In the High Court of Fiji at Suva
Civil Jurisdiction

Judicial Review No. 7 of 2012
The State
vs

1. Minister of Lands and Mineral Resources
2. Director of Lands
3. Minister of Local Government, Urban Development, Housing and Environment
4. Commissioner,Northern
5. Itaukei Land Trust Board
6. Director of Town and Country Planning
7. Labasa Town Council

Ex-Parte: Bashir Khan and Faizal R.Khan on their own behalf and as trustees of Vanualevu Muslim League

COUNSEL: Mr F.Haniff for the applicants
Ms M.Faktufon with Ms. T. Sharma for the first, second, third, fourth and sixth respondents
Ms E.Raitamata for the fifth respondent
Mr Sushil Sharma for the seventh respondent

Date of hearing: 9th July,2015
Date of judgment: 6th June,2017

JUDGMENT

1. I granted the applicants leave to apply for judicial review the decision of the respondents to withdraw the approval granted to Vanualevu Muslim League,(VML) for a drainage reserve from its property to the Labasa River.

2. The applicants seek a writ of certiorari to quash the decision and a declaration on the grounds that the respondents exceeded and/or did not properly exercise their jurisdiction under the Town and Country Planning Act, the Local Government Act, the State Lands Act, the iTaukei Lands Trust Act and their regulations; made errors of law in not properly construing and applying these laws; acted unreasonably and/or irrationally and/or arbitrarily; abused their discretion; acted in breach of natural justice and their legitimate expectations.

The determination

3. At the hearing, Mr Haniff, counsel for the applicants submitted that the only consideration by the respondents for withdrawal of the approved drainage reserve was the pending court case against the developer and lessee of the land. The alternative option given to the applicants was not viable.

4. The riposte of Ms Faktufon, counsel for the first,second,third,fourth and sixth respondents was that final approval was not given at any stage.

5. The letter of approval from the Ministry of Lands and Mineral Resources to the President, VML, the first applicant on 27th February,2012, reads as follows:

> *Reference is made to your application dated 18 Oct 2011, regarding the above subject.*
>
> *I am pleased to advise that approval is now granted for the Drainage Reserve to be put in place in order to discharge the storm water from your property to the Labasa River.* ***We will immediately proceed with the application to the Director of Town & Country Planning for approval****.* (my emphasis)

6. In my view, clearly no final decision was made to grant a drainage reserve to the applicants. The applicants were given a conditional approval, which was subject to the further approval of the sixth respondent.

7. Next, Mr Haniff submitted that the decision to withdraw was unreasonable and irrational.

8. Ms Faktufon, in reply submitted that all relevant considerations were taken into account by the respondents to ensure that its decision was not unreasonable. The respondents gave its initial approval to the applicants. Later, the respondents decided that the pending case against the developer of the land outweighed the previous consideration. There was an alternative drainage system which addressed the applicants' drainage issue. Ms Faktufon concluded that to go into the weight given by the respondents to each consideration is to challenge the merits of the decision. In support, she cited ***State v Director of Lands & Surveyor General, Ex Parte Mohammed,***(2000) FJHC 80; HBJ0031J.1998S where Shameem J stated:

> ***It is now well-settled that whilst the courts can rule on what relevant considerations are, they should not interfere with the balancing of those considerations*** *(per Lord Scarman in United Kingdom Association of Professional Engineers v Advisory, Conciliation and Arbitration Services (1981) AC 242).*
>
> *As such in deciding to terminate the Applicant's tenancy and in granting a new tenancy to the Supermarket, on the ground that it was necessary to ease traffic congestion in front of the Supermarket, the Respondent decided to give greater weight to one consideration over the others…*(my emphasis)

9. In my view, the decision to withdraw the conditional approval was not *Wednesbury* unreasonable.

10. The applicants contend that the respondents abused their discretion in not taking into consideration relevant matters namely that the "*drainage reserve or easement granted to VML is necessary to cater for the inspection chamber discharge and the voluminous roof water discharged which must not be discharged into the road*(and) *because the roof water piping is laid at an angle sloping to the river bank*".

11. At this point, I refer to the action filed on 9th September,2011, by the Trustees of Vanualevu Muslim League and Bashir Khan in the High Court of Labasa against:1.VCORP Limited;2.Labasa Town Council (LTC); 3.The ITLTB; 4.The Ministry of Lands and Mineral Resources(MOLMR); 5.The Ministry of Local Govt, Urban Development, Housing and Environment, and 6.The AG.

12. In paragraph 30 of their amended statement of claim in HBC no.32 of 2011, the applicants averred that the Ministry of Lands and Mineral Resources had issued to them "*an easement grant*" over Lot 1 on Plan no.M 2605, which was later withdrawn.

13. In my view, it is then an abuse of process for the applicants to have instituted these proceedings on 16th May,2012.

14. On 11th May, 2017, Wati J delivered judgment in HBC no.32 of 2011L consolidated with HBC no.22 of 2012L. I reproduce excerpts from the judgment:

> *The issue that flows from the amendment therefore is whether VML has a drainage easement on ITL No. 30080.* ***It is very clear from the evidence from the parties that none of the defendants, specifically the LTC, the ITLTB or the MOLMR had ever given VML a properly registered drainage easement for VML to discharge the storm water from the building and kitchen waste through someone else's land to the Labasa River****.*
>
> ***VML was to discharge its rain and storm water to a common drainage beside Savila House.*** *If it had initially started discharging storm water to the common drainage like the other lessees, there would not be this greed to capture the land and claim it as its own in the manner it has been done.*
>
> *Exhibit 16 is Certificate of Title for ITL No. 30080 which was tendered in Court. The lessee of this property, if I may re-iterate, for the sake of clarity, is VCORP. At the back of the lease is a plan showing the plaintiff's property and the property of VCORP. The plan does not show any easement in favour of VML.*
>
> *Further, the evidence from the office of the Registrar of Titles, a witness produced by LTC, was that CL 17786 does not have any registered easement. It was testified that CL 17786 was registered on 14 July 2009 and since then there is no registered easement.*
>
> *Pursuant to s. 49 of the LTA, if there was any easement, the Registrar of Titles would have had the same recorded on the certificate of title but there is no such evidence of any easement.*
>
> *When Mr. BK was not able to show either through any one of the registered plans or certificate of title that he had a drainage easement at the back of his property which is now leased to VCORP* ***he then alleged that LTC had made the chambers for his property through which the water collected and went into the drain to Labasa River.***
>
> *It was also alleged by Mr. BK that* ***the drain was provided by LTC and that it had also placed the two culverts at the mouth of the river for the water to pass through the drain to the culverts into the river.***
>
> ***LTC's witness, Mr. Faiz Ali gave evidence that LTC did not make any chambers or drains for VML behind the back of its property. It also did not fix any culverts as there is nothing on records to suggest that LTC gave permission for VML to discharge its storm and waste water on someone else's land****. ..*

> ***Mr. Ali further testified that VML had been given and should use the common drain provided by LTC for discharge of its water. The common drain goes past Savila House. VML should have created a pathway and laid pipes for the water from VML's building to be connected to the common drain but it did not do that. That is one of the reasons why VML did not get a completion certificate from LTC. VML's property is only 30 meters away from the common drain..***……
>
> ***At the closing submissions stage only, the plaintiff's counsel agreed that the plaintiff's do not have a drainage easement. This is only after the plaintiffs could not establish that there was an easement as falsely claimed all along.***
>
> ***I find from the evidence alone that the plaintiff did not have any drainage easement through which it could discharge water over Lot 1 on M 2605 to Labasa River****, a property which now belongs to VCORP.*
>
> *I also find that the plaintiff did not ever get permission from LTC to discharge the water on the land which it previously owned for public use.*(my emphasis and underlining)

15. Wati J held the applicants had "*falsely claimed*" that they had a drainage easement. The applicants did not get permission from the seventh respondent, the Labasa Town Council to discharge water over Lot 1 on M 2605. The Labasa Town Council did not make any chambers or drains for VML behind the back of its property. It was further held that VML was to discharge its rain and storm water to a common drainage beside Savila House.

16. Finally, the applicants complain that there was a breach of natural justice and their legitimate expectations.

17. In my view, a conditional approval does not give an opportunity to be heard before its withdrawn nor create a legitimate expectation.

18. Bingham L.J. in ***R v Ex. p. MFK Underwriters***,[1990] 1WLR 1545 at pg 1570 declared:

> *The doctrine of legitimate expectation is rooted in fairness. But fairness is not a one-way street. It imports the notion of equitableness, of fair and open dealing, to which the authority is as much entitled as the citizen.* ***Fairness requires that its exercise should be on a basis of full disclosure***. ***It would not be reasonable for a representee to rely on an unclear or equivocal representation. Nor, I think, facts such as the present, would it be fair to hold the revenue bound by anything less than a clear, unambiguous and unqualified representation***(my emphasis)

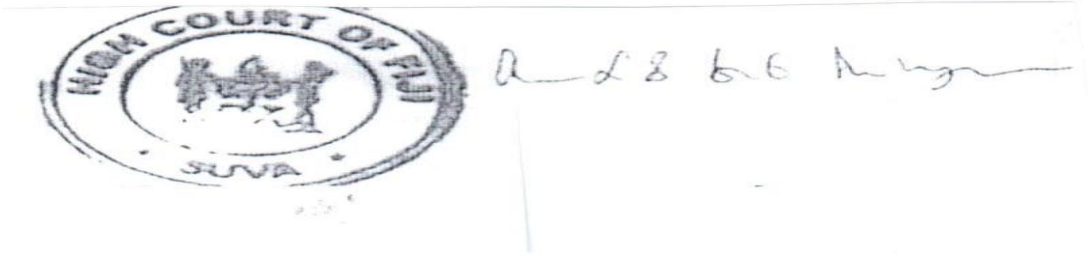
19. In my judgment, the respondents were entitled to withdraw the conditional approval granted to the applicants.

20. In the result, the application for judicial review fails and is declined .

21. ***Orders***

    (a) The application for judicial review is declined.

    (b) The applicants shall pay the first, second, third, fourth, fifth, sixth and seventh respondents a sum of $ 7000.00 as costs summarily assessed, ie a sum of $1000 to each of the respondents.



A.L.B. Brito Mutunayagam
JUDGE
6th June, 2017