

IN THE HIGH COURT OF FIJI
AT SUVA
[CIVIL JURISDICTION]

CIVIL ACTION NO. HBM 65 OF 2016

BETWEEN : **FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION** of the Republic of Fiji, Rev. John Hunt House, 3 St. Fort Street, Suva, for and on behalf of the **STATE**

APPLICANT

AND : **FEROZ JAN MOHAMMED** of Suva Prison

DEFENDANT

AND : **T.F. JAN BULLDOZING COMPANY LIMITED** a limited liability company having its registered office at Koula Road, Varadoli, PO Box 247 at Ba, Fiji.

1ST INTERESTED PARTY

AND : **TAJ JAN MOHAMMED** of Yalalevu, Ba, and **ESTATE OF AKBAR JAN MOHAMMED** (through its Executor and Trustee, Taj Jan Mohammed) as shareholders in TF Jan Bulldozing Company Limited a limited liability company having its registered office at Koula Road Varadoli, PO Box 247 at Ba, Fiji.

2ND INTERESTED PARTY

AND : **MOBIN MOHAMMED JAN** of Yalalevu, Ba as a beneficiary under the **ESTATE OF AKBAR JAN MOHAMMED** of shares in TF Jan Bulldozing Company Limited a limited liability company having its registered office at Koula Road, Varadoli, PO Box 247 at Ba, Fiji.

3RD INTERESTED PARTY

AND : **BANK OF BARODA** a body corporate registered under the Banking Act, having its registered office at 1 Thompson Street, Suva in the Republic of Fiji Islands.

4TH INTERESTED PARTY

AND : **ZARSHBINA COMPANY LIMITED** a limited liability Company having its registered office at c/- Divendra Singh & Company, Accountants, Office No. 10, Tukani Street, Lautoka.

5TH INTERESTED PARTY

AND : **CHANDRESH ARUN PRASAD** of Ba. **6TH INTERESTED PARTY**

AND : **TROPIC FOREST JOINT VENTURE COMPANY LIMITED** a limited liability company having its registered office at Ba, Fiji.

7TH INTERESTED PARTY

AND : **FIJI ROADS AUTHORITY** a corporate body with perpetual succession and a common seal registered under the Fiji Roads Authority Act 2012, situated at Level 4, Fiji Development Bank, 360 Victoria Parade, Suva in the Republic of Fiji Islands.

8TH INTERESTED PARTY

AND : **FIFA HOLDINGS (FIJI) LIMITED** a limited liability company having its registered office at Rarawai Road at Ba, Fiji.

9TH INTERESTED PARTY

COUNSEL : Mr. R. Aslam with Ms. F. Pulewai for the Applicant
Mr. A. K. Narayan for the Defendant
Ms. N. Tikoisuva for the 1st, 7th and 9th Interested Parties
Mr. S. K. Ram for the 2nd and 3rd Interested Parties
Ms. S. Devan for the 4th Interested Party
5th and 6th Interested Parties, Absent and Unrepresented
Mr. A. Vulauno for the 8th Interested Party

Date of Hearing : 31 January 2018

Date of Ruling : 23 April 2018

RULING

[1] This application was filed by the Applicant, Fiji Independent Commission against Corruption (FICAC), by way of an Originating Summons (Forfeiture Order on Conviction), on 17 June 2016. The Applicant seeks a declaration from this Court that the properties mentioned in the annexed "Schedule of Properties" be declared as tainted properties, pursuant to Section 11 of the Proceeds of Crime Act No. 27 of 1997 and for the issuance

of a Forfeiture Order to forfeit the said properties to the State. The application was supported by the Affidavit of Frank Tora, Commission against Corruption Officer (CO) of FICAC.

- [2] An Ex-Parte Notice of Motion was also filed by the Applicant for the issuance of a Restraining Order prohibiting any transactions or dealings in the properties listed in the Schedule of Properties, until the matter is finally determined by this Court.
- [3] This Court, having considered the application of the FICAC, issued a Restraining Order on 23rd June 2016, prohibiting the disposal of the said properties listed in the Schedule of Properties. This Restraining Order has been extended from time to time upon the consent of all the parties.
- [4] The Defendant, Feroz Jan Mohammed (hereafter referred to as the Defendant), was one of four accused in HAC 349 of 2013 and was charged with, Bribery of Public Officials contrary to Section 134(1) of the Crimes Act No. 44 of 2009 (Crimes Act), Obtaining a Financial Advantage contrary to Section 326(2) of the Crimes Act and Perverting the Course of Justice contrary to Section 190(e) of the Crimes Act. After trial he was convicted of the said offences on 22nd June 2015.
- [5] In the Originating Summons filed only the Applicant and the Defendant were named as parties to this action. Subsequent to filing of the Originating Summons, the Applicant named 7 other Interested Parties. Upon notice, all of these Interested Parties appeared before Court, except for 5th and 6th Interested Parties. This Court decided to proceed in their absence as notice was duly served on them.
- [6] On 24 February 2016, the 1st and 7th Interested Parties made an application for Joinder of Parties, "*pursuant Order 15, Rule 4 of the High Court Rules (1988) and Section 7 of the Proceeds of Crime Act 1997 (as amended)*" and they also invoked inherent jurisdiction of this Court. They sought to join the 8th Interested Party, Fiji Roads Authority (FRA), as it was the complainant to the criminal action in which the Defendant was convicted.
- [7] The factual basis in support of this application, as urged by them, was that the FRA had indicated that the Defendant and the Interested Parties owed it monies amounting to over \$3.1 Million and to avoid multiplicity of actions, the claims by FRA too had to be adjudicated upon in these proceedings.
- [8] The Defendant and 2nd, 3rd and 4th Interested Parties supported the application of the 1st and 7th Interested Parties.

[9] Upon hearing of the application made by the 1st and 7th Interested Parties, this Court made order on 14 March 2017, granting the said application.

[10] Accordingly, this Court made the following orders:

- i. *Fiji Roads Authority to be given notice by the Applicant (who exercises similar powers as the Director of Public Prosecution) of the present proceedings;*
- ii. *Fiji Roads Authority is named as a party to the proceedings;*
- iii. *No order for costs.*

[11] The 8th Interested Party, Fiji Roads Authority (FRA), filed a Notice of Motion, on 12 May 2017, seeking the following orders:

1. That the 8th Interested Party ceases to be party in this proceedings; and
2. That the costs of this application be costs in the cause.

[12] The Notice of Motion was filed pursuant to Order 15, Rule 6 (2) of the High Court Rules and the inherent jurisdiction of this Court.

[13] This Notice of Motion was supported by the Affidavit of John Schilling Hutchinson, the Chief Executive Officer of FRA. Therein, he deposed as follows:

"1. I am the Chief Executive Officer of the Fiji Roads Authority (hereinafter "FRA"), the named Eighth Interested Party in this proceeding. I am duly authorised to make this Affidavit on behalf of FRA.

2. That upon the conviction of the Respondent in Criminal Action HAC 349/2013, FRA as the complainant, claimed from TFJ Bulldozing Limited (hereinafter "TFJ") FJ\$3,132,773.77 being the subject money in the criminal proceeding (hereinafter "the Claim").

3. That upon being joined as an Interested Party, FRA obtained legal advice and after considering all the circumstances, FRA withdraws the Claim against TFJ and does not wish to proceed as an interested party by filing a claim.

4. That FRA does not intend to proceed with the Claim in any way or manner upon being ceased from being an interested party in this proceeding.

5. That at the date of this Affidavit, FRA does not have any other claim against TFJ in Court or otherwise."

[14] The 1st and 7th Interested Parties filed an Affidavit in Opposition to the said Notice of Motion. The Affidavit was filed by Faiz Javed Jan, Director of TFJ Bulldozing Company Limited (TFJ), a shareholder and Director of FIFA Holdings (Fiji) Limited (FIFA), and a shareholder and Director of Tropic Forest Joint Venture Company Limited (Tropic Forest).

[15] Faiz Javed Jan deposes this Affidavit on behalf of the majority shareholders of FIFA and Tropic Forest and as a Director of TFJ. He submits that their interest in the proceedings is purely commercial with heavy financial obligations. If the present application by FRA is allowed, it will result in great financial hardship to all the shareholders and affect their common interest and ties with financial institutions.

[16] He opposes the application for the following reasons:

- a. FRA had engaged their company TF Jan Bulldozing Company Ltd under various contracts for the supply and delivery of road materials.
- b. FRA entered into agreements with TFJ under various contracts in which TFJ then provided Bank Guarantees and took operational steps to fulfil its contractual obligations.
- c. FRA failed to fulfil its contractual obligations for other contracts when investigations commenced against the Respondent for the DTBW 02/07 Contract.
- d. As a result of the failures and breaches by FRA, TFJ has claims outstanding for payment by FRA. TFJ's Claim needs to be assessed and paid by FRA as follows:
 - i. Contract CTN 73/2011 pending claim for the approximate sum of \$339,636.00 for the supply and delivery of road making material together plus 3% interest and pending claim of loss of income in expectation of contract obligations at statutory rate. CTN 73/2011 – Period of 2011 to 2013 stopped without notice before the contract end period.

- ii. Construction of Valele Bridge and road works to the sum of \$494,517.60 with interest.
- iii. Contract WSC 97/2011 in which the parties agreed for TFJ to mobilize and commence work, bank guarantee were provided to FRA and active steps were taken to engage in the contract valued at \$1.9 million. This came to a stop without notice to TFJ. Loss of income from 2011 to date at the statutory rate.
- iv. WSC 149/2011 – Working in Monasavu and Nadarivatu Roads, mobilised and work commenced as per agreement. To date, FRA is still assessing the claims. Annexed is a copy of the Letter from FRA indicating their assessment of the claims.
- v. Nasinu Quarry CTN 14/2011 – Period of 2011 to 2013. It ended before the contract end period in 2012 without notice. Potential claim of loss of income as a result of breach in contract and expectation of performance.

[17] Faiz Javed Jan further submits that TFJ's claims against FRA is estimated to exceed the claim in the present action filed by FICAC for forfeiture under the Proceeds of Crimes Act, based on the values provided in the Schedule of Properties annexed to the Originating Summons.

[18] The Applicant filed an Affidavit in Response to the Affidavit in Opposition filed by the 1st and 7th Interested Parties. The Applicant supports the Notice of Motion filed by the 8th Interested Party to cease to be a party to these proceedings. This Affidavit has been deposed to by Frank Tora of FICAC, who is the Financial Investigating Officer for this case.

[19] In the said Affidavit inter-alia he states as follows:

1. That as per paragraph 7 of the 1st and 7th Interested Parties Affidavit, he is advised to say that:
 - a. FICAC (Applicant) concur that FRA had indeed engaged TF Jan Bulldozing Company Ltd ("TFJ") under various contracts for the supply and delivery of road materials.

- b. The current case against the Respondent arises out of a conviction entered and only relevant to a serious of acts done under the contract no DTBW 02/07 between the 8th Interested Party and the Respondent.
 - c. I am advised that the 1st and 7th Interested Party or any party has separate cause of action if they need to claim for any unpaid amount pursuant to and under the relevant contract they agreed upon.
 - d. That the 1st and 7th Interested Parties have failed to show in their affidavit that any further claim they may have against the 8th Interested Party is relevant to the 14 transactions under DTBW 02/07 that are subject to the current case. For any other claims outside these transactions as stated in Paragraph 46 of my first affidavit, dated 17 June 2016, shall be dealt separately in a separate course of action for any purported breach of contracts. Annexed as "A" is a copy of the said contract no DTBW 02/07 between FRA and TFJ.
2. That in reply to paragraph 9, FRA has indicated in their Affidavit in paragraph 4 that FRA does not intend to proceed with the Claim in any way or manner upon being ceased from being an interested party to this proceedings.
 3. That in reply to paragraph 10, FRA can in its own motion seek to withdraw as a party when it has no interest in the matter.
 4. That no party will be prejudiced if FRA is removed an interested party in the substantive application since FRA has clearly indicated in its Affidavit that it does not intend to proceed as an interested party and does not intend to proceed with the Claim in any way or manner in the substantive application, namely pertaining to the Contract No. DTBW 02/07.
 5. That in reply to paragraph 12, TFJ fails to show the Court the link between the separate contracts they have with FRA as outlined in paragraph 7(d) of their Affidavits to the properties that we seeking to forfeit to the State as per the substantive applications.
 6. That in reply to paragraph 13 of the Affidavit, he is advised to state that the claims stated in paragraph 7 of the 1st and 7th Interested Parties Affidavit shall take a separate

course of action under respective contracts independent to the actions in the current case.

7. That the current course of action under Proceeds of Crimes Act shall be limited to the source of proceeds that were used to purchase the property stated in the Schedule of properties submitted with the originating summons.

8. That for the reasons set out in his affidavit, he pleads that Court allows the application of the 8th Interested Party to withdraw from these proceedings.

[20] The FRA filed an Affidavit in Reply responding to the Affidavit in Opposition filed by the 1st and 7th Interested Parties.

[21] Furthermore, on 4 October 2017, this Court granted leave for an amended caption to be filed in these proceedings. The amended caption was filed with the consent of all parties.


[22] This matter was taken for hearing before me on 31 January 2018. The Applicant, the Defendant, the 1st and 7th Interested Parties and the 8th Interested Party filed written submissions, which I have had the benefit of perusing.

[23] I have considered the order made by this Court, on 14 March 2017 (naming FRA as a party to the proceedings), and all the pleadings subsequently filed in this application and the submissions made by all parties. I am of the opinion that permitting the FRA's application ceasing to be party in these proceedings at this point in time, would prejudice the rights and/or interests of the other parties' to these proceedings.

[24] In the circumstances, the application made by the 8th Interested Party, the Fiji Roads Authority (FRA), by way of its Notice of Motion, dated on 12 May 2017, is refused.

[25] I make no order for costs.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 23rd Day of April 2018