

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 147 of 2017

BETWEEN : **THE DIRECTOR OF PUBLIC PROSECUTIONS** of the Republic of Fiji, 25 Gladstone Road, Suva, for and on behalf of the State.

Applicant

AND : **ABINESH AJEET SINGH** of Namaka, Nadi.

First Respondent

AND : **WESTPAC FIJI** having its registered office at Level 1, 1 Thomson Street, Suva.

Second Respondent

AND : **SUNFLOWER AVIATION LTD** having its registered office at London Avenue, CAAF Compound, Nadi Airport.

Interested Party

Counsel: Mr Singh for the Applicant
Janend Sharma Lawyers for the First Respondent
Ms Fong for the Second Respondent
Non Appearance of the Interested Party

R U L I N G

1. By Originating Summons dated 19 July 2017, the Director of Public Prosecutions seeks a Civil Forfeiture Order over the sum of \$320, 304.16 (three hundred and twenty thousand three hundred and four dollars and sixteen cents).
2. The said sum is currently being held in a Westpac Banking Corporation Limited Account in Fiji, namely, Account No. 9803553503.
3. The said Account is held in the name of one Abinesh Ajeet Singh, the first Respondent. The Director of Public Prosecution's Summons is filed pursuant to Section 19C, 19D and 19E of the Proceeds of Crime (Amendment) No. 7 Act 2004 ("POCA").

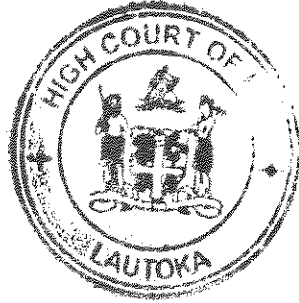
4. The Summons is supported by an Affidavit of one Josua Cakausesse sworn on 23 August 2017 and an Affidavit of one Timothy Joyce sworn on 19 July 2017.
5. An Affidavit of Abinesh Ajeet Singh sworn on 12 September 2017 is filed in opposition. The Plaintiff replies to the said Affidavit vide an Affidavit of Josua Cakausesse sworn on 02 October 2017. Abinesh Ajeet Singh has sworn an affidavit in reply on 29 January 2018 which is filed herein.
6. There is currently in place an interim injunctive order of the Master which prevents the Defendant from drawing the money from the said Account pending determination of the application.
7. Notably, there is currently pending in the Magistrates Court a criminal charge against the first Defendant. I gather from the hearing of this matter that the charges against the defendant have been amended but the amended charges have not been placed before me in evidence. The said charges are based on the basic allegation of fact that the Defendant, in the course of his employment with the Plaintiff, had directed clients of the Plaintiff to pay certain monies due for services rendered by the Defendant for and on behalf of the Plaintiff into his (Defendant's) own account and thereby depriving the Plaintiff of the same.
8. The Defendant argues that he only took money that was due to him on account of his services as a sub-contractor of the Plaintiff.
9. Mr. Singh argues that whether the Defendant was an employee or a subcontractor of the Plaintiff, he did not have any authority to direct the Plaintiff's clients to pay monies directly into his account.
10. I gather that the Defendant is yet to be tried on the said charges, let alone has had a conviction entered against him in relation to the said charges.
11. Notably, sections 19C, 19D and 19E of POCA allow the DPP to make an application for forfeiture of tainted property even where the Defendant is yet to be convicted of an offence.
12. Section 19C of POCA entitles the Director of Public Prosecution to apply to Court for an order forfeiting to the State all on any property that is tainted property.

13. Section 19E(i), provides that if the Court is satisfied, on a balance of probabilities that the property is tainted property, the Court may order that the property or said property as is specified by the Court, in the order, be forfeited to the State.
14. It would appear by the wording of Section 19E (i) that
- (i) If the Court is satisfied
 - (ii) on a balance of probabilities
 - (iii) that the property is tainted property
 - (iv) the Court may then order
 - (v) that the property be forfeited to the State.
15. In other words there is a discretion to order forfeiture to the State.
16. My reading of the section is that the said discretion only becomes exercisable once the court is satisfied on the balance of probabilities that the property in question is tainted. In other words, the Court is not carte blanche to Order forfeiture once it becomes satisfied on the balance of probabilities that the property is tainted.
17. On the contrary, it is upon being satisfied on the balance of probabilities that the property is tainted property that the Court must then begin to embark on a balancing exercise in the exercise of its discretion as to whether or not to order forfeiture.
18. In this case, I am satisfied on the balance of probabilities that the property in question is tainted property. In saying this, I am endorsing the argument of Mr. Singh that whether or not the Defendant was an employee or a subcontractor of the Plaintiff, he did not have any authority to authorize the payment of any of the monies in question directly into his account.
19. I accept that the amended charge against the Defendant should have been placed before me. I also accept that it is relevant in the balancing exercise. The fact that the amended charges against the Defendant have not been placed before me, although unfortunate, in my view, is not fatal to the application before me.
20. The DPP's application is premised on the argument that the property in question is tainted property because, on the balance of probabilities, the property was a "proceeds of crime" in terms of section 3 of POCA.

21. On my reading of sections 19C,19D and 19E, there is nothing in these provisions that make it a pre-requisite that the filing of criminal charges are is a pre-requisite to the making of an application for a non-conviction based forfeiture order for tainted property.
22. Having said that, I would agree that where criminal charges have been filed, evidence of those charges should be placed before this Court. That should be the case because the filed charges may or may not be relevant in the balancing exercise.
23. However, in my view, where the admitted facts per se would support a view that on the balance of probabilities, the property in question is tainted, that is enough for the Court to begin to embark on exercising its discretion as to whether or not to order forfeiture.
24. In this case, it is not in contention that the Defendant did direct the monies in question to be paid into his account. It is also admitted that the Defendant was engaged by the Plaintiff in the Plaintiff's business. Whether the Defendant was engaged as an employee or as a subcontractor, he would have to be paid for his services by the Plaintiff. If any monies were due to the Defendant from the Plaintiff, then Defendant should have expected payment from the Plaintiff. If the Plaintiff failed in that regard, the Defendant could then have recourse to civil proceedings against the Plaintiff. What he was not authorized to do, whether as an employee or as a subcontractor, was to direct payment of the monies into his account.
25. At this time, I must point out also that it is not my duty in this case to make a finding as to whether or not the Defendant was an employee or was a subcontractor of the Plaintiff. To make a conclusive finding of fact at this time in that regard would potentially embarrass the related criminal proceedings against the Defendant. All I am prepared to say now is that based on the evidence before me, on the balance of probabilities, it is fairly probable that the Defendant was in fact a subcontractor of the Plaintiff. However, as I have said, even if that were to be established, in the absence of any express contractual arrangement between the Plaintiff and the Defendant authorizing the Defendant to direct the payment of monies into his account, on the balance of probabilities, all the monies that the Defendant received into his account was tainted property.
26. The question I ask now is whether I should now then exercise my discretion and Order forfeiture accordingly and if so, whether I should then Order forfeiture of the entire sum or a part of it only. As I have said, without evidence of any contractual authority to do so, on the balance of probabilities, all the monies that the Defendant received into his account was

tainted property. His probable entitlement to a part of it based on the probability that he was a subcontractor, is irrelevant.

27. Accordingly, I grant Order in Terms of the Plaintiff's application.



A handwritten signature in black ink, consisting of stylized, overlapping letters, positioned above a horizontal dotted line.

Anare Tuilevuka
JUDGE

27 July, 2018.