

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO.: HBM 143 OF 2017

BETWEEN: **JOSAIA WAQABACA**

Applicant

A N D: **STATE**

Respondent

Counsel: Mr. A. R. Singh for Appellant
 Ms. B. Narayan for Respondent

Date of Hearing: 13th February 2018

Ruling: 19th March 2018

RULING

[Constitutional Redress Application; Section 44 (1)
of the Constitution of the Republic of Fiji Islands]

Introduction

1. The Applicant files this Notice of Motion pursuant to Section 44 (1), (2) and (3) (a) of the Constitution of the Republic of Fiji 2013 (hereinafter referred to as the Constitution), seeking the following orders *inter alia*:

- (i) *THAT the written words (English translation: "Muslims are not the indigenous of this country. These are people that have invaded other nations for, example, Bangladesh in India, where they killed, raped and abused their women and children. Today they have gone to the extent of having a part in the running of the country") does*

not constitute hate speech and is within the definition of Section 17 (1) (a) (b) & (c) under the Freedom of Speech, Expression & Publication provisions of the Constitution of the Republic of Fiji 2013:

- (ii) THAT the words deemed to have a seditious intention to promote feeling of ill-will and hostility between different classes of the population of Fiji does not amount to a seditious act contrary to section 67 (1) (a) of the Crimes Act 2009 and falls within the provisions of Section 17 (1) (a) (b) & (c) under the Freedom of Speech, Expression & Publication provisions of the Constitution of the Republic of Fiji 2013:*

- (iii) THAT the charge of Sedition contrary to section 67 (1) (a) of the Crimes Act 2009 against the Applicant is in breach of Section 17 (1) (a) (b) & (c) Freedom of Speech, Expression & Publication of the Constitution of the Republic of Fiji 2013:*

- (iv) THAT the charge of Sedition contrary to section 67 (1) (a) of the Crimes Act 2009 faced by the Applicant is an abuse of process in respect of High Court, Suva, Criminal Case Number HAC 361 of 2016; and*

- (v) THAT there be a permanent stay of all proceedings against the Applicant for the charge of Sedition contrary to Section 67 (1) (a) of the Crimes Act 2009 in respect of Criminal Case Number HAC 361 of 2016; in the High Court, Suva.*

- (vi) Applicant for the charge of Sedition contrary to Section 67 (1) (a) of the Crimes Act 2009 in respect of Criminal Case Number HAC 361 of 2016; in the High Court, Suva.*

2. The Notice of Motion is being supported by an affidavit of the Applicant, stating the grounds for this application. The Notice of Motion was first called on the 19th of December 2016, where the learned counsel for the Applicant sought further time to serve the copy of the Notice of Motion to the office of Attorney General. Accordingly, the matter was adjourned till 19th of January 2018.

Service on the Attorney-General

3. On the 19th of January 2018, the learned counsel for the Applicant argued that the Applicant is not required to serve the copy of the Notice of Motion to the office of the Attorney General on the ground that the Director of Public Prosecution is already representing the State. Mr. Burney, the learned counsel from the office of the Director of Public Prosecution informed the court that the office of the Director of Public Prosecution was served the notice of this matter by the Applicant, therefore he is appearing for the State. The learned counsel for the Applicant submitted that he relies on the Section 41 (9) of the Constitution, where it states that the notice to the Attorney General is not required if the Attorney General or the State is a party to the proceedings.
4. The proceedings of this Notice of Motion cannot be considered as the continuation of the proceedings in HAC 361 of 2016, where the Applicant has been charged as the first accused. Therefore, the Applicant has to serve the copy of this notice of motion to the Attorney General pursuant to Order 5 of the High Court (Constitutional Redress) Rules 2015 (hereinafter referred to as Constitutional Redress Rules 2015). Accordingly, the Court directed the Applicant to follow the appropriate procedure as stipulated under Order 5 of the Constitutional Redress Rules 2015. The learned Counsel for the Applicant then sought further time to serve the copy of this Notice of Motion to the office of Attorney General. The matter was then adjourned till 26th of January 2018.
5. Upon receiving the notice, the Attorney General filed Summons to Strike Out of this Notice of Motion pursuant to Order 18 rule 18 (1) (a) (b) and (d) of the High Court Rules on the 25th of January 2018. Having considered that the matter had already been listed for mention on the 26th of January 2018, the Court directed to call the said

Summons to Strike Out on the same day instead of giving two clear days as required under order 32 rule 3 of the High Court Rules.

6. On the 26th of January 2018, the learned counsel for the Applicant confirmed that the Applicant was properly served the summons to strike out. The court then gave direction to the Applicant and the Respondent to file their respective affidavits and written submissions, which they filed as per the directions. The hearing of the summons to strike out was conducted on the 13th of February 2018, where the learned counsel for the Applicant and the Respondent made their respective oral submissions.
7. Having carefully considered the Summons to Strike Out, the respective affidavits and the written and oral submissions of the parties, I now proceed to pronounce my ruling as follows.
8. The Respondent's Summons to strike out is founded on three main contentions, that:
 - i) It discloses no reasonable cause of action.
 - ii) It is scandalous, frivolous, or vexatious, and
 - iii) It is an abuse of the process of the court.
9. The Applicant filed an affidavit in opposition to this Summons, stating his objection. In his affidavit, the Applicant has raised a legal objection, stating that the Respondent has failed to serve the Summons to Strike Out in the manner as required under Order 32 rule 3 of the High Court Rules. The Applicant argues that this summons to strike out is defective on that ground therefore be dismissed.
10. The learned counsel for the Respondent filed a detailed and well research written submissions, where she constructed her argument on three main issues that:
 - i) This application for constitutional redress is filed in contravene to Order 3 rule 2 of the Constitutional Redress Rules, 2015,
 - ii) The Applicant has an adequate alternative remedy pursuant to Section 44 (4) of the Constitution,

- iii) If this court grant the orders sought by the Applicant, it will usurp the function and jurisdiction of the High Court (Criminal Division) which hears the HAC 361 of 2016.
11. The learned counsel for the Applicant in his written submission has only focused on the objection which the Applicant raised in his affidavit that the Respondent has failed to properly serve the Summons to Strike Out pursuant to Order 32 Rule 3 of the High Court Rules.

Order 32 rule 3 of the High Court Rules

12. I first draw my attention to this objection raised by the Applicant. Order 32 Rule 3 of the High Court Rules states that:

"A summons asking only for the extension or abridgement of any period of time may be served on the day before the day specified in the summons for the hearing thereof but, except as aforesaid and unless the court otherwise orders or any of these Rules otherwise provides, a summons must be served on every other party not less than two clear days before the day so specified."

13. The Respondent filed this Summons to Strike Out on the 25th of January 2018. By then this matter had already been listed on 26th of January 2018 for mention. Having taken into consideration the convenience of the parties, the Court directed the registry to list the Summons to Strike Out on the 26th of January 2018, which actually saved the parties from appearing in court on two consecutive days on 26th and 27th of January 2018. On the 26th of January 2018, the Applicant was given seven days to file his affidavit in objections. Another seven days thereafter was given to the Applicant to file his written submissions. The learned counsel for the Applicant made no objections under order 32 rule 3 on the 26th of January 2018. By granting seven days' time, the court gave the Applicant more time than two clear days as required under Order 32 rule 3 to file his objections and written submissions. The main purpose of order 32 rule 3 is to give the parties sufficient time to file their objections and make their submissions.

The learned counsel for the Applicant admitted in court during the hearing that no prejudices or difficulties were caused to the Applicant due to the mentioning of the Summons in court on the 26th of January 2018.

14. In view of the reasons discussed above, I find the objection raised by the Applicant is futile and has no merits. Hence, I refuse and dismiss this objection raised by the Applicant.

Reasonable Cause of Action

15. I now take my attention to the main issues in this Summons to Strike Out:

16. Section 44 (1) of the Constitution states that:

"If a person considers that any of the provisions of this Chapter has been or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if another person considers that there has been, or is likely to be, a contravention in relation to the detained person), then that person (or the other person) may apply to the High Court for redress."

17. According to Section 44 (1) of the Constitution, a person could invoke the jurisdiction of the High Court only if he considers that:

- i) Any of the rights that have been stipulated under the chapter of Bill of Rights of the Constitution had been contravened in relation to him, or
- ii) is likely to be contravened in relation to him.

18. Order 3 rule 1 of the Constitutional Redress Rules states that an application under Section 44 (1) of the Constitution may be made by a motion supported by an affidavit. The motion must state the nature of the claim and the remedy or relief sought by the applicant. (vide Order 4 rule 3 of the Constitutional Redress Rules).

19. Order 3 rule 2 of the Constitutional Redress Rules states that an application under Section 44 (1) of the Constitution must not be admitted or entertained by the court after 60 days from the date of the alleged violation first occurred, unless a judge satisfies that there are exceptional circumstances to hear the application outside of the period of 60 days. Order 3 rule 2 of the Constitutional Redress Rules states that:

“An application under paragraph (1) must not be admitted or entertained after 60 days from the date when the matter at issue first arise unless a judge finds there are exceptional circumstances and that it is just to hear the application outside of that period.”

20. The Applicant in his affidavit in support to the Notice of Motion states that he is charged in HAC 361 of 2016 with one count of Sedition, contrary to Section 67 (1) (a) of the Crimes Act. He further deposed that the charge is founded on the words that he submitted for publication in the i-taukei language paper, Nai Lalakai. Having stated the background, the Applicant in paragraph six of his affidavit has deposed that the charge filed by the prosecution, against him is in breach of Section 17 (1) (a),(b) and (c) of the Constitution.

21. The Section 117 (8) of the Constitution states that:

i) The Director of Public Prosecutions may—

a) institute and conduct criminal proceedings;

b) take over criminal proceedings that have been instituted by another person or authority (except proceedings instituted by the Fiji Independent Commission Against Corruption);

c) discontinue, at any stage before judgment is delivered, criminal proceedings instituted or conducted by the Director of Public Prosecutions or another person or authority (except proceedings instituted or conducted by the Fiji Independent Commission Against Corruption); and

d) intervene in proceedings that raise a question of public interest that may affect the conduct of criminal proceedings or criminal investigations.

22. According to Section 198 (1) of the Criminal Procedure Act, the Director of Public Prosecution, or the Commissioner or Deputy Commissioner of the Fiji Independence Commission Against Corruption, has authority to file an information to charge a person in the High Court, where it states that:

"An information charging an accused person and drawn up in accordance with section 202 shall be filed by the Director of Public Prosecutions or by the Commissioner or Deputy Commissioner of the Fiji Independent Commission Against Corruption with the Chief Registrar of the High Court within 21 days of the order for transfer except that the High Court may grant leave to extend the 21 days. The power of the Director of Public Prosecutions to file information may be delegated by him to a public prosecutor in writing."

23. According to the affidavit deposed by the Applicant, he has been charged with one count of Sedition by the Director of Public Prosecution. Accordingly, it is clear that this application for constitutional redress is founded on the ground that the Applicant's rights under Section 17 (1) (a), (b) and (c) of the Constitution has been violated by the Director of Public prosecution, by charging the Applicant with one count of Sedition.
24. The Director of Public Prosecution filed an information in HAC 361 of 2016, charging the Applicant and four others for one count of Inciting Communal Antagonism, contrary to Section 65 (2) (a) (i) and Section 53 (1) of the Crimes Act on the 13th of October 2016. The Director of Public Prosecution then amended the information and charged the Applicant with one count of Sedition, contrary to Section 67 (1) (a) and 66 (1) (v) of the Crimes Act. The Applicant filed this notice of motion pursuant to Section 44 (1) of the Constitution on the 7th of December 2017, that is nearly one year and two months after the institution of the proceedings of HAC 361 of 2016.

25. Therefore, the Applicant has to satisfy the court pursuant to Order 3 rule 2 of the Constitutional Redress Rules, that this application has exceptional circumstance to hear though it is filed outside the stipulated time period of 60 days.
26. The Applicant did not provide any reasonable excuse for the delay in filing this application. However, the learned counsel for the Applicant, in his oral submissions, stated that this case is a very exceptional matter, therefore, it is just to hear this application though it is instituted outside the stipulated time period of 60 days.
27. During the course of the hearing, the learned counsel for the Applicant submitted that he is not challenging or disputing the authority of the Director of Public Prosecution to file information, to charge the Applicant with one count of Sedition. The learned counsel further submitted that the Applicant does not allege that the Director of Public Prosecution has violated his rights as stipulated under Section 17 (1) of the Constitution. This submission of the learned counsel for the Applicant has completely nullified and invalidated the contention made by his own client, the Applicant, in paragraph six of the affidavit in support to this Notice of Motion.
28. Having made that submission, the learned Counsel for the Applicant then made an application, to withdraw all the orders and relieves that the Applicant had sought in the notice of motion, except the relief number one. Accordingly, the Court granted leave to the learned counsel for the Applicant to withdraw orders and relieves number 2, 3, 4, and 5 of the Notice of Motion. Accordingly, the only order that the Applicant is now seeking in this application for constitutional redress is that:

"THAT the written words (English translation: "Muslims are not the indigenous of this country. These are people that have invaded other nations for, example, Bangladesh in India, where they killed, raped and abused their women and children. Today they have gone to the extent of having a part in the running of the country") does not constitute hate speech and is within the definition of Section 17 (1) (a) (b) & (c) under the Freedom of Speech, Expression & Publication provisions of the Constitution of the Republic of Fiji 2013;"

29. The learned counsel for the Applicant then submitted that the charge filed in HAC 361 of 2016 has violated the rights of the Applicant. Despite this contention, the learned counsel for the Applicant still maintained his position where he neither challenges the authority of the Director of Public Prosecution nor alleges that the Director of Public Prosecution has violated his rights by filing this information. This is a vacuous argument as it is obviously clear that the Director of the Public Prosecution has filed this information in HAC 361 of 2016 pursuant to Section 198 (1) of the Criminal Procedure Act, charging the Applicant with one count of Sedition. Therefore, I refuse this submissions made by the learned counsel for the Applicant as it has no merit.
30. As discussed above, in order to invoke the jurisdiction of the High Court under Section 44 (1) of the Constitution, the Applicant has to satisfy the court that any of the rights stated under the Chapter of Bill of Rights of the Constitution had been contravened or likely to be contravened in relation to him.
31. Accordingly, I do not find that the Applicant has specifically stated how the rights of the Applicant, under the Section 17 (1) of the Constitution, had been contravened or likely to be contravened. Therefore, I am satisfied that the Notice of Motion filed by the Applicant discloses no reasonable cause of action in order to invoke the jurisdiction of this court pursuant to Section 44 (1) of the Constitution.

Alternative Remedy

32. The learned counsel for the Respondent submitted in her written submission that the Applicant has an adequate alternative remedy in HAC 361 of 2016 where he can raise this issue during the hearing. The learned counsel for the Respondent submitted that this application for the constitutional redress must be dismissed pursuant to Section 44 (4) of the Constitution. Section 44 (4) of the Constitution states that:

"The High Court may exercise its discretion not to grant relief in relation to an application or referral made under this section if it considers that an adequate alternative remedy is available to the person concerned."

33. The Applicant in this application seeks an order that the written words in the published article do not constitute hate speech and are within the definition of Section 17 (1) (a), (b) and (c) of the Constitution. Indeed that is the one of the main factual disputes that the court has to determine in HAC 361 of 2016. Therefore, I am satisfied that the Applicant already has an adequate alternative remedy pursuant to Section 44 (4) of the Constitution.

34. It is a settle legal principle in the domains of constitutional, human rights and criminal laws: not to allow an application for constitutional redress if there an adequate alternative remedy is available. Having discussed the principles laid down by the Privy Council in number of cases, the Fiji Court of Appeal in Singh v Director of Public Prosecutions [2004] FJCA 37; AAU0037.2003S (16 July 2004) held that:

"We note that the Privy Council has consistently laid down that where an adequate alternative remedy is available then constitutional redress will be refused. It has regarded an application for constitutional relief in these circumstances as an abuse of process and as being subversive of the Rule of Law which the Constitution is designed to uphold and protect. These cases set out the relevant principles for the court to follow when considering and applying s.41(4) of the Constitution."

35. The factual circumstances of the **Singh v State (supra)** is somewhat similar to this matter. In **Singh v State (supra)**, the Appellant was a Barrister and Solicitor. He was charged with three counts of attempting to pervert the cause of justice. These charges were founded on the allegation that the Appellant had approached a witness of the prosecution in a criminal matter, where he had represented the accused, in order to change or distort the evidence of the prosecution. The conversation that the Appellant had with that particular witness had been secretly recorded and intended to adduce in evidence against him. The Appellant then filed a constitutional redress application (Section 41 of the then Constitution of Republic of Fiji 1997). The High Court refused the said application for constitutional redress on the ground that there an adequate alternative remedy is available for the Appellant in the Criminal Proceeding to

challenge the admissibility of the recorded conversation in evidence. The Fiji Court of Appeal upheld the decision of the High Court in **Singh v State (supra)**.

36. The Fiji Court of Appeal in **Singh v State (supra)** has further held that:

"Perhaps what we have set out is a statement of the obvious. But once stated it becomes abundantly clear that the appellant has an adequate alternative remedy within s.41(4) of the Constitution and that Shameem J. was fully entitled to exercise her discretion summarily to dismiss the appellant's application. Applying the principles so firmly established by the Privy Council in the line of authority set out above to the circumstances of this case the appellant's application for constitutional redress was an abuse of process and was properly dismissed."

37. In view of the principles enunciated by the Fiji Court of Appeal in **Singh v State (supra)**, I find this application of the Applicant for constitutional redress is an abuse of process of the court.

38. In conclusion, I find that this application of the Applicant for constitutional redress has not disclosed any reasonable cause of action and also amount to an abuse of process of the court. Hence, I do not find that this is an exceptional case pursuant to Order 3 rule 2 of the Constitutional Redress Rules.

The Orders of the Court are:

- i) The Notice of Motion filed by the Applicant on the 7th of December 2017 is struck out,
- ii) The Applicant is ordered to pay a sum of \$1000 as cost (summarily assessed).

39. Thirty (30) days to appeal to the Fiji Court of Appeal.




R.D.R.T. Rajasinghe
Judge

At Suva
19th March 2018

Solicitors
Anan Ravindra-Singh Lawyers for the Applicant.
Attorney General's Chambers for the State.