

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action HBM No. 138 of 2013

BETWEEN : **THE DIRECTOR OF PUBLIC PROSECUTIONS**

APPLICANT

AND : **APAKUKI KAUYACA VITUKAWALU**

DEFENDANT

BEFORE : **Hon. Justice Kamal Kumar**

COUNSEL : Ms J. Prasad for the Applicant
Mr K. Maisamoa for the Defendant

DATE OF JUDGMENT : 14 April 2016

JUDGMENT

Introduction

1. On 12 December 2013, Applicant filed Originating Summons pursuant to Section 19C to 19E of Proceeds of Crimes Act 1997 seeking Civil forfeiture Orders against the items listed in schedule attached to the Originating

Summons and in custody of the Police Department, which Summons was returnable on 21 February 2014.

2. On 21 February 2014, Applicant sought time to serve the originating Summons on the Defendant and as such this action was adjourned to 21 March 2014, when Defendant was present in Court with his Counsel.
3. On the same day, Defendant was directed to file Affidavit in Opposition by 11 April 2014, whilst Plaintiff was directed to file Affidavit in Reply by 2 May 2014, and this matter was adjourned to 16 May 2014 at 9.30, am for mention only.
4. Parties complied with directive for filing of Affidavits and on 16 May 2014, this matter was adjourned to 3 July 2014 at 2.30pm, for hearing, when parties were directed to file and serve Submissions by 1 July 2014.
5. On 3 July 2014, Counsel for the parties made Oral Submissions with nothing more than what was submitted in the Submissions filed in Court.
6. Following Affidavits were filed on behalf of the parties:-

For Applicant

- (i) Affidavit in Support of Aiyaz Ali sworn on 2 November 2013 (**“Ali’s 1st Affidavit”**)
- (ii) Affidavit in Response of Aiyaz Ali sworn on 30 April 2014 (**“Ali’s 2nd Affidavit”**)

For Defendant

Defendant’s Affidavit in Opposition sworn on 3 April 2014.

Background Facts

7. As part of **“Operations Cavouraki”** Police Officers on 3 January 2012, raided Defendant’s farm in Kadavu after the Police Department received information that farmers in Kadavu were cultivating Marijuana an illicit drug botanically known as “Cannabis Sativa” (paragraph 6 of Ali’s 1st Affidavit).
8. During the investigation the Police Officers seized Marijuana (154 plants and 65 dried plants) and items listed in the schedule attached to the Originating Summons.

9. Defendant has been charged under the Illicit Drugs Act which charge is subject to Magistrates Court Case No 46 of 2012.
10. Police Department also investigated about the items that were allegedly acquired by the Defendant from proceed of sale of marijuana, under Proceeds of Crime Act 1997.

Preliminary Issue

11. This Court notes the Applicant's Affidavit states deponent's name as **"Inspector Aiyaz Ali"**.
12. The deponent should not use the title to their Occupation in front of their name.
13. For example in this instance, Inspector Aiyaz Ali should have stated as follows:-

"I Aiyaz Ali of Suva Inspector and Senior Investigator of Criminal Investigation Department make an oath and say as follows:-"

I also note that the date Affidavit in Support is sworn is stated as "2 day of November 2013" when annexure are dated "2 day of December 2013".

It appears the Commissioner for Oath witnessing the Affidavit overlooked to change the month from November (which was typed in) to December.

14. It is with great regret, I note that Ali's 1st Affidavit and Affidavit filed by the Defendant does not comply with Order 41 Rule 9(2) of the High Court Rules.
15. Current Chief Justice, His Lordship Justice Gates and other Judges of this Court have highlighted time and again the failure by parties in particular their Solicitors to comply with order 41 Rule 9(2) of the High Court Rules 1988.

Order 41 Rule 9(2) provides as follows:

"Every Affidavit must be endorsed with a note showing on whose behalf it is filed and the dates of swearing and filing and an Affidavit which is not so indorsed may not be filed or used without the leave of the Court."

16. In the matter of Kim Industries Ltd. (Unreported) Lautoka High Court Winding – Up Action No. HBF0036 of 1999L, his Lordship Justice Gates (as then he was), the Current Chief Justice stated as follows:

"If any Affidavit bears an irregularity in its form such as the

omission of the endorsement note, leave must be obtained from the Court for it to be filed or used..." (page 3)

17. Similar comments were made by his Lordship in **State v H.E. The President & Ors.** (unreported) Lautoka High Court Judicial Review No. HBJ007 / 2000L 12 October 2000. **Chandrika Prasad v Republic of Fiji** (unreported) Lautoka High Court Action No. HBC0217 / 2000L [Ruling on Stay Application – 20 December 2000, Ruling on Joinder Application – 17 January 2001].
18. In **Jokapeci Koroï & Ors. v Commissioner of Inland Revenue & Anor.** (unreported) Lautoka High Court Action No. HBC179 / 2001L (24 August 2001) his Lordship Justice Gates (as then he was) and Current Chief Justice removed two (2) Affidavits filed on behalf of the Defendants from the Court file for failure to comply with Order 41 Rule 9 (2) and ordered the Defendants to file the said Affidavit with endorsement in compliance with Order 41 Rule 9(2) within 14 days. His Lordship at page 4 of the Judgment stated as follows:

"These mistakes are of little consequence to the actual litigation but since the setting of the format of an Affidavit, vehicle for the presentation of sufficient evidence to the Court, is a relatively simple exercise, these errors should no longer persist."

19. In view of the lapse of time since the items were seized, leave is granted for Applicant and Defendant to rely on the Affidavits filed. However the litigants and their counsel should take note of the fact that failure to comply with Order 41 Rule 9(2) and failure to obtain Court's leave to utilize these Affidavits could result in the Affidavits being removed from the court file which of course will be fatal to their client's case.

Application for Forfeiture Order

20. The relevant provisions of Proceed of Crimes Act 1997 (as amended) ("**POCA**") are Section 19C, 19D and 19E which provide as follows:-

"19C. The Director of Public Prosecutions may apply to a Court for an order forfeiting to the State all or any of the property that is tainted property.

19D. Where the Director of Public Prosecutions applies under section 19C for a forfeiture order-

- (a) *the Director of Public Prosecutions must 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 in respect of which the application is being made;*
- (b) *any person who claims an interest in the property may appear and produce evidence at the hearing of the application; and*
- (c) *the Court may, at any time before the final determination of the application, direct the Director of Public Prosecutions to-*
 - (i) *give notice of the application to any person who, in the opinion of the Court, appears to have an interest in the property;*
 - (ii) *publish in the Gazette or a newspaper published and circulating in Fiji, a notice of the application.*

Non-conviction based forfeiture order for tainted property

- 19E.-(1) Subject to subsection (2), where the Director of Public Prosecutions applies to the Court for an order under this section and the Court is satisfied on a balance of probabilities that the property is tainted property, the Court may order that the property, or such of the property as is specified by the Court in the order, be forfeited to the State.***
- (2) Where a person claiming an interest in property to which an application relates satisfies the Court that the person-***
- (a) has an interest in the property;***
 - (b) did not acquire the interest in the property as a result of any serious offence carried out by the person and-***
 - (i) had the interest before any serious offence occurred; or***
 - (ii) acquired the interest for fair value after the serious offence occurred and did not know or could not reasonably have known at the time of the acquisition that the property was tainted property,***
- the Court shall order that the interest shall not be affected by the forfeiture order, and the Court shall declare the nature and extent of the interest in question.***
- (3) The Court may, when it makes a forfeiture order or at any time thereafter, make any other orders that it considers appropriate, including orders for and with respect to facilitating the transfer of property.***
- (4) The validity of an order under subsection (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated.***
- (5) Sections 7, 8, 11(2), (3), (4) and (5), 12, 13, 16 and 17 shall apply with the appropriate modifications as are necessary to an application for a forfeiture order under this section.”***

21. Proceed of Crime is defined in section 3 and 4(1)(A) of POCA as follows:-

**“(a) proceeds of a serious offence; or
(b) any property that is derived or realised, directly or indirectly, by any person from acts or omissions that occurred outside Fiji and would, if the acts or omissions had occurred in Fiji, have constituted a serious offence.”**

**“(a) wholly or partly derived or realised directly or indirectly by any person from the commission of a serious offence or a foreign serious offence;
(b) wholly or partly derived or realized from a disposal or other dealing with proceeds of a serious offence or a foreign serious offence; or
(c) wholly or partly acquired proceeds of a serious offence or a foreign serious offence,
and includes, on a proportional basis, property into which any property derived or realised directly from the serious offence or foreign serious offence is later converted, transformed or intermingled, and any income, capital or other economic gains derived or realised from the property at any time after the offence.”**

22. Tainted property is defined in section 3 of POCA as follows:-

**“(a) property used in, or in connection with, the commission of the offence; or
(b) proceeds of crime.”**

23. This Court has discretion to Order that tainted property be forfeited to the State if the Court is “satisfied on balance of probabilities that the property is tainted”.

24. The Applicant relied on the case of **The Director of Public Prosecutions v. Anand Kumar Prasad & Ors.** Lautoka High Court Civil Action No. 03 of 2010 and **Mishra v. The Director of Public Prosecution** [2012] Civil Appeal No. ABU0050 of 2010 (High Court of Lautoka Civil Action No. HBM 03 of 2010).

25. Whilst in Lautoka High Court Civil Action No. HBM 03 of 2010 his Lordship Justice Madigan (as he then was) made forfeiture Orders in respect to tainted properties subject to that action, with all due respect the Court created bit of confusion in respect to the standard of proof to establish that the property is tainted.

26. At paragraph 30 of the Judgment his Lordship stated as follows:-

“I am satisfied on the balance of probabilities that the property was purchased largely with tainted money and as a consequence it is

tainted property, no matter who the registered owner. I order the land to be forfeited.

27. But then at paragraph 31 of the said Judgment his Lordship stated as follows:-

“In the premises and being satisfied beyond reasonable doubt that all of the subject property was obtained by illegal activities; pursuant to section 19C of the Proceeds of Crime (Amendment) Act 2004 ...”

28. It appears that what was said at paragraph 31 of the Judgment in Lautoka High Court Civil Action No. HBM 03 of 2010 was a mistake and not meant to be so.

Also section 19C is **not** section 19C of **Proceeds of Crime (Amendment) Act 2004** but Section 19C of POCA which is inserted pursuant to section 11 of Proceeds of Crime (Amendment) Act 2004.

29. To clear any doubt this Court categorically states that the standard of proof that is required to prove that property is tainted property is civil standard and that is on balance of probabilities (s19 of POCA).

30. This view is supported by what was said by Fiji Court of Appeal in Civil Appeal No. ABU0050 of 2010 when the Court stated as follows:-

“Tainted means proceeds of an offence. When such an application is made and the court is satisfied on a balance of probability that the property is tainted property, the court may order that the property be forfeited to the State.”

31. Defendant in his Submissions raised seven issues which are as follows:-

- (1) Who should prove that seized properties are proceeds of crime;*
- (2) Are seized properties proceed of crime;*
- (3) Does Police Officer have power to seize properties without search warrant;*
- (4) Are the owners of the properties have right to receive to take back his or her properties seized by Police without search warrant;*
- (5) What happens to properties seized by authority under search warrant;*
- (6) Is the continued detention of the seized properties by the Police reasonable;*
- (7) Are the seized properties used as evidence or an exhibit to the charge or offence.”*

32. I have re-numbered the issue raised in Defendant’s Submission in the Order I think is appropriate.

33. I have indicated earlier that it is for the Applicant, and in this instant the Director of Public Prosecution to prove the properties listed in the Schedule attached to the Originating Summons are proceeds of crime.
34. After analysing the Affidavit evidence and Submissions filed I hold that the Applicant proved on balance of probabilities that items listed in Schedule attached to the Originating Summons are proceeds of crime and as such tainted properties.

Whether this Court can make an Order for forfeiture of the properties

35. Section 28 and 30 of POCA provide as follows:-

“28. Warrant to search premises etc. for tainted property

(1) A police officer may apply to a Magistrate for a warrant to search premises for tainted property or terrorist property or property suspected of being tainted property or terrorist property in the same way as a police officer may apply for the issue of a search warrant under Part IV of the Criminal Procedure Code.

(1)(A) If the circumstances are such that an application on oath is not reasonably practicable, an application initially made-

(a) orally, including by telephone or

(b) by electronic transmission;

and followed within 48 hours by the application made on oath, is deemed to be an application under subsection (1).

(2) Where an application is made under subsection (1), the magistrate may, subject to conditions, issue a search warrant under Part IV of the Criminal Procedure Code and, subject to this Division, the warrant may be executed in the same manner as if it had been issued under Part IV of the Criminal Procedure Code.”

“30. In the course of a search under a warrant issued under section 28 a police officer may seize:

(a) any property that the police officer believes, on reasonable grounds, to be tainted property or terrorist property in relation to any serious offence, or

(b) any thing that the police officer believes, on reasonable grounds, will afford evidence as to the commission of a criminal offence, if the police officer believes, on reasonable grounds, that it is necessary to seize that property or thing in order to prevent its concealment, loss or destruction, or its use in committing, continuing or repeating the offence or any other offence.”

36. Criminal Procedure Code was repealed by Criminal Procedure Decree 2009 (Decree No. 43 of 2009) (“CPD”). Sections 98 and 99 of CPD provides as follows:-

“s98.(1) Where it is proved on oath to a magistrate or a justice of the peace that in fact or according to reasonable suspicion anything relevant to the commission of an offence is in any building, ship, vehicle, box, receptacle or place, the magistrate or justice of the peace may by a search warrant authorise a police officer or other person named in it to search the building, ship, carriage, box, receptacle or place named or described in the warrant.

(2) If, during the authorised search-

(a) anything searched for is found; or

(b) any other thing reasonably suspected as having been stolen or unlawfully obtained is found -

the police officer or other person authorised by the search warrant may seize it and take it to the court issuing the warrant, or some other court, to be dealt with according to law.

s99. Every search warrant may be issued on any day (including Sunday) and may be executed between the hours of sunrise and sunset, but the magistrate or justice of the peace may by the warrant, specifically authorise the police officer or other person to whom it is addressed to execute it at any hour.”

37. In Ali's 1st Affidavit he states that together with investigation into the alleged offence under Illicit Drugs Act, the Police Department also investigated about the properties of the Defendant to find out if those properties were tainted.
38. It is not in dispute, that the Police Officers seized the properties listed in Schedule attached to the Originating Summons from the Defendant.
39. However, the Applicant has not provided any evidence to show that the Police Officers had obtained search warrant to seize the properties listed in the Schedule attached to the Originating Summons under Section 28 of POCA.
40. In this time and age, we have such advanced technology and as such there was nothing stopping the Police Officers concerned to obtain a search warrant.
41. This is supported by the fact that s28(1)(A) was inserted by Proceeds of Crime (Amendment) Act 2004, which permits Police Officer to make application for search warrant by **phone or electronic transmission**.
42. I therefore hold that the seizure of the properties listed in the Schedule attached to the Originating Summons was without a search warrant and in breach of Section 28 of POCA.
43. Section 31(4) of POCA provides as follows:-

(4) Where:

(a) property has been seized under this Division, otherwise than because it may afford evidence as to the commission of an offence; and

(b) no forfeiture order has been made against the property within the period of 14 days after the property was seized and the property is in the possession of the Commissioner at the end of that period,

the Commissioner shall, subject to subsections (5) and (6), arrange for the property to be returned to the person from whose possession it was seized as soon as practicable after the end of that period.

44. The properties listed in the Schedule attached to the Originating Summons were seized on or about 9 February 2012.

45. In terms of s31(4) the Forfeiture Order was to be made on or about 23 February 2012.
46. It is not in dispute that no forfeiture Order was made as the Application for Forfeiture Order in this action was filed on 12 December 2013, and therefore the items listed in the Schedule attached to the Originating Summons were held by Police Department in breach of section 31(4) and therefore illegally.
47. The Applicant cannot expect this Court or any Court to make Orders in respect to items that were seized illegally (breach of sections 28 and 30 of POCA) and held by Police Department illegally (breach of section 31(4) of POCA.
48. There is no evidence to suggest that the properties listed in the schedule attached to the Originating Summons would afford evidence as to commission of the offence because the only property that would afford evidence to the offence under Illicit Drugs Act is the Marijuana Plants seized by the Police Officers.
49. I have no hesitation but to dismiss and strike out the Originating Summons dated 11 December 2013.
50. Before I conclude I would like to put on record that the sum of \$3,000.00 seized from the Defendant by the Police Officers does not form part of the list attached to the Originating Summons. The Applicant at paragraph 8 of Ali's 2nd Affidavit states as follows:-
- “THAT in response to paragraph 16, I repeat the contents of paragraph 4. With regards to the \$3,000.00 I confirm the same was seized by Police but this is not subject to the current application for forfeiture.”***
51. No explanation has been given by the Applicant as to why the sum of \$3,000.00 seized from the Defendant does not form part of the item in the Schedule attached to the Originating Summons.

Costs


52. I have taken into consideration that the Defendant file Affidavit and Submissions and attended the hearing.

Order

53. I make following Orders:-

- (i) Originating Summons dated 11 December 2013, and filed on 12 December 2013, is dismissed and struck out;
- (ii) Applicant do arrange release of all the items listed in Schedule attached to the Originating Summons to the Defendant forthwith
- (iii) Applicant do pay Defendants costs assessed in the sum of \$1,500.00.




K. Kumar
JUDGE

At Suva
14 April 2016

Office of the Director of Public Prosecutions for the Applicant
Vakaloloma & Associates for the Defendant