

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISIDCTION

Civil Action No.345 of 2018

BETWEEN : **SAKUISA BOLADAI WAQA** of Dakuinuku Village, Sawakasa Tailevu, Fiji, Retired suing in propria persona, as Head of Mataqali Ulugai, and in a representative capacity for and on behalf of other members of Mataqali Ulugai of Sawakasa, Tailevu, who qualify pursuant to the provisions of the iTaukei Land Trust Act (as amended) and as customary owners of iTaukei Land.

PLAINTIFF

AND : **BASIC INDUSTRIES PTE LIMITED**, of and/or its subsidiary Standard Concrete, its servant and/or agents, having its registered office at 4th Floor, Ra Marama House, Suva, Fiji.

DEFENDANT

Counsel : **Plaintiff : Mr. S. Valenitabua**
: **Defendant : Mr. A. Nathan**

Reasons for Mitigation and Punishment for Civil Contempt

INTRODUCTION

1. Plaintiff filed this application seeking committal of the Defendant. Defendant is a corporate body, it had admitted violation of court order which restrained all works of construction of an access road through a iTaukei Reserve (the Reserve) until an Environmental Impact Assessment (EIA) is carried out and road access is demarcated in a **surveyed plan** and last not least the **De –Reservation** of the area and obtaining a valid legal authority for road access, which is mandatory under the law. Defendant had neither obtained EIA nor a surveyed plan for the road access through the Reserve. There was no evidence of de-reservation of a road access and a legally valid authority to use such access and or construct such a road through the Reserve. Defendant was found guilty of the violation of court order hence guilty of contempt which has serious consequences not only to Plaintiff but for general public and also to land owners. Upon consideration of grounds for mitigation a fine of \$ 200,000 is imposed. Apart from this Defendant is ordered to carryout reforestation of

the entire area it had destroyed inside the Reserve illegally, at its own cost. This is to be carried out with the supervision by government entity responsible for reforestation and other entities such as iTaukei Land Trust Board. Plaintiff is ordered to make a refundable deposit of \$200,000 to Environment Trust Fund as security for reforestation.

Mitigation and Reasons

2. In the civil action filed by way of originating summons an interim injunction was granted against Defendant “from continuing carrying on and completing all access road work and construction currently being undertaken by the Defendant by itself, its servants and or agents and or independent contractors with in Mataqali Ulugai’s iTaukei Reserve land at Sawakasa, Tailevu until further order of the court”.
3. Apart from that an order was made not to use such a road if already constructed by the time the orders were made on 28.11.2018.
4. Considering the destruction and irreparable damage and imminent threat to eco system of the Reserve above orders were granted on *ex parte* basis and later matter was heard *inter partes* and the said orders were extended until final determination of the matter.
5. Final Orders were granted in the originating summons *inter alia* for
“First Defendant had obtained consent for de reservation, but so far it had not been de reserved and right of passage/access granted.”
6. So there was no misapprehension to first Defendant that it must obtain de reservation before construction or any development inside the Reserve.
7. Since the area where the road was constructed near to a water source and considering environmental issues of soil erosion or runoff of soil to the water source there was a need to assess the environmental factors before construction of a road in the Reserve, even if that are is de reserved.
8. Accordingly, the first Defendant was directed to obtain an EIA before continuing with the construction of road access through the Reserve and also to obtain de –reservation and also to obtain road access through a surveyed plan and legal documentation for the access. None of these things were done but a road was constructed through the Reserve to the creeks, illegally.
9. First Defendant in the mitigatory submissions stated,
 - a. First Defendant is deeply remorseful for its actions.
 - b. It as a clean record and exemplary record as a business.

- c. Provides some services to the country such as,
 - a. Manufacturer of ready-mix concrete. precast concrete products such as power poles, culverts and bridge components and other construction materials across the country.
- d. Established in 1984 and contributed to economy
- e. Prospects of expanding in its business in the future.
- f. Employs 716 employees as direct employment, as staff and ever expanding hence potential for more employment in future.
- g. The contempt was not willful, as there was an agreement to lease.
- h. Liased with second Defendant for issuance of lease and part of the requirement, was de reservation.
- i. Once the lease was granted thought that road can be completed.
- j. No previous convictions
- k. Stopped work subsequent to contempt proceedings.
- l. Sought a fine.

10. Plaintiff in the submission for mitigation stated

- a. Order 52 rule 8 of High Court Rules 1988(HCR) grants the court the power to penalize contemnor through a fine.
- b. There is no limitation for a fine to be imposed for a contempt.
- c. It is a common law offence.
- d. Aim of the contempt is to compel compliance.
- e. Principles are set out in *Shell E& P Ireland Ltd v McGrath* [2007] 1 IR 671
- f. Considerations for contempt in *R V Witt* (No 2) [2016] VSC 142.
- g. Contempt of Defendant had created a risk of the Reserve degradation.
- h. Affected rights of iTaukei and environmental harm
- i. Public perception.
- j. Gross misconduct by Defendant.
- k. Violated court orders and also iTaukei Lands Act.
- l. Court order was unambiguous.
- m. Intention was clear.
- n. Order was served to first Defendant's registered office.
- o. Arrogance of first Defendant in admission of the violation and also admission of the using of the road.
- p. Defendant's elevated hunger for profit over obeying law.
- q. Members of the Mataquali were powerless and purpose of the action was not realized.
- r. No apology was tendered.

- s. First Defendant is a subsidiary of Fijian Holding Ltd a \$340 asset worth, and 28 million operating revenue in 2018.
- t. Seeks heavy fine.
- u. In Re Application by AG of Fiji (decided on 22.1.2009) – penal code was considered hence Environmental Management Act 2005 applicable

FACTS

11. Plaintiff was found guilty of contempt of court upon a hearing on 13.9.2019 by judgment handed down on 15.10.2019.
12. Both parties were heard on mitigatory submissions through written submissions.
13. Factors to be considered in civil contempt of court are stated in an Australian Supreme Court decision of *The Queen v Michael Geoffrey Witt* (No2)[2016] VSC 142 (11.4.2016)

“93 There are a number of decisions of this Court and the Federal Court dealing with the imposition of penalties for contempt. From those cases, the following are the relevant considerations:

 - the nature and circumstances of the contempt (including the objective seriousness of the contempt);
 - the effect of the contempt on the administration of justice;
 - the contemnor’s culpability as judged by his or her state of mind and intention at the time of the contempt;
 - general and specific deterrence;
 - the previous good character of the contemnor (including the absence or presence of a prior conviction for contempt);
 - the contemnor’s personal circumstances and financial means;
 - whether the contemnor has exhibited contrition and made an apology;
 - denunciation of the contempt; and
 - the passage of time since the occurrence of the contempt.”
14. The above grounds are considered below
 - a. **Nature and circumstances of the contempt**
15. The contempt committed by Defendant is serious when considering objectively. It is so on several grounds. One major issue is it is an irreparable damage to fauna and flora of iTaukei Reserve. Plaintiff had obtained interim injunction when the road construction inside the Reserve had commences but before completion of that.

16. First Defendant had ample opportunity to mitigate its damage though they had commenced road construction in the Reserve without taking any measures to minimize further damage. Having considered economic realities, court had directed and allowed their commercial activity and construction of access to operational area, subject to an EIA and to consider best available option for construction of the road.
17. It is noted EIA obtained prior to court order had not considered any road access through the Reserve. This was the reason for court order to obtain a separate EIA for the construction of the access through the Reserve.
18. This is to consider, minimal destruction to the Reserve and environment surrounding the water source. The minimum pollution to the water resource from runoff of soil from a newly constructed road and other environmental factors needed to be considered in EIA process to mitigate the damage already done.
19. First Defendant had not done an EIA for the road construction inside the Reserve, but the road was constructed.
20. Apart from that court had directed to obtain a surveyed plan for the road and then to obtain de reservation of that road access. This was also not done. This itself makes the construction of road in the Reserve illegal.
21. What first Defendant had done is complete disregard of the court order and to conduct the illegal road construction as it intended to do prior to the interim restraining orders were granted.

b. The Effect of the Contempt on the Administration of Justice

22. The conduct of first Defendant had seriously affected Administration of Justice as it had disregarded orders of court and if this is allowed, court orders will not serve any purpose. This is aggravated as this was witnessed by all the iTaukei Land owners who were vulnerable and underprivileged and also economically weak, compared with a corporate body such as First Defendant.
23. The destruction of environment in this manner when there is a court order to mitigate the impact has wider public interest.
24. First Defendant had financial resources whereas Plaintiffs were land owners who are helpless and their only redress was the court orders.

c. The Contemnor's culpability as judged by his or her state of mind and intention at the time of the contempt.

25. I cannot think of any intention other than economic consideration by Defendant, at the expense of land owners and also entire eco system. Defendant who had financial strength of a premier Holding company should be aware of CSR (Corporate Social Responsibility) towards mitigation of Climate Change when doing business in an island state. This is more when development was inside the Reserve, and court orders made.
26. The orders of the court did not stop the economic activities of first Defendant who had contributed to the economy through employment etc. It would not cost substantially, for them to obtain an EIA for the road access inside the Reserve and also to demarcate it in a surveyed plan, and to obtain de reservation.
27. Contemnor was aware of the orders of the court and they were clear as to what it had to do before completion of road construction. Failure to obtain EIA was a fault of first Defendant that can have serious impact on the Reserve including water way.

d. General and Specific Deterrence

28. If the contempt is not dealt there is loss of public confidence in the justice system hence there is general deterrence needed.
29. Another factor for general deterrence is the requirement for companies to safeguard environment and not to over exploit the environment for pure economic gain or maximization of economic benefit.
30. In relation to specific deterrence, the fact that first Defendant had a clean record so far is important, but that should not be considered as indication as to its future behaviour.
31. If such violations are not dealt with a fine and or orders for restoration to mitigate the damage, this can create a bad precedence.

e. Good Character of the Contemnor

32. First Defendant had not committed previous contempt of court. It was established as subsidiary of premier Holding Company in Fiji in 1984.
33. It had contributed to the economy through employment. These factors were considered in ordering a fine and restoration orders. Contribution to economy cannot override duty towards sustainable environment.

f. Personal circumstances and financial means

34. Defendant had indicated that their business had provided employment to over 700 and it is growing with potential for further employment. This show the financial status.
35. First Defendant is also a subsidiary of a reputed Holding Company, hence there is financial strength to pay an appropriate fine.

Denunciation of the Contempt

36. It is deplorable that a reputed company such as first Defendant, which is a subsidiary of a premier Holding company in Fiji, disregarded court orders and or the Environment in this manner.
37. Business Ethics and good practice to safeguard environment should be corner stone for good corporate citizen. Small and newcomer to business look up to established corporate citizens to set the bench marks in. Unfortunately, first Defendant had prioritized economic considerations over an order of the court, and or environment.
38. It is a requirement to set proper benchmarks for environmental protection, by well-known companies such as first Defendant.

Apology

39. Even after completion of work for access road inside the Reserve first Defendant had
 - a. Not obtained and EIA regarding the road inside the Reserve as ordered by court order.
 - b. Not obtained a surveyed plan for the said road inside the Reserve.
 - c. Not obtained a de-reservation of the area under the road in Reserve.
 - d. Not obtained a lease for the said area in the Reserve.
40. Defendant must know that agreement to lease cannot circumvent specific orders of the court. First Defendant had not submitted a written apology even after the court found it guilty of contempt, though in the written submission stated that it was remorseful.
41. There was no evidence of any remorse, and the least it could have done was to carry out remedial work to mitigate damage it had done in a pristine iTaukei Reserve close to a water stream in a catchment area.
42. The contempt committed by first Defendant is not only a violation of court order that affect two parties but it has wider public interest due to environmental destruction.

43. Justice Hickie in *In Re Application by Attorney General of Fiji* (decided on 22.1.2009) used a statutory penal provisions, as a guide, though it was not directly relevant to punishment of the committal.
44. Punishments for Environmental offences are found in Environmental Management Act 2005. It is used as guide.
45. Since the contempt committed by first Defendant has implication on the Environment Management Act 2005 is taken as a guide and specifically section 47 which states, what are specific and additional orders court can make. It reads,

"47.-(1) The court, when convicting a person for an offence under this Act and having regard to the nature of the offence and the circumstances surrounding its commission, may, **in addition to any penalty imposed, make an order-**

(a) prohibiting the person from doing any act or engaging in any activity or undertaking that may result in the continuation or repetition of the offence;

(b) ordering work to stop temporarily or permanently, on any activity or undertaking on a development proposal;

(c) **ordering the restoration of the area on which any activity or undertaking** on a development proposal is taking place, to as near to its original condition with the cost to be borne by the proponent;

(d) **carrying out of improvement or remediation work** on the area **with the cost to be borne by the proponent;**

(e) directing the person to pay into the Fund costs and other expenses associated with any inspection, audit or investigation undertaken in respect of the offence;

(f) **directing the person to pay into the Fund a refundable security** for costs to ensure compliance with an order made under this section;

(g) directing the seizure and forfeiture of any vessel, aircraft or thing used in the commission of an offence; or

(h) requiring the person to comply with any other condition the court considers appropriate in the circumstances.

(2) If a person is convicted of an offence under this Act, the court may, when sentencing the offender and on the application by a person aggrieved, order the convicted person to pay to the person aggrieved-

(a) compensation for loss or damage to property or income proved to have been suffered by that person as a result of the commission of the offence; or

(b) the cost of any preventative or remedial action proved to have been reasonably taken or caused to be taken by that person as a result of the act or omission that constituted the offence.

(3) An order under paragraph (a) or (b) of subsection (1) is enforceable as if it were an injunction.

(4) An order under this section relating to payment of money is enforceable as if it were a judgment debt and recoverable in a court.

(5) If a person fails to comply with a court order made under this section relating to restoration, improvement or remedial action of an area, the Department may undertake the restoration, improvement or remediation of the area, and the cost shall become a debt recoverable in the court (including using the security for costs deposited in the Fund).”

(emphasis added)

46. The road was constructed in the Reserve without the said part being de reserved and a lease was obtained as opposed to an agreement to lease. Since EIA was not obtained it is not clear whether this road construction’s impact on the Reserve’s eco system and its impact on fauna and flora. This is a serious violation than an unauthorized development. (see Section 43 of the Environment Management Act 2005 as a guide)
47. A fine of \$200,000 is imposed on the first Defendant considering all the circumstances first Defendant is granted one month to pay it.
48. Apart from that First Defendant is directed to take following remedial work
 - a. Re forestation of entire area in the Resserve, where a road was constructed in violation of court orders and other relevant law with the concurrence of second Defendant and relevant government Ministry and or organization.
 - b. First Defendant to obtain a proper plan for reforestation or instructions from relevant government entity/Ministry of Forestry that is entrusted with the subject of reforestation and also time line for fulfilment of specific goals and or indicators.
 - c. All the cost of reforestation to be borne by first Defendant.
 - d. Fort monitoring and evaluation of the above purpose and to ensure compliance a refundable deposit of \$200,000 is to be made to Environmental Trust Fund established under Section 55 of Environmental Management Act 2005.

CONCLUSION

49. Considering above grounds the contempt of first Defendant is serious. It had access to legal practitioners and the violation of the court orders were clear. The environmental damage could have been mitigated though a proper EIA which first Defendant did not obtain. It is clear that financial gains were prioritized over safeguard of environment. First Defendant is ordered a fine of \$200,000. This fine may be recoverable as judgment debt if failed to pay. Apart from that a refundable deposit of \$200,000 is to be made to Environmental Trust Fund as a security for orders made for reforestation as stated in the judgment. The refund of the said sum to be made after satisfactory completion of reforestation upon submission of report from relevant government entity or Ministry of Forestry, and also from an order of the court. Delay is regretted.

FINAL ORDERS

- a. First Defendant is ordered to pay a fine of \$200,000. A period of one month is granted for payment.
- b. Restoration of entire area where a road was constructed inside iTaukei Reserve through reforestation at its own cost with a proper plan for reforestation from the government entity/entities responsible for reforestation/Ministry of Forestry. This work needs to start within a reasonable time after obtaining a plan for reforestation from Ministry of Forestry, by first Defendant.
- c. A refundable deposit of \$200,000 to be paid by first Defendant to Environmental Trust Fund established under Section 55 of Environmental Management Act 2005 as a security for the reforestation in terms of the above order. For this one month is granted.
- d. The above deposit to be released by the order of the court upon satisfactory completion of reforestation, to the court.

Dated at Suva this 26th day of August, 2022.



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Justice Deepthi Amaratunga
High Court, Suva