

**ATTORNEY GENERAL OF FIJI AND ANOTHER V MARIKA VUKI SILIMAIBAU AND ANOTHER**

**[2004] FJCA 17**

BY SURUJ SHARMA<sup>[\*]</sup>

This is an appeal heard by the Fiji Court of Appeal in its most recent session on 17 March 2004. The decision, which was delivered just two days later is rather short when one compares it to other cases where constitutional issues are raised and decided. The case is unreported at present and no appeal has been filed challenging this decision.

### **HISTORY OF PROCEEDINGS**

In the Sugar Cane Growers Council Triennial Elections in the year 2001, the Second Respondent National Farmers Union (NFU) gained 21 seats and its rival the Growers Association 16 seats. An independent candidate also won a seat. In exercise of his powers under the *Sugar Industry Amendment Decree 1992* the Minister of Sugar Industry who is the Second Appellant in this Appeal appointed 8 more members to the Council. The Honorable Minister's appointees included 3 unsuccessful candidates from the Growers Association who were actually not elected in the Triennial elections. There were none from the NFU. The appointment of these 8 members resulted in the NFU losing control of the Council, which in the immediate past it has always done so.

On 30 May 2001 proceedings were filed by the Respondents in the High Court at Suva seeking to challenge the nomination by the Sugar Industry Minister in the Caretaker Government of Honorable Laisenia Qarase of 8 persons as members of the Sugar Cane Growers Council. The appointments were made on 8 May 2001 by the Minister Mr. Kaliopate Tavola in exercise of his powers under the *Sugar Industry (Amendment) Decree 1992*.

It is to be noted that although this Decree was issued by the Caretaker Government of Sitiveni Rabuka, no challenge had previously been made in the Courts of Fiji as to its validity. From the facts set out in this case it is unclear whether appointments were previously made under this Decree. This however was not the first occasion on which the power to appoint had been exercised by the Honorable Minister. Be that as it may, the points in issue have at their base the constitutional question of the validity of the Caretaker Government of Laisenia Qarase which has been the subject of discussion in several decisions starting from the celebrated case of *Chandrika Prasad v Republic of Fiji*. [2001] 1LRC 665; [2001] NZAR21.

Although these proceedings were initially begun by an originating summons, it appears that a Notice of Motion pursuant to the *High Court (Constitutional Redress) Rules 1998* was later issued. The relief sought was for declarations. His Lordship Mr. Justice Gates, granted the remedies prayed for although the Order was made after some 2 years from the date of the commencement of the proceedings. His Lordship framed the orders as follows:

1. The purported appointments of the Minister for Sugar [and the

Acting Minister for Sugar] are null and void and contrary to the provisions of the 1997 Constitution.

2. *The Sugar Industry (Amendment) Decree 1992* is invalid and of no legal effect.
3. The exercise of powers by the purported Minister for Sugar in nominating 8 members to the Sugar Cane Growers Council is null and void and of no effect.

In making his decision His Lordship revisited some of the events following the May 2000 Coup and took cognizance of matters and pronouncements made by the Courts in the following decisions:

- (a) *Republic of Fiji & Ano v Prasad* [2001] NZAR 385
- (b) *Koroi v Commissioner of Inland Revenue* [2003] NZAR 18

He also relied on the following decisions of other Local High Court Judges in arriving at his finding:

- (a) *Akuila Yabaki & Seven Others v The President* (Unreported) Suva High Court HBC119.01S; 11 July 2001.
- (b) *Audie Pickering v State* (Suva High Court Criminal Appeal)
- (c) *Tropic Wood Industries Ltd v Apenisa Balewakula & three Others* [Unreported] Lautoka High Court Civil Action HBC 158.97L 4 October 2002.

In addition to the above cases His Lordship also referred to the following decisions:

- (a) *Adegbenro v Akintola* [1963] AC 614
- (b) *Simpson v AG* [1955] NZLR 271
- (c) *Pakistan Petition Case* [Per I H Khan CJ]
- (d) *Clayton v Heffron* [1961] 105 CLR 214
- (e) *Mitchell v DPP* [1986] LRC (Const) 35 at 88
- (f) *Madzimbamuto v Lardner-Burke* [1969] 1AC 645

His Lordship went at length to discuss the appointment of the caretaker government of Laisenia Qarase and in conclusion was not satisfied that the appointment was appropriately made (as per provisions of the 1997 Constitution) after the resignation of Ratu Tevita Momoedonu. He even found Momoedonu's appointment to be suspect based on the premise that (former Prime Minister) Mahendra Chaudhary's dismissal was unlawful. On this ground the replacement would have been similarly flawed. He therefore ruled that the Minister's appointment was invalid in itself and that the *Sugar Industry (Amendment) Decree 1992* was also an invalid legislation.

Although in the appeal papers the Appellants had filed challenge to each of the above three declarations, at the hearing they did not wish to proceed against the first and third. Therefore the sole question that was required to be decided by the Court of Appeal was whether the *Sugar Industry (Amendment) Decree of 1992* was invalid and of no legal effect.

## THE SUGAR INDUSTRY (AMENDMENT) DECREE 1992

The relevant Decree was made on 6 February 1992. It was signed by the First President Ratu Sir Penaia Ganilau. In the preamble of the Decree it was stated that:

In exercise of the powers vested in me as President of the Sovereign Republic of Fiji and Commander in Chief of the Armed Forces, and acting in accordance with the advice of the Prime Minister and the Cabinet [the Decree is issued].