

34/82

IN THE PRIVY COUNCIL

No. 37 of 1981

ON APPEAL

FROM THE FIJI COURT OF APPEAL

B E T W E E N:

THE ATTORNEY GENERAL

Appellant
(Defendant)

THE DIRECTOR OF PUBLIC
PROSECUTIONS

Respondent
(Plaintiff)

CASE FOR THE RESPONDENT

Record

1. This is an Appeal from the Order of the Fiji Court of Appeal (Civil Jurisdiction) (Gould V.P., Spring J.A., and Chilwell J.A.) delivered on 5th August 1981, unanimously dismissing with costs the Appellant's Appeal against the Judgment and Order of the Supreme Court of Fiji (Civil Jurisdiction) (Tuivaga C.J. and Williams J., Mishra J, dissenting) dated 10th April 1981 whereby a Declaration was issued under Section 97 of the Fiji Constitution that a Notice dated 28th January 1981 and published in the Fiji Royal Gazette assigning responsibility to the Attorney General under Section 76(1) of the Constitution in relation to the Office of the Director of Public Prosecutions was unconstitutional. Final leave to appeal to Her Majesty in Council was granted in the Fiji Court of Appeal on 18th August 1981.

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2. On 6th February 1981 there was published in the Fiji Royal Gazette a Notice dated 28th January 1981 and signed by I.Q.Lasqa, Secretary to the Cabinet, stating that the Governor General in exercise of the powers conferred on him by Section 76(1) of the Constitution had (inter alia) assigned to the Attorney General responsibility for the administration of the "Office of the Director of Public Prosecutions (subject to Section 85 of the Constitution)". The history of the matter thereafter is set out in the Respondent's Affidavit sworn on 5th March 1981.

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- 10 3. Section 76(1) of the Constitution provides:
"The Governor General, acting in accordance with the advice of the Prime Minister, may, by directions in writing, assign to the Prime Minister or any other Minister responsibility for the conduct (subject to the provisions of this Constitution and any other law) of any business of the Government, including responsibility for the administration of any department of the Government".
4. Section 85 of the Constitution provides:
20 "(i) There shall be a Director of Public Prosecutions whose office shall be a public office.
(ii) Power to make appointments to the office of Director of Public Prosecutions shall vest in the Judicial and Legal Services Commission:
provided that the Commission shall not select for appointment to hold that office a person who is not a citizen of Fiji and is not a public officer unless the

Prime Minister has agreed that such a person may be so selected.

(iii) A person shall not be qualified to hold or act in the office of Director of Public Prosecutions unless he is qualified for appointment as a Judge of the Supreme Court.

(iv) The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do

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(a) to institute and undertake criminal proceedings before any Court of law (not being a Court established by disciplinary law);

(b) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority; and

(c) to discontinue at any stage before Judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.

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(v) The powers of the Director of Public Prosecutions under the preceding sub-section may be exercised by him in person or through other persons acting in accordance with his general or specific instructions.

(vi) The powers conferred upon the Director of Public Prosecutions by paragraphs (b) and (c) of sub-section (iv) of this Section shall be vested in him to the exclusion of any other person or authority: provided that where any other person or authority has

instituted criminal proceedings, nothing in this sub-section shall prevent the withdrawal of those proceedings by or at the instance of that person or authority at any stage before the person against whom the proceedings have been instituted has been charged before the Court.

(vii) In the exercise of the powers conferred upon him by this Section the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority.

10 (viii) For the purposes of this Section any appeal from any determination in any criminal proceedings before any Court, or any case stated or questions of law reserved for the purposes of any such proceedings to any other Court, shall be deemed to be part of those proceedings: provided that the power conferred on the Director of Public Prosecutions by sub-section (iv)(c) of this Section shall not be exercised in relation to any Appeal by a person convicted in any criminal proceedings or to any case stated or questions of law reserved except at
20 the instance of such a person".

5. Section 82 of the Constitution provides:

"Where any Minister has been charged with responsibility for the administration of any department of the Government, he shall exercise general direction and control over that department and, subject to such direction and control, any department in the charge of a Minister (including the office of the Prime Minister or

any other Minister) shall be under the supervision of a Permanent Secretary or of some other Supervising Officer whose office shall be a Public Office:

provided that

(a) any such department may be under the joint supervision of two or more Supervising Officers; and

(b) different parts of any such department may respectively be under the supervision of different Supervising Officers.

10 6. It was contended for the Appellant that the words "(subject to Section 85 of the Constitution)" in the Notice had the result that the powers vested in the Director of Public Prosecutions by Section 85 remain the Director of Public Prosecution's exclusively but that by Section 82 the Attorney General would have responsibility for the "general direction and control" of the Director of Public Prosecution's office. The Appellant contended that this was desirable to ensure ministerial responsibility for expenditure upon such matters as office equipment.

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20 7. The main issues raised by this appeal are:

(i) Whether the Director of Public Prosecutions is a legal entity with capacity to sue.

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(ii) Whether the Director of Public Prosecutions had locus standi to bring this action in the Supreme Court.

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(iii) Whether the effect of Sections 76(1), 82 and 85 of the Constitution taken together is to make the assignment

of responsibility to the Attorney General for
the administration of the Office of the Director
of Public Prosecutions unconstitutional. p.77

The Appellant through his Solicitors has said that he no
longer relies on the 2 further grounds argued in the p.59
Fiji Court of Appeal and consequently the Respondent p.73
makes no submissions about them.

8. Capacity to sue and "locus standi"

It is respectfully submitted that for the reasons p.11
given by them the Fiji Court of Appeal and the Supreme p.74
Court were correct in finding that the Director of
Public Prosecutions was a person whose interests were
being or were likely to be affected within Section 97(1)
of the Constitution and that that Section gave him the
right to sue.

9. Whether the notice was constitutional

In the Supreme Court, Williams J. accepted that p.32
parliamentary control is best achieved by having a
Minister responsible for the administrative section of
the Respondent's office, provided that the extent of
the ministerial responsibility is clearly set out in
the notice assigning such responsibility. He concluded p.35
that the notice was so vague that it would probably lead
to conflicting directions being given by the Appellant
and the Respondent and would enable the Appellant to
interfere with the Respondent's functions. p.39

Tuivaga C.J. agreed with Williams J. He added that p.14
conflict between the powers of the Appellant and the p.18

could be avoided if in the Respondent's office there was a Permanent Secretary or Supervising Officer, which there was not. He said that accountability to Parliament could be achieved as it had been done since independence in 1970 or through powers vested in the Prime Minister by Sections 73(1) and 75(1) of the Constitution.

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Mishra J. dissented.

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10 The Court of Appeal concluded that the notice did not preserve the severance of powers between the Appellant and the Respondent effected by the Constitution.

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It is respectfully submitted that the unanimous Judgment of the Fiji Court of Appeal was correct in adopting "a generous rather than a legalistic approach" to interpreting the Constitution and therefore upholding the "obvious intention of the framers of the Constitution when the Office of Director of Public Prosecutions was created", by holding the assignment unconstitutional.

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20 Further, it is respectfully submitted that Williams J. in the Supreme Court was correct in holding that such administrative matters as are controlled by the Director of Public Prosecutions are necessarily incidental to his exclusive functions set out in Section 85 and as such are protected from assignment under Section 76(1).

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10. If, contrary to the Respondent's submissions, the Respondent has no capacity to sue or has no "locus standi" to bring these proceedings, it is respectfully submitted that it is of importance to determine whether or not the notice is

constitutional and the Respondent respectfully submits that that issue should be determined in these proceedings.

11. The Respondent therefore respectfully submits that the majority decision of the Supreme Court and the unanimous decision of the Court of Appeal were correct for the following, among other,

REASONS

- (1) Because the Director of Public Prosecutions had capacity to sue and had locus standi.
- (2) Because the assignment of responsibility infringed the powers and duties exclusively reserved to the Director of Public Prosecutions by Section 85 of the Constitution.
- (3) Because the assignment of responsibility infringed the scheme of separation of powers envisaged by the framers of the Constitution.
- (4) Because of the reasons given by Tuivaga C.J., Williams J. and the Fiji Court of Appeal.

MICHAEL OGDEN

ANDREW PHILLIPS

