

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action HBM No. 52 of 2019

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

APPLICANT

AND : **ADI RAVI MANU of 92 Nailuva Road, Suva.**

RESPONDENT

BEFORE : **M. Javed Mansoor, J**

COUNSEL : **Ms. M. Konrote for the Plaintiff**
: **Mr. A. Singh for the Respondent**

Date of Hearing : **14.11.2019**

Date of Judgment : **10.12.2019**

RULING

PROCEEDS OF CRIME ACT 1997: proceedings instituted by *ex parte* notice of motion – strike off of *inter partes* notice of motion – restraining order – Sections 19A & 34 of the Proceeds of Crime Act 1997 – restraining order – mode of instituting proceedings – tainted property – proceeds of crime – Illicit Drugs Control Act 2004 – time limits to be observed – property already in the custody of the Police – ownership of tainted property – Order 41 Rule 9 (2) of the High Court Rules

Cases referred to:

- a. The Director of Public Prosecutions v Apakuki Kauyaca Vitukawalu, Civil Action No. HBM 138 of 2013; 14 April 2016
- b. The Director of Public Prosecutions v Apakuki Kauyaca Vitukawalu, Civil Appeal No. ABU 90 of 2016; 6 August 2018

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1. The Applicant initially filed an *ex-parte* notice of motion dated 8 February 2019 seeking a restraining order. This application was supported by an affidavit dated 6 February 2019 and filed on 8 February 2019, from detective constable, Joape Qio of the Fiji Police Force. In terms of the *ex parte* notice of motion, Alfred, J, on 25 February 2019, granted a restraining order over the sum of \$13,942.00 held by the Fiji Police. That order was sealed on 27 February 2019.
 2. The Applicant filed a notice of motion on 27 February 2019, moving Court for a restraining order over a sum of \$13,942.00 currently held by the Fiji Police Force at the exhibit room safe of the Raiwaqa Police Station, to be supported on 14 March 2019; this application, made under Section 19A and Section 34 of the Proceeds of Crime Act 1997 (“the Act”), was supported by the affidavit filed on 8 February 2019 from detective constable, Joape Qio. On 14 March 2019, Alfred, J made an *inter parte* order striking out the notice of motion filed on 27 February 2017, with liberty to file afresh.
 3. Thereafter, the Applicant filed another notice of motion on 26 April 2019, seeking a restraining order over a sum of \$13,942.00 currently held by the Fiji Police Force at the exhibit room safe of the Raiwaqa Police Station in terms of

Sections 19A and 34 of the Act. This application was supported by the affidavit of detective constable, Joape Qio, filed on 8 February 2019, from. This was supported by the Applicant's counsel on 22 May 2019. The Respondent filed an affidavit in response on 27 May 2019, which was replied on behalf of the Applicant by affidavit dated 18 June 2019.

4. The Respondent stated in her affidavit that the Applicant's application was defective in that:
 - a. *The action was struck out by Justice Alfred on 14 March 2019;*
 - b. *The Applicant cannot file a notice of motion in the same action without leave or application to reinstate the matter that was struck out;*
 - c. *That the Applicant cannot commence an action by notice of motion without originating summons;*
 - d. *That the Applicant cannot commence restraining order that is an injunction without a writ of summons or cause of action;*
 - e. *That the notice of motion is signed as barrister and solicitor for the state I defective, as it should be state counsel.*
 - f. *That the service of the notice of motion only is irregular and served less than 3 days as required under the rules;*
 - g. *That no restraining order can be applied without a cause of action.*

5. In her affidavit dated 27 May 2019, the Respondent admitted that the police took a sum of \$13,942 from her residence, but stated that the money belonged to her husband from his fish business, and that part of the money was given by her mother in law (who died on 16 April 2019). She prayed for dismissal of the Applicant's application.

6. In his affidavit, filed on behalf of the Applicant on 18 June 2019, detective constable Shamal Shavneel Chand declared that there are reasonable grounds for the Police to believe that the property in question is tainted, and maintained that the Police received information that drugs were sold at the Respondent's residence. Thereafter, the Applicant sought the leave of the Court in terms of Order 41 Rule 9 (2) to rely on the affidavit of Shamal Shavneel Chand, as the Applicant had failed to endorse the affidavit with a note showing on whose behalf the affidavit was filed. This was supported by the affidavit of Kiran Lata

Singh, Executive Litigation Officer of the Director of Public Prosecutions, which was filed on 8 November 2019. Leave was granted on 14 November 2019, the day of the hearing.

7. The Applicant tendered two sets of submissions filed on 18 June 2019 and 20 August 2019. The submission for the Respondent was filed on 17 July 2019. The Applicant relied on Sections 19A and 34 of the Act. Section 19A (1) as amended states that where there are reasonable grounds to suspect that any property in respect of which a forfeiture order may be made under Section 19E or 19H, the Director of Public Prosecutions may apply to the Court for a restraining order under subsection (2) against that property.
8. Section 34(1)¹ states that where there are reasonable grounds to suspect that any property in respect of which a forfeiture order may be made under Sections 11 or 19, the Director of Public Prosecutions may apply to the Court for a *restraining order* under subsection (3) against that property. Section 34 (2) states that where there are reasonable grounds to suspect that a pecuniary penalty order may be issued under Section 20, the Director of Public Prosecutions may apply to the Court for a *restraining order* under subsection (5) against any realisable property held by the person.
9. The affidavit of Joape Qio, tendered on behalf of the Applicant, has provided a description of the property believed to be tainted and its location, as well as the grounds for belief that such property is tainted; this is in compliance with the requirements mentioned in the aforesaid sections. The term “tainted property”² is defined in relation to a serious offence or a foreign serious offence to mean -
 - (a) property used in, or in connection with, the commission of the offence;
 - (b) property intended to be used in, or in connection with, the commission of the offence;
 - (c) proceeds of crime.

The phrase “proceeds of crime” is defined in Section 4A of the Act, and the definition relates to the commission of a serious offence or serious foreign

¹ Proceeds of Crimes Act 1997

² Section 3 of the Proceeds of Crime Act 1997

offence. The Applicant submitted that the charge against the Respondent is in relation to a serious offence as the Respondent is facing charges under section 5 of the Illicit Drugs Control Act 2004, which carries a maximum penalty of a fine not exceeding \$1,000,000 or imprisonment for life or both.

10. Counsel for the Applicant submitted that there is reasonable suspicion that the seized money is proceeds of crime because the Respondent was found in possession of illicit drugs; the Respondent and her husband were unemployed and the Respondent did not have a lawful source of income.
11. On behalf of the Respondent it was submitted that:
 - a. the Affidavit of Shamal Shavneel Chand was in breach of Order 41 Rule 9 (2) and should be struck out as leave had not been obtained to rectify it.
 - b. that the Applicant's current application was defective because it had filed the notice of motion in the same *action* that was struck out by Alfred, J, without making an application for reinstatement or commencing a new action by way of an originating summons;
 - c. that the Applicant had failed to give an undertaking as to damages when it made an application for a restraining order;
 - d. that the seized property is held by the Raiwaqa Police pending the hearing and determination of the Respondent's case before the Magistrate Court, and, therefore, the necessity of restraining funds did not arise;
 - e. the Applicant did not make a forfeiture application within 14 days. Counsel drew attention to the case of Director of Public Prosecutions v Apakuki Kauyaca Vitukawalu³, Civil Action No. HBM 138 of 2013; 14 April 2016 which was affirmed by the Court of Appeal except on the question of costs⁴;
 - f. the State was in breach of section 19 D of the Act when it did not join or serve the application to the Respondent's husband, as the owner of the property. That in terms of Section 19D of the Act, the Director of Public

³ Civil Action No. HBM 138 of 2013; 14 April 2016

⁴ Director of Public Prosecutions v Apakuki Kauyaca Vitukawalu, Civil Appeal No. ABU 90 of 2016; 6 August 2018

Prosecutions is required to give no less than 30 days written notice of the application to any person who is known to have an interest in the tainted property;

g. that the Nasinu Magistrate had no jurisdiction to issue a search warrant.

12. These issues need to be addressed.

a. On 14 November 2019, at the outset of the hearing, Court granted leave to the Applicant after an application was filed seeking leave and supported by the affidavit of Kiran Lata Singh, filed on 8 November 2019. Order 41 Rule 9(2) permits an affidavit without being indorsed as required by the rule to be filed with the leave of Court;

b. I accept the submission of the Applicant's counsel that it was the *inter parte* notice of motion dated 27 February 2019, which was struck out by Alfred, J on 14 March 2019, with liberty to file afresh, and that the affidavit of detective constable Joape Qio was in support of both the *ex parte* as well as the *inter parte* motions filed by the Plaintiff. Section 19A(2) states that an application for a restraining order could be made *ex parte* in writing, and sets out the matters to be stated by an affidavit; this spells out the mode of instituting proceedings for a restraining order;

c. In terms of the Act, and understandably so, there is no requirement for the Director of Public Prosecutions to give an undertaking as to damages as may be necessary for a party seeking an injunction in civil proceedings; unlike the rules of the High Court which relate to contentious civil proceedings, the provisions of this Act were enacted for the purpose of dealing with property suspected to be tainted. As contended by the counsel for the Applicant, this application is for a restraining order in terms of the Act, and not an injunction under Order 29 of the High Court Rules.

d. The Applicant submitted that although the property is currently in police custody, the Act permits the Applicant to apply for the property to be restrained pending a Civil Forfeiture Application. The Applicant made it clear that in these proceedings, the Applicant did not seek a forfeiture of the property seized. The Respondent's contention was that the property –

consisting of cash and illicit drugs – did not belong to her. As the Respondent does not own the property, it is unlikely that any prejudice would be caused to her by restraining the suspected tainted property which is currently in the custody of the Police;

- e. The decisions in the High Court and the Court of Appeal in Director of Public Prosecutions v Apakuki Kauyaca Vitukawalu are not applicable to the present case. That action related to a forfeiture of the property, which is not the case in the proceedings before Court. In that action proceedings were instituted nearly two years after the property was seized, and the Police acted in breach of Section 31 (4) of the Act. The seizure of the property was held to be illegal as the search was done without a warrant. Such has not been the case in the matter before this Court, and timelines imposed by law have been observed by the Applicant. Counsel submitted that the application for a restraining order was brought to Court within 14 days as required by the Act; the property was seized on 1 February, 2019 and the application was made *ex-parte* on 8 February, 2019. As submitted by Ms. Konrote, the Respondent was served the Notice of Motion and affidavit for *inter parte* proceedings on the 20 May, 2019 and the matter was listed for mention on the 22nd of May, 2019, on which date the Respondents counsel appeared in Court. These submissions on the Applicant's compliance of time limits were not challenged by the Respondent's counsel at the hearing, though adverted to in his written submissions. In any event, non - compliance with notice requirements alone would not have invalidated these proceedings ⁵;
- f. It was submitted on behalf of the Respondent that the property in question did not belong to the Respondent, and that it was owned by her husband and her deceased mother in law. Property is defined to include money or any other property, real or personal, things in action or other intangible or incorporeal property whether located in Fiji or elsewhere and also includes a legal or equitable interest therein⁶. Ownership, when in dispute, is a matter that falls to be determined by investigation and

⁵ Order 2 Rule 1 of the High Court Rules

⁶ Section 3 of the Act

evidence, and the Act doesn't prohibit the restraining of tainted property where questions on ownership have not been fully resolved. It is the opinion of this Court that a contrary reading of the enactment on the restraining of tainted property would lead to an absurdity not intended by the legislature

g. Paragraph 15 of the affidavit of detective constable Shamal Shavneel Chand, filed on 18 June 2019, averred that two search warrants were obtained by the Police: the warrant under the Illicit Drugs Control Act was obtained by the Nasinu Magistrates Court while the warrant under the Crimes Act was obtained from the Suva Magistrate's Court.

13. The long title to the Act states that it is an Act to provide for pecuniary penalty of the proceeds of crime to deprive persons of the proceeds, benefits and properties derived from the commission of serious offences and to assist law enforcement authorities in tracing the proceeds, benefits and properties and for related matters. This and the generality of provisions in the Act make it clear that the purpose of the enactment is to deprive persons of the proceeds, benefits and properties derived from the commission of serious offences and to trace such proceeds.
14. The relevant portion of Section 35 (1) of the Act states that where the Director of Public Prosecutions applies to the Court for a restraining order against property under section 34(1) of the Act and the Court is satisfied that there are reasonable grounds for suspecting that the property is tainted property or terrorist property, the Court may make an order under subsection (1B) prohibiting the defendant or any person from disposing of, or dealing with, the property or interest in the property except in the manner specified in the order.
15. The Applicant was entitled to initiate these proceedings as permitted by a special law, the Proceeds of Crime Act 1997, and it was not necessary for the Applicant to initiate proceedings by Originating Summons; Order 5 Rule 3 of the High Court Rules states that Proceedings by which an application is to be made to the High Court must be begun by originating summons except where the rules or by or under *any Act* the application in question is expressly required or authorized to be made by some other means.

16. Having considered these factors, it is the opinion of this Court that the Applicant has made out a case for issuing a restraining order as prayed. At the conclusion of the hearing, counsel for the Respondent conceded that the grant of the restraining order at this stage would cause no great prejudice to the Respondent as the seized property is already in police custody. I am mindful that there is provision in the Act to revoke the restraining order⁷ if necessary, and for such order to cease effect⁸.

Orders

- A. A restraining order is issued in terms of the notice of motion dated 26 April 2019, over the sum of \$13,942.00 held by the Fiji Police Force at the exhibit room safe of the Raiwaqa Police Station.
- B. There is no order as to costs.

Delivered at Suva this 10th day of **December, 2019**



M. Javed Mansoor

Justice M. Javed Mansoor
Judge of the High Court

⁷ Section 43 of the Act

⁸ Section 44 of the Act