IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

CIVIL ACTION NO.: HBC 368 OF 2003

BETWEEN: STEPHEN HALLACY

PLAINTIFF

A N D: 1. FARASIKO PAGO

2. ATTORNEY GENERAL OF FIJI

DEFENDANTS

Mr. A.K. Singh for Plaintiff

Ms N. Karan for Defendants

Date of Hearing: 11th October 2006

Date of Judgment: 31st October 2006

JUDGMENT

Stephen Hallacy was a site engineer at the Taveuni Community Health Project. It involved work at the new sub-divisional hospital, government staff quarters, a new health center and some renovations. The project was funded by Ausaid. Farasiko Pago was the Health Inspector who was posted to Taveuni after the project was on its way.

In May 2003 a search was conducted of Hallacy's house by Taveuni police who took some items but returned those a few days later. No charges were ever laid nor was he interviewed by the police for any offence.

Mr. Hallacy is alleging that the search was instigated by Mr. Pago for a collateral purpose of trying to obtain plans for the works carried out and it was done maliciously. Mr. Pago denies that he had anything to do with the search or that he was complainant to the police.

There is no dispute that Mr. Hallacy's house was searched. The plaintiff says that the first defendant wanted to see the approved plans but he could not assist. The plaintiff's story is that as far as he was aware, this being a joint project between Ausaid and the Government of Fiji, there was no need to have plans approved by the relevant Health Authority. He stated in his evidence in chief that he had a letter from the Health authorities that no development approval was required for the project. The first defendant on the other hand stated that the government or Ausaid was not exempt from the provisions of the Public Health Act and plans required the necessary approval. Further he did ask the plaintiff for approved plans but the plaintiff did not provide him with plans.

The plaintiff is saying that the defendant had a motive to get a search done and that was to acquire the plans. He suggests that the first defendant used the District Officer, whom he knew well, to advance his cause. If I may say, if there was ill will between the plaintiff and the first defendant, then the court must proceed with great deal of caution in assessing the evidence.

In this case there is no evidence from the police themselves that the first defendant came and lodged a complaint against the plaintiff. Paragraph 6 of the plaintiff's claim says that the first defendant falsely and maliciously procured the District Officer acting as a Magistrate pursuant to the provisions of the Police Act to issue a search warrant. I invited counsels to assist me on this as I am not aware that a District Officer could act as a Magistrate. Neither the provisions of

the Magistrates Court Act nor the Police Act say that. In fact counsels were equally surprised. The District Officer was also not called to testify.

The only incriminating or linking evidence against the first defendant is an e-mail sent by Luke Rokovada on 5th May 2002 at 9.14 p.m. which was a Sunday to one Gerard whose house was also searched it appears. It is an apology for search conducted and says that the complaint was made to Taveuni police by Mr. Pago. Luke Rokovada was the CEO of Health Ministry. He could have had two reasons to point a finger at Mr. Pago. First, Mr. Pago was being difficult about approved plans for a government hospital which would come under Rokovada's portfolio. Here was an ordinary Health Inspector, a junior person in the Ministry and making life difficult for the Ministry. Secondly, Luke Rokovada was related to Steven Hallacy, whose wife was Rokovada's sister.

This e-mail was not copied to Mr. Pago. One of the persons it was copied to was Manasa Niubaleirua who replied to Luke Rokovada the next day. Niubaleirua in his e-mail says that he spoke to Pago who denied making a complaint to police. He also spoke to the Sergeant at Waiyevo Police Post who stated that no complaint was made to police by Pago. He called for a thorough independent investigation. That did not take place.

As long ago as 6th May 2002, the first defendant denied making a complaint to police. He came to court and testified to that effect. He was cross-examined at length. During cross-examination, there was information which he volunteered like his relationship with the District Officer in that they had worked together at one time. This type of evidence would be prejudicial to him but he happily stated all this without prompting from the counsel.

The impression I got of Mr. Pago is that he took his work seriously and was conducting his duty according to law, even if it meant not sparing the very Ministry he worked for. He was quite composed, coherent and gave his evidence in an assured manner. He stated that even though the plaintiff was no co-operative, he did not let this develop into an acrimonious relationship.

Opposed to the defendant is the untested e-mail written by Mr. Rokovada who did not testify. Having heard Pago and the manner of his testimony, I find that Pago did not complain to the police about financial mismanagement of the Ausaid project. At best there is only suspicion supported by Luke Rokovada's e-mail the contents of which are again hearsay.

This case is remarkable for what was left out. The plaintiff says he had a letter from the Ministry of Health stating that developmental approval was not required. However this letter was never produced. The necessity for this letter should have been obvious to him at the time of filing of the writ.

The plaintiff's assertion always was that it was Pago who made a complaint to the police. As early as 6th May 2002, this was denied in the e-mail by Manasa Niubaleirua and again denied in the defence dated 9th August 2005. This should have alerted the plaintiff and he should have either called some one from Taveuni Police and ask that the station diary be produced. The station diary keeps records of all complaints made, the nature of complaint, name of the complainant and the time of complaint. When relevant credible evidence is accessible, the court naturally expects it be made available.

With my finding that the first defendant had not made the complaint, the issue remains whether the Attorney General is liable. Mr. Singh submitted that the Attorney General was the custodian of liberty including freedom from illegal search of premises and it was up to the Attorney General to show what the cause of search was; a reasonable explanation for the search should have been given even if police were not a party to the procedure. Ms Karan stated that unless the police were joined, the Attorney General could not be liable. Her submission was that it was the police who mounted the search and they should have been joined as defendants.

This action involves the State so the provisions of Order 77 and State Proceedings Act Cap 25 would apply. Order 77 Rule 2 requires the statement of

claim or endorsement to include the circumstances in which the State's liability is said to arise and the government department and officers of the State involved. In these proceedings the circumstances are mentioned, the name of the officer has been given. Under Section 3 of the State Proceedings Act the State is vicariously liable for the acts of its servants.

The purpose Order 77 Rule 2 is clear. The State employs a large number of persons. Even within a ministry, there may be a substantial number of employees. It would be an onerous task for the Attorney General, if proper officers were not named, to find out the person who could provide the relevant facts regarding the case at hand. In this case Pago is the named officer, so the Attorney General would be entitled to get the necessary facts from him and stop there. If the plaintiff wanted to join police officers, he should have done so earlier. The police in that event would have to show the warrant under which they conducted the search. Further Section 20 of the Police Act provides police protection from liability if they act under a warrant signed by a magistrate or a justice of peace.

I find on balance of probability that the first defendant did not lodge the complaint to the police which resulted in the search, so the second defendant also cannot be vicariously liable. Accordingly the plaintiff's claim against the defendants fails.

Now to counterclaim, First, I note that Order 77 Rule 4(2) requires leave of the court before a counterclaim is filed where the State is sued in the name of the Attorney General. No leave was sought but there has been no objection raised either.

The first defendant says that he had been suspended and remained suspended for a period of three years until disciplinary hearings by Public Service Commission were completed. He says his suspension was due to false allegations against him by the plaintiff in that the first defendant had orchestrated search in his premises. He was reinstated after three years with all his arrears of

salary paid to him. Once his salary was given back to him, he suffered no loss. His prayer is for damages for loss of employment for three years. He may have lost out on a chance of promotion but that is not prayed for.

Accordingly the counterclaim is also dismissed.

Final Order:

The plaintiff's claim against the defendants is dismissed. The first defendant's counterclaim against the plaintiff is dismissed. There is to be no order as to costs as both the plaintiffs' claim and defendant's counterclaim have been dismissed.

[Jiten Singh]
JUDGE

At Suva
31st October 2006