 45** of the Constitution, I was guilty of the same error because I had not mentioned **Section 46** of the Constitution which states:

“Subject to this Constitution, the power of the Parliament to make laws is exercised through the enactment of Bills passed by both Houses of the Parliament and assented to by the President”.

Counsel argued that the expression “Subject to this Constitution” means reference to be made to **Section 194** and **195**.

17. To this I rejoined that in the present case **Section 175** of the Constitution appeared to be relevant. That reads:

“The raising by the Government of revenue or moneys whether through the imposition of taxation or otherwise, must be authorized by or under an Act”.

18. One could probably go on but in my judgment such a submission overlooks the general purpose and reason for the Constitution. All three Constitutions Fiji has had be in saying that Fiji is a democracy. **Section 1** of the 1970 Constitution reads:

“Fiji shall be a sovereign Democratic State”

19. The 1990 Constitution begins by saying in **Section 1**:

“Fiji shall be a sovereign Democratic Republic”

and the 1997 Constitution begins likewise. **Section 1** of that Constitution reads:

“The Republic of the Fiji Islands is a sovereign democratic State”.

That clearly is the criterion by which all laws are to be judged. Are they consistent with the laws of a democracy? In the case of **Qarase v Chaudhary (unreported) Supreme Court Civ. App. No. CBV0004 of 2002S**, 18th of July 2003 the Supreme Court stated at paragraph 63:

“Construction builds upon the natural and ordinary meaning of the words in a constitutional provision. The way in which the words, taken together, are to be read will often involve selection from among a number of possible readings. That selection must have regard to the context which includes the whole of the document identified as the Constitution (Amendment) Act 1997. It must also have regard to the interpretive principles which are to be found in the Constitution itself and which apply to the whole of its text. These are set out in ss.3 and 7 read with s.6. The purpose or object underlying the provision to be construed, the spirit of the Constitution as a whole, context, in the extended sense of the context in which the Constitution was drafted, and social and cultural developments relating to particular human rights, all have a part to play by virtue of s.3. The important principles upon which the conduct of government is to be based which are set out in the conduct of government is to be based which are set out in

the Compact (s.6) must also be given consideration when relevant [(subs.7(2)].

In my judgment in the instant case I quoted part of my judgment in **Ghimli Fashion (Fiji) Pty. Ltd v Commissioner of Inland Revenue HBC 403/98** when I criticized **Section 89** of the Decree. At page 15, paragraph 31, I said:

“For gargantuan wideness 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”.

It seems to me that the question which should be asked about the VAT Decree is whether it is consistent with the democracy which all three Constitutions claim Fiji is. There are other sections also to which I refer in my judgment in **Ghimli** namely **sections 44, 45 and 46** which I considered contravened **section 29** of the 1997 Constitution. For good measure I could add **Section 8** of the **VAT Decree 1991 (Amendment)(No.1) Decree 1992**. **Section 8** of this Decree repeals **Section 12** of the principal Decree and substitutes a new **Section 12** which purports to give the Commissioner powers to inspect books and documents.

20. **Sub-section (1)** begins thus:

“Notwithstanding anything in any other Act, Decree, laws or rules the Commissioner or any other officer of the department authorized by him in that behalf shall at all reasonable times be entitled to enter upon or into any land, buildings and places for the purpose of inspecting any books, documents, goods, property, process or matter the Commissioner considers relevant for the purpose of collecting any tax under this Decree or for the purpose of carrying out any functions, lawfully conferred on the Commissioner or considers likely to provide

any information otherwise required for the purpose of any Acts, Decrees, laws administered by the Commissioner or any of those functions, and may without fee or reward make extracts from or copies of any such books or documents”.

Again we see a Decree purporting to over-rule an Act. Again I ask – Is this consistent with or desirable in a democracy? Unless the Decree is submitted to Parliament in the form of a Bill where it can be debated and provisions such as those I have quoted considered by our legislators my view is that it is not, but that this is something which in my judgment it is important the Court of Appeal is not the Supreme Court should rule on definitively.

21. In argument Mr Scott relied on **Section 3 sub-section (6)** of the **VAT (Amendment) Act No. 1 of 2001** which states “for the avoidance of doubt the **VAT Decree 1991** is deemed to be an Act of Parliament for all intent and purposes”. This Act was never cited to me in argument but I note that in an explanatory note intended to explain the purpose of the Bill it was stated “Parliament only can validate or change any law declared to be invalid by the Courts”. The purpose of **Act No. 1 of 2001** was to reinstate and validate the VAT imposed or collected by virtue of the Value Added Tax Essential Food Items Amendment) Decree 2001. Gates J. had declared that Decree invalid because he considered it should have gone through the parliamentary process. The explanatory note then stated on page 2:

“It (the Bill) also nullifies any judgment of the court or any proceeding pending or otherwise in relation to any challenge on the legality of the amendment Decree. This is important in order to express the matters that are covered by the retrospective application of the Bill”.

22. This also raises an important question for consideration by the Court of Appeal namely whether an Act dealing with a Decree relating to the imposition of VAT on essential food items can be used to validate a Decree covering a much wider subject namely the imposition of taxation in many and various forms on the citizens of this

country. This of course also raises the question of whether there can be taxation without representation? In this regard I adopt with respect what Gates J. said in **Jokapeci Koroi and Ors v Commissioner of Inland Revenue and Anor. HBC 179/2001L** at page 17 of his unreported judgment of the 24th of August 2001.

“The people will only accept laws imposing taxes, imposts, penalties and punishments upon them if such imposition had the approval of their elected representatives in Parliament. It was because of this failure to accord representation that the Bostonians tipped their much valued chests of imported tea into the harbour, one of the incidents culminating in the American War of Independence. They refused to pay the taxes on tea importations, imposed by the English Parliament. “No taxation without representation was their simple riposte to the demands for excise duty”.

To my mind this is the important constitutional question which I consider in the interests of Fiji should be decided by either the Court of Appeal or the Supreme Court. In my view it comes down to the meaning of representative government. Can a Decree, giving such wide powers as it does to the Commissioner of Inland Revenue in the collection of income tax in its various forms be considered consistent with a democracy unless that decree is first passed by Parliament in the form of a Bill?

23. I consider that leave to appeal on this important constitutional ground should be granted to the Defendant but as I indicated earlier I am not impressed by the floodgates argument. I consider that the fact that this a constitutional case makes no difference to the general role that a successful litigant is entitled to the fruits of his judgment. I therefore grant a stay subject to the Defendant refunding the \$70,000.00 already paid to it by the Plaintiff no later than the 2nd December 2004. I have considered the various cases cited to me by the Defendant some I hasten to add, inaccurately I have studied the decision of the Supreme Court of Canada in **Re Attorney –General of Manitoba v Metropolitan Stores (MTS) Ltd. 38 DLR (4th Ed.) 331** on which the Defendant placed much reliance. I consider it is

distinguishable on the facts but broadly accept the statements of the court dealing with the public interest will be adversely affected if I order a refund of the VAT paid by the Plaintiff to it but I do consider as I have said that the constitutional issues involved here warrant my granting a stay of execution of my decision on the constitutionality of the Decree. I rule accordingly.

John E. Byrne

Judge

At Lautoka

23 November 2004

