

IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

Judicial Review No. HBJ 04 of 2016

BETWEEN

STATE

AND

SPEAKER OF PARLIAMENT as elected under section 77(1)(b) of the
Constitution of the Republic of Fiji

RESPONDENT

AND

SOCIAL DEMOCRATIC LIBERAL PARTY a political party registered
under the Political Parties (Registration, Conduct, Funding and
Disclosures) Decree 2013

INTERESTED PARTY

EX-PARTE

ISOA DELAMISI TIKOCA of Saweni, Vuda, Suspended Member of Parliament

APPLICANT

Counsel : Mr J. Uludole with Mr K. Vuataki for the Applicant
Mr S. Sharma, Solicitor General with Ms T. Baravilala
and Mr D. Solovalu for the Respondent
Mr N. Nawaikula for the Interested Party

Date of Hearing : 01st August, 2017

Date of Ruling : 31st August, 2017

RULING

(On the application under Order 33 rule 7 of the High Court Rules 1988)

[1] The applicant filed this application for leave to apply for judicial review seeking the following reliefs:

- i. A declaration that Parliament is subject to the Constitution and has no constitutional authority to punish the applicant by permanent suspension from Parliament for the remainder of the term of Parliament.
- ii. A declaration that the Respondents' action in allowing the Parliamentary procedures of majority vote to be used to suspend the Applicant from the Parliament for the remainder of the term of Parliament was and is unlawful.

- iii. A declaration that the resolution the Parliament adopted on 29th day of September, 2016 which purports to suspend the Applicant from Parliament is void and be set aside.
- iv. General Damages.
- v. Other Declarations and Mandamus Orders as the court may decide.
- vi. Indemnity costs.

[2] On 08th May, 2017 the respondent filed summons under Order 18 rule 18(1)(a)(b)(d) and Order 33 rule 3 of the High Court Rules 1988 seeking the following orders.

That the applicant's application for leave to apply for judicial review be struck out on the following grounds:

- (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.

In the alternative whether the internal proceedings of Parliament and/or the exercise of established Parliamentary Privilege falls within the jurisdiction of this court.

[3] When the applicant made certain comments on 5th July, 2016 about the Minister of Economy the Government Whip raised a point of order objecting to the comments of the applicant. The comments made by the applicant in the Parliament are found in the document marked "IDT3" and annexed to the affidavit in support of the applicant. On 09th August, 2016 the respondent wrote a letter to the applicant stating inter alia, the following:

I wish to reiterate with emphasis that when responding to debates in the House, Honourable Members are indeed urged to focus their responses to the substance of the debate and relate their contributions to the issue at hand.

[4] The Prime Minister then complained to the speaker. On 26th September, 2016 the Speaker informed the House of Parliament that she had received notification on a matter of privilege and on 27th September, 2016 the matter was referred to the

Privileges Committee under Standing Order 127(1)(c) which provides that the mandate of the committee is to inquire into any complaint that may be referred to it by Parliament or Speaker concerning any breach of privilege on the part of any person or persons.

[5] After receiving the report of the Privilege Committee the Leader of the Government in Parliament moved that the Parliament endorses the findings of the Privilege Committee that;

- (i) the applicant contravened Standing Order 62(4)(a) and (d) in circumstances that were grave and in serious breach of privilege;
- (ii) the applicant issue a public apology;
- (iii) the applicant must be suspended for the remainder of the term of Parliament with immediate effect;
- (iv) during the period of suspension the applicant not be allowed to enter the Parliamentary precincts, including the Opposition Office and immediately upon the applicant's suspension, that he be ordered to leave the Parliamentary precincts; and
- (v) if the applicant fails to comply with the above, the necessary enforcement measures be imposed to ensure compliance.

[6] During the debate a motion to reduce the period of suspension to thirty days was brought but was defeated by the majority of the Parliament. The motion on the recommendations of the Privilege Committee was adopted by the Parliament with 30 votes in support of it and 13 votes against. Seven Members abstained from voting.

[7] The applicant came to court on the basis that the Parliament had no constitutional or lawful authority to suspend him from the Parliament.

[8] In my view it is pertinent to make a finding initially on the question whether this court has jurisdiction over the internal proceedings of the Parliament.

[9] In this regard both parties relied on authorities from various jurisdictions. The learned Solicitor General submitted the following excerpts from Erskine May's

Treaties on The Law, Privileges, Proceedings and Usage of Parliament, 24th Edition, 2011, 203–204 pages:

Parliament privilege is the sum of certain rights enjoyed by each House collectively as a constituent part of the High Court of Parliament; and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Some privileges rest slowly on the law and custom of Parliament, while others have been defined by statute.

Certain rights and immunities such as freedom from arrest or freedom of speech belong primarily to individual Members of each House and exist because the House cannot perform its functions without unimpeded use of the services of its Members. Other rights and immunities, such as the power to punish for contempt and the power to regulate its own constitution, belong primarily to each House as a collective body, for the protection of its Members and the vindication of its own authority and dignity. Fundamentally, however, it is only as a means to the effective discharge of the collective functions of the House that the individual privileges are enjoyed by Members. The Speaker has ruled that parliamentary privilege is absolute.

When any of these rights and immunities is discharged or attacked, the offence is called a breach of privilege and is punishable under the law of Parliament. Each House also claims the right to punish contempt, that is, actions which, while not breaches of any specific privilege, obstruct or impede it in the performance of its functions, or are offences against its authority or dignity, such as disobedience to its legitimate commands or libel upon itself, its Members or its officers. The power to punish for contempt has been judicially considered to be inherent in each House of Parliament not as a necessary incident of the authority and functions of a legislature (as might be argued in respect of certain privileges) but by virtue of their descent from the

undivided High Court of Parliament and in right of the *lex et consuetudo parliamenti*.

Since parliamentary privilege is a means to the collective discharge by each House of Parliament of its functions, occasions have arisen and will continue to arise when one House or the other is content not to insist upon its privileges, either generally or in a particular instance.

- [10] In **Bradlaugh v Gossett** (1883-4) 12 QBD 271 the plaintiff Charles Bradlaugh who was a duly elected burgess to serve in the House of Commons for Northampton was entitled to take the oath by law prescribed to be taken by members of the House of Commons, and to sit and vote in the House as one of the representatives of Northampton. In May, 1883 Mr. Bradlaugh required the speaker to call him to the table for the purpose of taking oaths. The speaker did not do so. On 9th July, the House of Commons resolved, that the Serjeant-at-arms do exclude Mr Bradlaugh from the House until he shall engage not further to disturb the proceedings of the House.

Stephen, J. in his judgment made the following observations:

The legal question which this statement of the case appears to me to raise for our decision is this: - Suppose that the House of Commons forbids one of its members to do that which an Act of Parliament required him to do, and in order to enforce its prohibition, directs its executive officer to exclude him from the House by force if necessary, is such an order one which we can declare to be void and restrain the executive officer of the House from carrying out? **In my opinion, we have no such power.** I think that House of Commons is not subject to the control of Her Majesty's Courts in the administration of that part of the statute-law which has relation to its own internal proceedings, and that the use of such actual force as may be necessary to carry into effect such a resolution as the one before us is justifiable. (Emphasis added).

Many authorities might be sighted for this principle; but I will quote two only..... Blackstone says: "The whole of the law and custom of Parliament has its original from this one maxim, 'that whatever matter arises concerning either House of Parliament ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere.'" This principle is re-stated nearly in Blackstone's words by each of the judges in the case of **Stockdale v. Hansard**¹. As the principle result of that case is to assert in the strongest way the right of the Court of Queen's Bench to ascertain in case of need the extent of the privileges of the House, and to deny emphatically that the court is bound by a resolution of the House declaring any matter to fall within their privilege, these declarations are of the highest authority. Lord Denman says: "Whatever is done within the walls of either assembly must pass without question in any other place." Littledale, J., says: "It is said the House of Commons is the sole judge of its own privilege; and so I admit as far as the proceedings in the House and some other things are concerned." Patterson, J., said: "Beyond all dispute, it is necessary that the proceedings of each House of Parliament should be entirely free and unshackled, that whatever is said or done in either House should not be liable to examine elsewhere.' And Coleridge, J., said: "That the House should have exclusive jurisdiction to regulate the course of its own proceedings, and animadvert upon any conduct there in violation of its rules or derogation from its dignity, stands upon the clearest grounds of necessity.

[11] **James Madhavan v John Neil Falvey and Others** 19 FLR 140 –

The appellant was a member of the House of Representatives. At the end of a duly convened sitting of the House, the Speaker adjourned the House *sine die* under standing orders. The respondents objected to the adjournment and physically took over the House and the fifth respondent purported to sit as Deputy Speaker.

¹ (1839) 9 Ad. & E. 1

The appellant had sought declarations from the Supreme Court, that the actions of the 5th respondent in sitting as Deputy Speaker were ultra vires the Constitution of Fiji and that the actions of the respondents in physically taking over the House were unconstitutional and illegal, a breach of the Constitution of Fiji, the doctrine of separation of powers and conventions of Parliament democracy.

The learned trial judge refused to make the declarations sought.

The Court of Appeal held:

The preliminary question is whether the English law that the House has absolute control over its own internal proceedings is applicable to Fiji; if so to what relevant extent is it affected or negative by the constitution.

As to the former, we think that, so far as local legislation does not provide, the privileges of the British Parliament (of which the sole right of regulating its internal proceedings is one) would attach to the newly created Houses in Fiji. It is true that there is no statement in Fiji Constitution in the same terms as that of section 49 of the Australian Constitution, which states that until the powers privileges and immunities of the house are declared by Act of Parliament, the powers privileges and immunities of the House shall be those of the Commons House of Parliament of the United Kingdom at the establishment of the commonwealth. See *The Queen v Richards* [1957] 92 C.L.R. 157. In Fiji, Article 54(1) gives Parliament power to make provisions for the powers privileges and immunities of the two Houses "for the purpose of the orderly and effective discharge of the business of the two Houses.

Later, however, the courts came to regard the privileges of Parliament as part of the law of the land of which they were bound to take judicial notice. Whether, therefore, the privileges of the House to

control its own internal proceedings is part of the common law, or based upon general statute law (e.g. the Bill of Rights) or even if it arose through a development in court practice during the protected controversy on the question between Courts and Parliament, it has, in our opinion, become part of the law of Fiji unless the Constitution otherwise requires. We do not think that the Parliamentary Power and Privileges Ordinance negatives this position.

It was held further that it is one of the functions of a Court so to construe the law as to avoid conflict, if that can be properly done. Referring to the comments made by Stephen J in *Bradlaugh v Gossett* (*supra*) the court held that even the statute law will not be examined by the Courts if it relates to the internal proceedings of the House.

- [12] In **Sakeasi Butadroka v Attorney General** (1993) 39 FLR 115 the plaintiff who was a member of the House of Representatives was suspended from the House after a confrontation with the speaker. He sought declarations from the High court that the manner of his suspension was in breach of the House's Standing Orders, that the Standing Orders themselves infringed his constitutionally guaranteed freedoms and that he had been denied natural justice.

Referring to the decision of the Court of Appeal in **James Madhavan v John Neil Falvey and Others** (*supra*) the court held:

Thus, I understand it, the decision in Madhavan's case established that the privilege of the House of Representatives of Fiji to control its own internal proceedings was part of the law of Fiji. Also, the House of Representatives has exclusive control over its internal proceedings. As such, the internal proceedings of the House of Representatives are not subject to the jurisdiction of the Court. The High Court can only inquire into the internal proceedings of the House where it can do so in its capacity as guardian of the constitution, and that will only be where internal proceedings of the House are specifically provided for in the Constitution, such as found in Section 67(1) where the

Constitution specifically sets out the requirement that someone must preside at a sittings of the House of Representatives and defines whom it is that should preside. The jurisdiction of the court to inquire in such an instance being based on the fact that a part of the internal procedure of the House of Representatives has been specifically incorporated as a provision of the constitution.

It follows from this, that where a procedure of the House of Representatives is not specifically incorporated into the constitution then the High Court has no jurisdiction to inquire into the internal proceedings of the House. From this it would further follow that the manner of the application of Standing orders by the Speaker, and the activities of the privileges committee, in matters concerning the internal proceedings of the House of Representatives, unless specifically provided for in the Constitution, are not cognizable in the Court.

The compelling authority of the common law and the law as applies in Fiji I believe forcefully and logically can only lead to the conclusion that Parliament in its internal proceedings should not be, and is not subject to the scrutiny or jurisdiction of the High Court unless specifically provided for in that capacity in the Constitution.

Parliament must be free to control and regulate its own internal proceedings free from the interference from the court. In a society where the rule of law is paramount, Parliament is presumed to, and can be relied upon to act properly and to lawfully regulate itself. Given the unique and onerous responsibility of the Parliament as being in effect, and fact, the People of Fiji acting through their elected representatives as the supreme law making body of the land, it must be free to order its own affairs without interfering from the court. It must be unfettered in controlling its own proceedings, empowering itself to give force and effect to those proceedings and applying those powers in a manner and with the discretion of its own choosing.

- [13] In the case **Rost v Edwards** [1990] 1 All E.R. 641 Poppelwell J made the following observations:

The Courts must always be sensitive to the rights and privileges of Parliament and the constitutional importance of Parliament retaining control over its own proceedings. Equally as Viscount Radcliff put it in **A.G. of Ceylon v D'Oliveira** [1962] 1 ALL ER 1069, the house will be anxious to confine its own or its members' privileges to the minimum infringement of the liberties of others. Mutual respect for an understanding of each other's respective rights and privileges are an essential ingredient in the relationship between Parliament and the Courts.

- [14] **Tuivaga CJ** in **Anand Babla v Devakar Prasad & Attorney General** 44 FLR 184 referring to the observation made in the case cited above said—

I am satisfied that the inquiry into Babla's conduct by the Privileges Committee of the House and the findings thereof are part of the internal proceedings of the House. As such this court cannot inquire into them. The court has no jurisdiction to do so.

I am satisfied both on principle and authority that the same legal relationship applies in Fiji between the Court and Parliament. It is important that these two most revered institutions in the land should recognise and respect each other's jurisdiction. This is necessary to ensure the proper discharge of their respective constitutional responsibilities. It is not a mere matter of Comity but one of well-established law and custom.

- [15] In **Stockdale v Hansard** (*supra*) Lord Denman C.J. made the following observations:

The test of necessity is not applied as a standard for judging the content of a claimed privilege, but for the purpose of determining the necessary sphere of exclusive absolute "parliamentary" or "legislative" jurisdiction. If a matter falls within this necessary sphere of matters without which the dignity and efficiency of the House cannot be upheld, Courts will not inquire into

questions concerning such privilege. All such questions will instead fall to the exclusive jurisdiction of the legislative body.

- [16] In the case of **Ratu Rakuira Vakalalabure v Ratu Epeli Nailatikau & 2 Others** [2005] FJHC 741 the High Court made the following observations;

In the end, the position is that howsoever the Parliament exercises its privilege in regulating its own internal concerns, no consequence can come to and be entertained by the Court, subject of course to the provisions of the constitution which specifically provide for the regulation of any of its specific proceedings. We must presume that Parliament, in regulating its own internal proceedings include decision that ensue, it is discharging its functions properly and with due regards to the law of which it is after all, its primary source.

- [17] In the case of **Anisminic v Foreign Compensation Commission** [1969] 2 AC 147, [1969] 2 WLR 163, as a result of the Suez Crisis some mining properties of the appellant Anisminic located in the Sinai peninsula were seized by the Egyptian government before November 1956. The appellants then sold the mining properties to an Egyptian government-owned organisation called TEDO in 1957. In 1959, a piece of subordinate legislation was passed under the Foreign Compensation Act 1950 to distribute compensation paid by the Egyptian government to the UK government with respect to British properties it had nationalised. The appellants claimed that they were eligible for compensation under this piece of subordinate legislation, which was determined by a tribunal (the respondents in this case) set up under the Foreign Compensation Act 1950. The tribunal, however, decided that the appellants were not eligible for compensation, because their "successors in title" (TEDO) did not have the British nationality as required under one of the provisions of the subordinate legislation. There were two important issues on the appeal to the Court of Appeal and later, to the House of Lords. The first was whether the tribunal had made an error of law in construing the term "successor of title" under the subordinate legislation. The second issue was more complex and had important implications for the law on judicial review. Even if the tribunal had made an error of

law, the House of Lords had to decide whether or not an appellate court had the jurisdiction to intervene in the tribunal's decision. Section 4(4) of the Foreign Compensation Act 1950 stated that:

"The determination by the commission of any application made to them under this Act shall not be called into question in any court of law".

The House of Lords by a 3-2 majority decided that section 4(4) of the Foreign Compensation Act did not preclude the court from inquiring whether or not the order of the tribunal was a nullity, and accordingly it decided that the tribunal had misconstrued the legislation (the term "successor in title"), and that the determination by the defendant tribunal that the appellant did not qualify to be paid compensation was null, and that they were entitled to have a share of the compensation fund paid by the Egyptian government.

- [18] This decision shows the reluctance of the court to give effect to any legislative provision that attempts to exclude their jurisdiction in judicial review. Even when such an exclusion is relatively clearly worded, the courts will hold that it does not preclude them from scrutinising the decision on an error of law and quashing it when such an error occurs. It also establishes that any error of law by a public body will result in its decision being ultra vires.
- [19] The matter in issue in these proceedings is not with regard to a decision of a statutory tribunal or an interpretation of a subsidiary legislation and not even the interpretation of the constitutional provisions. What the applicant is seeking to challenge in these proceedings is a decision taken by the Speaker of Parliament under the Standing orders of the Parliament. I am therefore of the view that the decision in *Anisminic v Foreign Compensation Commission* (*supra*) is not relevant to the matter in issue before this court.
- [20] Both parties cited many other authorities on the same question of law, from various jurisdictions. From the decisions cited above, especially the decisions from our own jurisdiction it appears that the law relating to the issue whether the court has power

to interfere with the internal affairs of the Parliament, is well settled, that is that the courts have no jurisdiction over the internal matters of the Parliament.

[21] The learned counsel for the applicant referring to paragraph 7 of the respondent's affidavit where it is stated; "applicant's application wholly relates to internal proceedings of Parliament, and is an attempt by the applicant to challenge the internal proceedings of Parliament and the exercise by Parliament of its well established and recognized privileges", submitted that the applicant is not challenging the right of parliament to make a finding of guilt or otherwise on applicant's breach of Standing Orders by the words "your kind" nor the disciplinary measures it has made in Standing Orders. The applicant has a constitutional right to freedom of speech and debate and says that such can only be derogated from in terms of Standing Order. The learned counsel submitted further that the query that this honourable Court is whether there is power in the Standing Orders to remove the applicant's freedom of speech and debate till end of terms of Parliament. He also submitted that this is an enquiry into the powers of Parliament and not internal proceedings. If there is no such power then the honourable court has every right to so enquire because the Constitution is supreme.

[22] It is also the submission of the learned counsel for the applicant that the 1st respondent violated the freedom of speech guaranteed under sections 17 and 73 of the Constitution. The freedom of speech guaranteed by section 17 of the Constitution is applicable to every citizen of Fiji, whereas section 73 deals with the freedom of speech conferred upon the Members of the Parliament. If a Member of the Parliament acts in violation of the standing orders, it is the Speaker and the Members of the Parliament who has the power to deal with it, as was done in this case.

[23] Section 73 of the Constitution provides as follows:

[1] Every member of Parliament, and anyone else speaking in Parliament has—

(a) freedom of speech and debate in Parliament or its committees, subject to the standing orders; and

(b) Parliamentary privilege and immunity in respect of anything said in Parliament or its committees.

[2] Parliament may prescribe the powers, privileges and immunities of members of Parliament and may make rules and orders for the discipline of members of Parliament.

[24] Section 73(2) of the Constitution only provides for the prescribing of powers, privileges and immunities of its members and empowers the Parliament to make rules and orders for the discipline of the Members. There is no provision incorporated in the Constitution which directly deals with the disciplinary matters of the Members of the Parliament. The matters relating to discipline of the Members of the Parliament are governed by the Standing Orders of the Parliament made under the above provisions. The power to suspend a Member and the procedure that should be followed are found in the Standing Orders. There are no such provisions in the Constitution. Making, implementing and interpreting the Standing orders of the Parliament are internal matters of the Parliament with which the court has no power to interfere. The authorities cited above are more than sufficient for the court to arrive at the conclusion that even if the decision of the Parliament made under the Standing Orders to suspend the applicant as a Member is wrong, it cannot be challenged in a court of law.

[25] The applicant is seeking not only to have the decision of the Speaker to suspend him set aside but also to have the resolution passed by the majority of the Parliament on 29th September, 2016, set aside. If the courts start interfering with the internal affairs of the Parliament it will open floodgates for the Members to challenge any resolution passed by the Parliament in court which will lead to a situation where the judiciary will, virtually, be controlling the internal affairs of the Parliament and the entire system of administration of the country can collapse in no time.

[26] For the reasons aforementioned I am of the view that the decision of the Parliament which the applicant is seeking to challenge by way of judicial review must

necessarily fail for the reason that this court has no jurisdiction to inquire into the decision of the Parliament to suspend him.

[27] Order 33 rule 2 of the High Court Rules 1988 provides that subject to the provisions of these Rules, a cause or matter, or any question or issue arising therein, may be tried before-

(a) a judge alone, or

(b) a judge with the assistance of assessors.

[28] Order 33 rule 7 of the High Court Rules 1988 provides that if it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.

[29] Since the matter is liable to be struck out on the ground that the court lacks jurisdiction to hear and determine it, the grounds for striking out an application under Order 18 rule 18 of the High Court Rules 1988 do not arise for consideration.

ORDERS

1. The application of the applicant seeking leave for judicial review is struck out.
2. The parties will bear their own costs of this application.


Lyone Seneviratne
JUDGE



31st August, 2017