

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 240 of 2014

BETWEEN : **THE ELECTORAL COMMISSION**
PLAINTIFF

AND : **THE SUPERVISOR OF ELECTIONS**
DEFENDANT

BEFORE : Hon. Justice Kamal Kumar

COUNSEL : Mr Adish K. Narayan, Mr C. B. Young and Mr
Ashnil K. Narayan for the Plaintiff

Mr S. N. Sharma and Mr N. Chand for the
Defendant

DATE OF HEARING : 23rd August 2014

DATE OF RULING: 24th August 2014

JUDGMENT

1.0 Introduction

1.1 On 23 August 2014 the Plaintiff with leave of the Honourable Chief Justice filed Originating Summons dated 23 August 2014 (hereinafter referred to as **“the Summons”**) seeking following relief:

- “1. *A declaration that the Supervisor of Elections has erred in law and in fact in concluding that the Electoral Commission was bound to deliver its decision on the objections and applications for review in terms of Section 30 and 31 of the Electoral Decree 2014 by 4pm Friday 22 August, 2014 and not any later time on that day.*
2. *A declaration that the Supervisor of Elections was bound to follow the directive of the Electoral Commission by the Electoral Commission’s letter dated 22 of August, 2014 in compliance with Section 76 (3) of the Constitution of the Republic of Fiji.*
3. *A declaration that the purported assignment of numbers in order in which names of the candidates should appear (pursuant to Section 36 of the Electoral Decree 2014) by the Supervisor of Elections on Saturday 23 August, 2014 is void and of no effect.*
4. *An order that the Supervisor of Elections assign numbers in the order in which names of the candidates should appear (pursuant to Section 36 of the Electoral Decree 2014) either on Sunday 24 August 2014 or such date permissible under the Electoral Decree 2014.*
5. *An abridgement of time for the service and hearing of these proceedings.*
6. *And that each party been pays its own cost in the legal proceedings filed therein.”*

1.2 As a matter of urgency Plaintiff’s Application was filed and issued out of the Court Registry at around 1.00pm yesterday and listed for hearing at 5.00pm yesterday.

1.3 At the hearing this Court enquired as to date and time of filing of objection and appeal subject to this proceedings as paragraph 3 of Affidavit of Larry Thomas did not specify the same.

1.4 After this proceeding was stood down twice Counsel for the parties agreed that:-

- (i) Plaintiff will provide copies of its Register recording objections and appeal to the Defendant;
 - (ii) Copies of the Register be accepted as Exhibit and be included in Court records;
 - (iii) In light of above the Defendant will not file any Affidavit in Response to Plaintiff's Affidavit in Support.
- 1.5 At the commencement of the hearing of the Summons Mr S. N. Sharma, leading Counsel for the Defendant submitted that this Court does not have jurisdiction to grant the reliefs sought in the Summons.
- 1.6 I then directed Counsel for the parties to make submissions on jurisdiction issues and then the substantive matter.

2.0 Preliminary Issue

- 2.1 Before I decide on the jurisdiction issue I wish to bring to legal practitioners and litigants attention the requirement of Order 41 Rule 9(2) of the High Court Rules.
- 2.2 Time and again this Court has emphasised the need for parties and their legal advisors to comply the requirement of Order 41 Rule 9(2):

Kim Industries Ltd. (unreported) Lautoka High Court Winding-Up Action No. HBF0036 of 1999L

State v H.E. The President & Ors. (unreported) Lautoka High Court Judicial Review No. HBJ007/2000L 12 October 2000

Chandrika Prasad v Republic of Fiji (unreported) Lautoka High Court Action No. HBC0217/2000L [Ruling on Stay Application - 20 December 2000, Ruling on Joinder Application - 17 January 2001]

Jokapeci Koroi & Ors. v Commissioner of Inland Revenue & Anor. (unreported) Lautoka High Court Action No. HBC179/2001L (24 August 2001)

- 2.3 Order 41 Rule 9(2) provides:-

“Every Affidavit must be endorsed with a note showing on whose behalf it is filed and the date of swearing and filing and an Affidavit which is not so indorsed may not be filed or used without the leave of the Court.”

- 2.4 The Affidavit of Larry Thomas filed in Support of the Summons does not bear such indorsement and no leave has been sought to use this Affidavit.
- 2.5 In view of the urgency of this matter I will grant leave to use the said Affidavit.

3.0 Jurisdiction

- 3.1 Leading Counsel for the Defendant submitted that Section 173(4)(d) of the 2013 Constitution of the Republic of Fiji excludes Courts jurisdiction to hear and determine any challenge to any promulgation or decree or decisions made under any promulgation or decree after 5 December 2006.
- 3.2 Defendant by its Counsel submits that Declarations and Order sought by the Plaintiff are directly challenging the decision of the Defendant who exercised his powers pursuant to Section 36 of the Electoral Decree 2014.
- 3.3 Defendant's Counsel relied on the case of **Waqavonovono v. Chairperson of Fijian Electoral Commission and Ors.** Civil Action No. 92 of 2014 (1 August 2014) and **Padarath and Anor. v. His Excellency the President of Fiji and Ors.** [2013] FJHC 116; HBC 33 of 2013 (14 March 2013).
- 3.4 Mr Young in making submission on jurisdiction issue on behalf of the Plaintiff submitted that Plaintiff is not challenging any decision and relies on Section 76(3) of the Constitution and Sections 4 and 8 of the Electoral Decree 2014.
- 3.5 Mr Young submits that Declaration 1 and 2 of the Summons only challenges the view taken by the Defendant in respect to three day period in Sections 30(5) and 31(4) of the Electoral Decree 2014.
- 3.6 Plaintiff further submits that if Declarations 1 and 2 of the Summons is made by this Court then it follows that Court has to make/grant the declaration Order in paragraphs 3 and 4 of the Summons.
- 3.7 It is well established that "notwithstanding anything contained in the Constitution" this Court does not have jurisdiction to accept, hear, determine, or in any other way entertain, or to grant any order, relief or remedy, in any proceedings of any nature whatsoever which seeks or purports to challenge or question any decision made or authorised, or any action taken, or any decision which may be made or authorised, or any action which may be taken, under any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as any be made between 5 December 2006 until the first sitting of the first Parliament

under this Constitution, except as may be provided in or authorised by any such Promulgation, Decree or Declaration (including any provision of any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under the Constitution. s173(4)(d) of the Constitution

- 3.8 Once Court determines that it does not have jurisdiction to deal with any matter then the matter ends there and as such only option left for the Court is strike-out the matter for want of jurisdiction.

See **Exparte McCardle** 74 U.S (7 Walls) 506 (1868) and **Padarath's** case both which were cited in recent case of **Waqavonovono's** case.

- 3.9 I wish to take this opportunity to clarify that in **Waqavonovono's** case this Court in no way determined Ms Waqavonovono's eligibility or ineligibility to seek nomination as candidate in 2014 General Elections. This Court dismissed that action only because it did not have jurisdiction to determine the validity or invalidity of initial Section 23(5) of Electoral Decree 2014.

- 3.10 Section 76(3) of the Constitution provides:

“The Supervisor of Elections must comply with any directions that the Electoral Commission gives him or her concerning the performance of his or her functions.”

- 3.11 Sections 4(1) and 8 of the Electoral Decree provides as follows:-

“s4.-(1) In the performance of its functions and exercise of its powers, the Electoral Commission is not subject to the direction or control of any person or authority, provided however, the Electoral Commission shall be subject to any decision of a court of law exercising jurisdiction in relation to a question as to whether the Electoral Commission performed its functions or exercised its powers in accordance with the Constitution and the law or whether the Electoral Commission should or should not perform its functions or exercise its powers.

s8. In the performance of his or her functions and the exercise of his or her powers, the Supervisor is not subject to the direction or control by any person, except that he or she must comply with-

- (a) the directions or instructions that the Electoral Commission gives him or her concerning the performance of his or her functions; and*
- (b) a decision of a court of law exercising its jurisdiction in relation to a question on whether he or she has*

performed the functions or exercised the powers in accordance with the Constitution and the law, or whether he or she should or should not perform those functions or exercise those powers.”

- 3.12 It is obvious that the Defendant must comply with directions of the Plaintiff in performing his functions and decision of the Court as provided in Section 8 of the Electoral Decree 2014 and rightfully submitted by Mr Young.
- 3.13 Mr Young submits that based on the provisions of Section 8 of the Electoral Decree and Section 76(3) of the Constitution requires the Supervisor of Elections to seek relief from Court if he thinks that Commission’s direction is wrong.
- 3.14 With respect I cannot agree with this submission as Section 8(b) only Supervisor of Elections is required to perform or not to perform certain functions as ordered by the Court. There is no direct provision which requires the Supervisor of Elections to seek relief from Court if he does not agree with Commission’s decision.
- 3.15 I tend to agree with submission of the Leading Counsel for the Defendant that the Supervisor of Elections cannot be directed or instructed to do anything by the Electoral Commission only because the Decree says so. Any direction or instruction must be within the confines of the Electoral Decree, Constitution and the Law.
- 3.16 I am of the view that Supervisor of Elections was right in his approach in consulting the Solicitor General for an opinion before deciding on whether to act on Commissions’ directions as per Commission’s letter dated 22 August 2014 to Supervisor of Elections (**Annexure LT2 of Affidavit of Larry Thomas**).
- 3.17 I will now deal with the Declaration sought in the Summons.

First Declaration

- 3.18 This declaration raises the issue as to whether three (3) day time limit in sections 30(5) and 31(4) of the Electoral Decree as submitted by Mr Adish Narayan for the Plaintiff means 72 hours from the time objection or Application for Appeal was received by the Commission or three (3) whole days with the expiry at midnight on the third day.
- 3.19 Section 100(3) and (4) of the 2013 Constitution of Republic of Fiji Islands provides:-

“100.-(3) The High Court has unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law

and such other original jurisdiction as is conferred on it under this Constitution or any written law.

-(4) The High Court also has original jurisdiction in any matter arising under this Constitution or involving its interpretation.”

- 3.20 How the three day time period in section 30(5) is to be computed is not provided for in the Electoral Decree 2014 and therefore it is incumbent upon this Court to pronounce as how the three (3) day period is to be calculated for certainty.
- 3.21 I also hold that First Declaration does not challenge the validity of any decision made by the Supervisor of Elections as submitted by Mr Young and as such this Court has jurisdiction to deal with the issue raised in this declaration.
- 3.22 Mr Adish Narayan for the Plaintiff submitted that in the absence any definition as to how 3 days time limit is calculated Court should have recourse to common law principles.
- 3.23 I agree with Mr Adish Narayan that where legislation fails to define any provision then common law should be looked for guidance. Having said that, I am of the view Court should not readily accept common law definitions if doing so will defeat or frustrate the purpose of the particular legislation.
- 3.24 The meaning of any provision or word in any legislation should first be determined in light of the other provision of the legislation, the intention, purpose and nature of the legislation.
- 3.25 Mr Adish Narayan for the Plaintiff referred to following cases in support of his submission that time for notification of Commission’s decision pursuant to section 30(5) and 31(4) of the Electoral Decree expired at midnight on 22 August 2014.

Clayton case (1585) 5 Co Rep 1a

In re Figgis [1969] 1Ch 123

Trow v. Ind Coope (West Midlands) [1967] 2 QB 899 (CA)

Cartright v. MacCormack [1963] 1WLR 18 (CA)

- 3.26 I have not been provided with copy of Clayton case and the soft copy of remaining cases provided could not be uploaded.

3.27 The **Clayton's** case (**Devayne & Ors v. Noble & Others** [1814] [1823] ALL ER of which this Court is aware of does not deal with time but deals with payment of debt by creditors in instalments.

3.28 In **Re-Figgis** the Court dealt with provision in a will whereby the Testator bequeathed his house to his wife provided his wife survived him for a period of three months from his death. Testator died at 5.00am on 9 January 1966 and his wife died at 11.00am on 9 April 1966. At page 138, paragraph D of the Judgment Court held that:-

“The period of three months is a period to be reckoned in complete days beginning at the end of the day of the husband’s death, and so began to run at midnight on January 9, 1966. It thus ended at midnight on April 9, 1966 and I accordingly hold that clause 4 of the will did not carry the house from the husband to the wife.”

3.29 In **Trow's** case the Court of Appeal dealt with the Rule requiring service of the Writ of Summons within 12 calendar months from date of issuance. In this case, Lord Justice Harman stated as follows:-

“The law does not as a rule take account of fraction of the day unless there is some necessity for it...” (emphasis added) para C page 921

3.30 In **Cartwright's** case the Court dealt with provision in an insurance policy which stated that the cover “shall not be more than FIFTEEN DAYS from date of commencement of insurance.” At page 21, Lord Justice Harman stated as follows:-

“The insurance company argued that it started at 11.45am on December 2 and therefore expired at the same time on December 17, several hours before the accident occurred. For the defendant it was argued that time did not begin to run till midnight on December 2 and was therefore, still current at the time of the accident. The judge favoured the former view, and as a matter of first impression I must say that I was inclined to agree with him because there seems no adequate reason otherwise to explain the entry of time in the box. First impression is often a good pointer to follow on questions of construction; but the cardinal rule is to give proper weight if possible to every word used, and a further scrutiny has led me to prefer the second meaning.”

3.31 In **Re Figgis** and **Cartwright** the Court indicates that the Court should determine the issue of time differently if there is a necessity and where circumstances so dictates.

3.32 It must be also noted none of cited cases dealt with time limit pursuant to any Electoral Decree or Act.

- 3.33 Mr Young submits that the Court should take liberal approach in defining the 3 day period as in section 30(5), as it affects individual rights.
- 3.34 Whilst Court accepts that where person's rights or liberty is at stake a liberal approach should be taken to define time limits. One such instance is where taxpayer is required to pay tax by certain day from time of issuance of tax assessment. In this situation and in the absence of any precise definition the day will be deemed to end at 12 midnight on the last day.
- 3.35 However in this proceeding Commission comprises of qualified personnel who should have full appreciation of the time constraints placed on all those responsible for conduct of elections in a timely and efficient manner.
- 3.36 Electoral Decree is drafted in such a way that it is more or less a code and time limits are to complied with strictly and there should not be any delay to frustrate, hinder or delay the election process.
- 3.37 The fact that section 30(3) requires objection to be filed by 4.00pm may suggest that the time limit set by section 30(5) does not end at midnight but 72 hours from the time objections is lodged and in this instance at 4.00pm on 22 August 2014.
- 3.38 Another factor which I have taken account is the Register kept by the Electoral Commission.
- 3.39 The columns recording the "time" of receipt of objections sending and notification of objection and responses have all been divided into "date" and "time".
- 3.40 The Received, sent to Supervisor of Elections and Notification of Electoral Commission Received column in Register relating to Appeal have been purposely divided into "date" and "time".
- 3.41 If the 3 day time period was to expire at midnight on 22 August 2014 then one must ask why was there a need to be so specific as to time in the Register compiled for the Commission.
- 3.42 Also it will be absurd and beyond rationale to expect the Supervisor of Elections to wait for Commission's determination on objections and appeals until midnight of the third day.
- 3.43 It is therefore obvious that the time limit in section 30(5) and 31(4) commenced at the precise time the objection and Application for Appeal is lodged and not at the beginning of the day as is the Common Law position.
- 3.44 I therefore hold that 3 day time limit is section 30(5) and 31(4) of the Electoral Decree expired at 4.00pm on 22 August 2014.

- 3.45 It is undisputed that objection for Mr Praveen Kumar's nomination as a candidate was received at 4.00pm on 19 August 2014 and notification was given by the Commission at 7.47 on 22 August 2014.
- 3.46 Since the notification of its decision by the Commission was late even by only 3 hours 47 minutes the Supervisor of Elections was not bound to follow the Commission's directive as the Commission breached the time limit. If the Commission was of the view that it needed more time or not certain as to whether time expired the Commission should have sought relief from Court.
- 3.47 In respect to Mr Steven P. Singh's appeal it is undisputed that Application for Appeal was received by the Commission at 1.50pm on 19 August 2014 and Commission issued the notification at 7.47pm on 22 August 2014 some 5 hour 57 minutes after the time for notification had expired. Hence, the Supervisor of Elections was not bound to follow the Commission's directive in respect to Mr Singh's nomination.
- 3.48 It must be understood that if the decision was notified before 4.00pm on 22 August 2014 then the Supervisor of Elections would have had no option but to follow Commission's direction in removing Mr Praveen Kumar's name and including Mr Singh's name in the candidate list.

Second Declaration

- 3.49 In view of what is said at paragraphs 3.13 to 3.16 of this Judgment I refuse to grant the declaration sought.

Third Declaration

- 3.50 In view of my judgment in respect to First Declaration this declaration must also be refused.
- 3.51 In any event even if this Court formed the view that time expired at midnight on 22 August 2014, this Court does not have jurisdiction to make the declaration challenging decision of Supervisor of Elections as void and of no effect, as to do so would constrain s173(4)(d) of the Constitution.

Fourth Relief

- 3.52 Order sought at paragraph 4 of the Summons is also dismissed for the reasons stated above.
- 3.53 I note that due to constraint of time limit Counsel did not have opportunity to make comprehensive submissions and also this Court did have an opportunity to conduct an in-depth research in respect to issues in this proceeding.

3.54 I also express my gratitude to all the Counsel, the parties and the Court staff for their assistance and cooperation in dealing this matter in the weekend.

4.0 Costs

4.1 On the issue of costs I have taken into consideration that Commission is responsible for conduct of the election process and this proceedings eventuated because of failure by the drafter of the Electoral Decree 2014 to state as when the 3 day time period expires.

5.0 Conclusion

5.1 I make following declaration/order:-

- (i) I declare that the 3 day time period in sections 30(5) and 31(4) of the Electoral Decree 2014 is to be computed from the precise time the objection and/or Application for Appeal is lodged with the Electoral Commission and ends at the same time on third day of the receipt of the objection and/or application for appeal by the Electoral Commission;
- (ii) Originating Summons dated and filed on 23rd August 2014 is dismissed in all other respects;
- (iii) Each party is to bear their own costs.



A handwritten signature in black ink, appearing to read 'Kamal Kumar', written over a horizontal dotted line.

Kamal Kumar

JUDGE

**At Suva
24 August, 2014**

Plaintiff in Person
Office of the Solicitor General for the Defendant