

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action HBC No: 64 of 2016

IN THE MATTER of an application by
the Applicant under Section 44(1) of
the Constitution of the Republic of Fiji

And

IN THE MATTER of Section 72A of the
Value Added Tax Decree 1991

And

IN THE MATTER of the Value Added
Tax (Infringement) Regulations 2016

BETWEEN : **DATA BUREAU LIMITED**
Applicant

AND : **FIJI REVENUE AND CUSTOMS AUTHORITY**
First Respondent

AND : **MINISTER OF FINANCE**
Second Respondent

AND : **THE ATTORNEY GENERAL OF FIJI**
Third Respondent

Coram : The Hon. Mr Justice David Alfred
Counsel : Mr W Clarke for the Applicant
: Ms T Rayawa for the First Respondent
: Ms R Pranjivan for the Second and Third Respondents

Date of Hearing : 26 July 2016
Date of Judgment : 19 August 2016

JUDGMENT

1. **This matter raises a question of constitutional significance. It is this. The High Court is being asked to declare provisions of a Decree to be unconstitutional, so that a criminal prosecution of a taxpayer in a Magistrates' Court cannot proceed.**

2. This is the Applicant's Notice of Originating Motion (Motion) seeking the following reliefs, *viz*:
 - (i) **A DECLARATION** that section 72A of the Value Added Tax Decree 1991 contravenes:
 - (a) Section 14(2)(a);
 - (b) Section 15(1); and/or
 - (c) Section 16(1)(a)of the Constitution; and/or
 - (d) The separation of powers enshrined in the Constitution, and is therefore invalid.

 - (ii) A **DECLARATION** that regulations 3 and 4 and Schedule 2 of the Value Added Tax (Infringement) Regulations contravene:
 - (a) Section 14(2)(a);
 - (b) Section 15(1);
 - (c) Section 16(1)(a)of the Constitution; and/or
 - (d) The separation of powers enshrined in the Constitution.

 - (iii) **AN ORDER** all proceedings instituted and any other recovery actions that may be brought by the First Respondent against the Applicant brought in relation to section 72A of the VAT Decree 1991 (Decree) and

Value Added Tax (Infringement) Regulations (Regulations) be stayed until further order; and

(iv) **ANY OTHER ORDER** that this Honourable Court deems appropriate.

And that the costs of and incidental to this application be paid by the Respondents.

3. In this Judgment, sections refer to sections of the Decree and regulations refer to the Regulations.
4. The Motion goes on to state the several grounds for the application, which is made pursuant to section 44(1) of the Constitution and Rule 3(1) of the High Court (Constitutional Redress) Rules 2015 and the inherent jurisdiction of the High Court.
5. The Affidavit in Support of the Motion is by one, Peter Dixon (Dixon), who deposes he is a director of the Applicant, and is duly authorised to depose this affidavit on its behalf and is very familiar with the pertinent issues.
6. Mr Dixon sets out the nub of this matter as follows:
 - (a) By Act No. 22 of 2015, the rate of value added tax (VAT) was reduced to 9% to take effect from 1 January 2016.
 - (b) The Applicant overlooked to incorporate the reduction of VAT to its Walk In credit report applications. This oversight was completely inadvertent.
 - (c) He was advised by Ms Delores Elliot (Elliot) the General Manager of the Applicant that it was brought to her attention on 13 January 2016 that the VAT charged by the Applicant for Walk Ins was incorrect, whereupon she took immediate steps to remedy the situation.
 - (d) He was further advised by Ms Elliot that when she was questioned, under caution, by officers of the First Respondent (FRCA) at an interview conducted at the Applicant's premises, as to why the Applicant had not reduced its price by 6%, she had replied it was an oversight. Ms Elliot

had consulted its solicitors, Howards, and a solicitor from that firm, Ms P Low had been present during the interview.

- (e) The Applicant was served with a VAT Infringement Notice (Notice) ordering it to pay a fine of \$25,000.00 by 11 February 2016 (the Fine).
 - (f) Ms Elliot was advised by Ms P Low of Howards that the Legal Section of FRCA had informed the latter that they could not withdraw the Notice, that it did not matter what the amount was, and it did not matter that it was inadvertent: the Applicant must pay the Fine.
7. Mr Dixon went on to depose to the Applicant's position as follows:
- (a) The Applicant did not intentionally breach section 72A. It was an administrative mix up.
 - (b) The Notice and the Fine are unconscionable because it is disproportionate to the inadvertent and minor nature of the Applicant's purported "breach" of section 72A.
 - (c) The Applicant believes it has effectively been found guilty by FRCA, and takes exception to the fact its only options are to pay the Fine or face a charge for not paying it.
 - (d) The Applicant is aggrieved that when clarification was sought from FRCA, the advice was initially wrong.
8. The First Respondent (FRCA) in its Affidavit in Response deposed by Seveci Rokotakala the Acting National Manager Audit Compliance, Tax Division responded to the contents of the Affidavit deposed by Mr Dixon. A summary of FRCA's contentions in its Affidavit is as follows:
- (a) The Applicant has given a sworn confession that it failed to reduce the fees charged for "Walk Ins."
 - (b) Ms P Low was informed by officers of the 1st Respondent's Legal Department that if they wished to challenge the Notice they had the opportunity to do so when the matter will be called in the Magistrates' Court.
 - (c) The Notice of Objection pursuant to section 16 of the Tax Administration Decree is ill conceived. There is an alternate adequate remedy available

to the Applicant before the same Magistrate who is currently hearing the case.

- (d) The 1st Respondent is not a law maker but an institution which administers and enforces the law. Section 72A does not give any discretion to the CEO FRCA on the formula to adopt. The formula is set out in the rules which have to be followed. If the Applicant wants the rule to be changed, then it should go to Parliament.
 - (e) The advice given by the officers of FRCA in November 2015 is irrelevant to the charges issued in January 2016.
 - (f) The relief sought is objected to as there is an alternative adequate remedy available to be Applicant through the Magistrates' Court. The stay sought is also objected to in the interests of justice and as a matter of policy.
9. At the outset of the hearing, Counsel for the Applicant informed the Court that he was abandoning reliance on section 16(1)(a) of the Constitution (proportionate executive or administrative action) and only relying on section 14(2) and section 15 thereof. He submitted that he was relying on the following:
- (a) Presumption of innocence.
 - (b) The right to a fair trial.
 - (c) The separation of powers.
10. Counsel submitted that section 72A and the Regulations are inconsistent with the provisions of the Constitution. He relied on the decision of the House of Lords in: *Imperial Tobacco Ltd and another v Attorney General* [1980] 1 All ER 866. The Applicant was not asking for a declaration that the charges were not proven but that the VAT Regulations are unconstitutional. Further, Counsel contended that when one reaches the court under section 72(4), one is already guilty.
11. The Counsel for FRCA then submitted. She said the High Court does not grant relief if an adequate alternative remedy is available which is in the Magistrates' Court under section 72A.

12. Counsel further submitted the intent of the Decree was that a reduced VAT should be reflected by a reduced price. Here the Applicant did not reduce the price and this the Applicant admitted.
13. She referred to Exhibit PD3 of the Affidavit of Mr Dixon. This was the Record of Interview of Delores Elliot, the General Manager of the Applicant, duly signed by her. In response to Question 13 whether she was aware of the 2016 Budget announcement that VAT would be reduced, Ms Elliot answered “off course, we have already taken measures to do.”
In response to Question 14 why the VAT reduction did not cause the price of goods to go down, Ms Elliot answered “oversight, it was an oversight.”
14. Counsel continued that the VAT Notice was issued but the Applicant did not pay the Fine of \$25,000.00 within 21 days. The Applicant had the right to appear in court and to be represented by a barrister.
15. Counsel for the 2nd and 3rd Respondents now submitted. She said the rationale for reversing the onus is to ensure the money goes into the pocket of the public.
16. She would adopt the FRCA’s Counsel’s argument regarding the availability of the alternative remedy. She concluded by referring to some authorities and to section 3(1) and (2) of the Constitution.
17. Counsel for the Applicant replied.
18. At the conclusion of the hearing, I said I would take time for consideration. In the course of reaching my decision I have perused:
 - (1) The Notice of Originating Motion.
 - (2) The Affidavit in Support of Originating Motion.
 - (3) The Affidavit in Reply of the 1st Respondent.
 - (4) The Affidavit in Response of the 2nd and 3rd Respondents.
 - (5) The Written submission of the Applicant.

- (6) The Written Submission of the 1st Respondent.
 - (7) The Written Submission of the 2nd and 3rd Respondents.
 - (8) The Applicant's Bundle of Authorities.
 - (9) The Value Added Tax Decree 1991 (updated to Act 22 of 2015).
 - (10) Value Added Tax (Infringement) Regulations 2016.
19. I now proceed to deliver my judgment. The nub of the Applicant's case is that section 72A of the Decree and the Regulations are unconstitutional. To enable me to decide this, I am required to consider the relevant sections of the Constitution, *viz* sections 14(2)(a) and 15(1). Then I have to consider whether the above sections and the Regulations contravene the separation of powers doctrine embedded in the Constitution and are therefore invalid.
20. Section 14 (2) reads "Every person charged with an offence has the right (a) to be presumed innocent until proven guilty according to law; Section 15(1) reads "Every person charged with an offence has the right to a fair trial before a court of law."
21. What then is the position of a Constitution where it states, as here in Section 2(1) that "This Constitution is the supreme law of the State".
22. In this, the Fiji Constitution emulates the Constitutions of the United States of America, Australia, Malaysia and South Africa, amongst other nations. To my mind the supremacy of the Constitution means it has primacy and superiority over all other laws, no matter what is the origin of that other law or system of laws.
23. For this judgment I do not need to take on board, section 3(2) of the Constitution which reads:
"If a law appears to be inconsistent with a provision of this Constitution, the court must adopt a reasonable interpretation of that law that is consistent with the provisions of the Constitution over an interpretation that is inconsistent with this Constitution."

24. The starting point then is the relevant provision of Chapter 2 Bill of Rights of the Constitution under which the Applicant has brought this Application. This is section 44-(1) which reads:

“If a person considers that any of the provisions of this Chapter has been or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if another person considers that there has been, or is likely to be, a contravention in relation to the detained person), then that person (or the other person) may apply to the High Court for redress.”

25. The Application having been correctly brought here, the onus then on the Applicant is to satisfy me in what way the provision of this chapter have been or is likely to be contravened. Since this is a civil matter, the onus is no higher than the civil standard of the balance of probabilities. In other words the Applicant has to satisfy me that it is more probable than not that its prosecution in the Magistrates’ Court has or will contravene its constitutional rights.

26. So I turn to Section 72A which I reproduce below in its entirety.

72A. Prices to reflect VAT decrease:

- (1) *If the percentage of VAT decreases, a registered person must sell goods and services at a price which reflects the actual percentage VAT decrease.*
- (2) *The onus of proving that the price at which the goods or services are sold by the registered person reflects the actual percentage VAT decrease shall be on the registered person.*
- (3) *A registered person who fails to comply with subsection (1) shall be liable to a fine not exceeding \$50,000 which must be payable by that registered person within 21 days of notification by the Chief Executive Officer.*
- (4) *A registered person who fails to pay the fine as prescribed in subsection (3) within the time period prescribed in subsection (3), shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding \$100,000 or a term of imprisonment not exceeding 10 years.*
- (5) *The Minister shall make regulations prescribing fines for the purpose of subsection (3).*

27. The Applicant has to prove, as a registered person, that the price at which the services were sold reflect the actual percentage VAT decrease.
28. At first blush this would appear to cast an onerous responsibility on a registered person. However on a careful study this does not prove to be the case. To the reasonable man on the Victoria Parade bus, it would be clearly justified and a relatively simple matter for the registered person to prove. It would be entirely within its ken whether it had or had not, for whatever reason, reduced its prices to reflect the reduction in the VAT.
29. That this is so is clearly shown in this case, by the contents of the Record of the Interview of Ms Elliot. Having understood the allegation and the nature of the caution given to her, Ms Elliot was able to answer forthwith that the price of the services had not gone down in the cases concerned thus showing clearly that this was within her own knowledge.
30. I am fortified in the view I am going to take here by what is stated in Archbold Criminal Pleading, Evidence And Practice 2005. From para 16-78, I glean that a reverse onus clause is justified if, inter-alia, it is the easier for the accused to discharge the burden and the more difficult for the prosecution in proving the opposite. I am therefore not prepared to read down section 72A(3) but I shall hold the onus of proof on the Applicant is the civil standard.
31. It is also necessary in this judgment for me to explain what the doctrine of the separation of powers means. This doctrine was first expounded by Montesquieu in his 1748 work "De L' Esprit Des Lois "where he supported the separation of the main branches of Government. These are the Legislative, the Executive and the Judicial. I represent them as the 3 sides of an equilateral triangle with the Government as the apex.
32. The Judicial branch is independent of the other 2 branches and this independence is preserved by the Constitution placing restrictions on the powers

of the Legislature and the Executive to interfere with the exercise of judicial power by the Judiciary.

33. These safeguards then ensure the Judiciary is able to play its vital and significant role as the guardian of the Constitution and in the interpretation of the laws of the Land. This after all is what I am doing here today.
34. To my mind for the Judiciary to be able to exercise its bounden duty under the Constitution, it must not only be independent but it must be seen to be independent by both the powers that be and the populace. This is because section 97 of the Constitution enjoins a judge to apply the law without fear or favour or prejudice.
35. This is the **lodestar** for any judge. To be able to apply the law without fear or favour or prejudice a judge, who is worth his salt must be a person of probity, rectitude and integrity who also possesses the qualities of competence, knowledge and vast experience.
36. The best description of what the attributes of an independent judiciary are, is contained in Neil Andrews' paper on "Judicial Independence," The British Experience, where he says." It is important that they (English judges) should neither kowtow to Parliament, nor to the Executive, nor to any princes or other high or powerful persons. Judges must stand above party politics, governmental exigency, corporate greed and private interest."
37. I have spent time expounding the separation of powers with regard to the independence of the judiciary to show why it is that the Constitution has entrusted the High Court with the responsibility of enforcing the provisions of the Bill of Rights.
38. The section I have to pronounce on regarding its constitutionality or otherwise is part of a Decree. The law maker of the Decree intends that the benefit of a reduction in VAT should be translated into a reduction in the price of a service.

39. It is cannot be gainsaid that this laudable objective will be thwarted if a registered person does not with alacrity reduce the price accordingly. I think the best way to view the issue and to secure its resolution is to paraphrase and read subsections (1) and (2) together and in consecutive order. Thus:
- (1) If the VAT is decreased, the registered person must sell the services at a price which reflects the actual decrease.
 - (2) The onus of proving the price of the service reflects the actual decrease shall be on the registered person.
40. The Oxford Advanced Dictionary of Current English defines “The onus of proof rests with you” as “It is for you to supply proof.” I fail to see any apparent injustice in the workings of these 2 subsections. If the registered person had decreased the sale price it would have with the greatest of ease supplied proof of this to FRCA. Here on the contrary, the Applicant with the greatest of ease and with an alacrity and candour, which are to be commended, supplied admission of the opposite. Ms Elliot had readily admitted the price had not gone down to reflect the decrease in VAT.
41. Further, nothing has transpired to date which can be considered as even remotely contravening sections 14 and 15 of the Constitution. I find and I so hold these constitutional provisions only come to play when the criminal proceedings in the Magistrates Court commence. They are not called into operation before that. My reasoning for this is as plain as a pikestaff. Section 14(2) says every person charged with an offence has the right (a) to be presumed innocent until proven guilty according to law. Section 15(1) states: *“Every person charged with an offence has the right to a fair trial before a court of law.”*
42. A party must not be unable to see the wood for the trees. The Applicant is facing charges not before FRCA but in the Magistrates Court. The Applicant has not lost its right to be presumed innocent nor its right to a fair trial. In the Magistrates Court it will be pleading not guilty, will be defended by Counsel of its


choice and the onus of proof that it had contravened the relevant sub sections of section 72A rests throughout on the prosecution and the standard of proof will be beyond a reasonable doubt (the golden rule). I do not see how the principle of “equality of arms” referred to Archbold 2012 para 16-63 can conceivably be breached in the trial before the Magistrate.

43. Let me show the process flow in the court below to illustrate why I say this, without my prejudging the issues there and without any pronouncement which would prejudice the criminal trial one way or the other. The Applicant appears before the Magistrate to answer charges under subsection (4), because it has failed (as it admits) to pay the fine under subsection (3). Subsection (3) imposes liability to pay a fine because the Applicant has failed to comply with subsection (1). Subsection (1) requires the Applicant to sell the services at the VAT reduced price.
44. Only if the prosecution proves the charges beyond any reasonable doubt and the Applicant fails to raise a reasonable doubt, can the Magistrate then convict it on the charges against it. Only after a conviction is recorded can the Magistrate mete out the punishments laid down by law.
45. It should be crystal clear by now why there is no need for me to dilate on the other 2 branches of government. Suffice it to say in my considered opinion the maker of the Decree had not transgressed the bounds set for a Lawmaker.
46. I therefore find and I so hold that the Application is misconceived. Nothing in the decided cases cited, indicate there is anything in section 72A which violates the golden rule above, I find it unjustified for the Applicant to contend that the judicial function of the Magistrates Court has been usurped by FRCA. From start to finish it will be the Magistrates Court before whom the Applicant is appearing which will decide the guilt or the innocence of the Applicant of the criminal charges facing it.

47. In conclusion, I reiterate the Applicant is not been deprived of a fair trial before the Magistrates Court. The presumption of innocence is preserved intact in the Magistrates Court and if the Applicant pleads not guilty it will then be incumbent on the prosecution to prove the charges to the requisite standard, before the Magistrate can record a conviction and mete out the appropriate punishment.
48. In the light of my decision, there remains no other issue that falls to me to decide, and it will be inexpedient for me to discuss the authorities cited.
49. In fine I make the following Orders:
- (1) The Notice of Originating Motion filed 23 March 2016 is hereby dismissed.
 - (2) I hereby decline to grant the Declarations and Orders sought therein.
 - (3) In the circumstances, there shall be no order as to costs.

Delivered at Suva this 19th day of August 2016.




David Alfred
JUDGE
High Court of Fiji