

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 216 of 1997

BETWEEN: SAMISONI TUI BALE aka TUIMASI LUTU, Trading as **GENERAL FOOD FIJI LIMITED**

PLAINTIFF

AND: NATIONAL BANK OF FIJI

FIRST DEFENDANT

AND: NBF ASSET MANAGEMENT BANK

SECOND DEFENDANT

BEFORE: Master Vishwa Datt Sharma
COUNSELS: MR. Bulisea - for the Plaintiff
Mr. Jamnadas - for the 1st Defendant
Ms. Seeto - for the 2nd Defendant

Date of Hearing: 15th August, 2016
Date of Ruling: 23rd September, 2016

RULING

[Application seeking Joinder of parties pursuant to
Order 15 Rule 4 of the High Court Rules, 1988]

APPLICATION

1. The **Plaintiff** filed an **Inter Parte Notice of Motion** dated 19th May, 2016 with an Affidavit in Support seeking the following orders-

- (i) That Reserve Bank of Fiji is added to the proceedings as Third Defendant;
AND
 - (ii) Costs be in cause of the application.
- 2. The application is made in Support of an Affidavit deposed by the Plaintiff on 29th April, 2016.
 - 3. Both Defendants **strongly oppose** this application of the Plaintiff.
 - 4. All parties to the proceedings furnished Court with written and oral submissions.

LAW

- 5. **Order 15 Rule 4 of the High Court Rules, 1988** deals with joinder of parties and states as follows-

4. (1) *Subject to rule 5(1), two or more persons may be joined together in one action as plaintiffs or as defendants with the leave of the Court or where-*

(a) *if separate actions were brought by or against each of them, as the case may be, some common question of law or fact would arise in all the actions, and*

(b) *all rights to relief claimed in the action (whether they are joint, several or alternative) are in respect of or arise out of the same transaction or series of transactions.*

(2) *Where the plaintiff in any action claims any relief to which any other person is entitled jointly with him, all persons so entitled must, subject to the provisions of any Act and unless the Court gives leave to the contrary, be parties to the action and any of them who does not consent to being joined as a plaintiff must, subject to any order made by the Court on an application for leave under this paragraph, be made a defendant.*

PLAINTIFF'S CASE

- 6. The Plaintiff adopts its written submissions and orally submitted that **Reserve Bank of Fiji** should be joined as a **Third party** to this proceeding.

7. The Plaintiff's written submissions can be summarised as follows. I will not reiterate the entire submissions but the full context may be accessed from the court record if so desired.
- (i) The proceedings arise out of a relationship between the Plaintiff as a customer of the Defendant where they enjoyed the protection provided under the common law doctrine of customer/banker relationship which entailed the existence of a contractual and fiduciary relationship whereby the Plaintiff placed all his trust on the Defendants for the protection and management of the aforesaid account and the Defendants owed a very high degree of duty of care in regards to the protection and management of the Plaintiff's account.
 - (ii) The Plaintiff feels that after perusing the documents pertaining to the substantive matters, the Reserve Bank of Fiji should be joined as a party to this proceeding because of its virtue of vicarious liability to both Defendants.
 - (iii) That Reserve Bank of Fiji is mandated to oversee and well aware of all transactions within the financial institution under its controllership.
 - (iv) Plaintiff referred Court to the case of *Zoeller v Brahill* [2015] FJHC 892; HBC 171.2008.

FIRST AND SECOND DEFENDANTS CASE

8. The First and Second Defendant's written submissions will also not be reiterated in its entirety but will be summarised as follows:
- (i) *The first objection is that the application is a dishonest application.*
 - (ii) *The second objection raised in regards to the Plaintiff's application is that the affidavit in Reply of Samisoni Bale has added new points which were not put to NBF ASSET Management Bank or to the proposed Defendant and therefore the affidavit should be disallowed.*
 - (iii) *The Plaintiff has filed a sparse Affidavit in Support.*
 - (iv) *The alleged facts as enumerated at paragraph 2.4 in terms of the Plaintiff's Affidavit at paragraph 6 are completely new and were not put to either the current or proposed Defendant.*
 - (v) *Reference is made to the case of Munesh Prasad v NBF Asset Management Bank HBC No. 59 of 2014.*

PROPOSED PARTY'S CASE (RBF)

9. In summary the Counsel representing the Reserve Bank of Fiji submitted as follows:

Vicarious Liability

- (i) *It is a well-established that in order to prove vicarious liability one would need to show that a relationship of principal/employer and agent/employee existed, that a tortuous act of negligence was committed and such an act was committed within the course of employment.*
- (ii) *The Plaintiff's claim is that the Reserve Bank should be vicariously liable for the failure to instruct the corresponding and receiving banks to inform the Plaintiff of the receipt of funds that are alleged to have come from his business partner in Indonesia.*
- (iii) *The Reserve Bank is the regulatory supervisor of the financial system and as the regulator it is responsible for, inter alia, developing legislation and regulations for the financial system, carrying out inspections are safe and in compliance with legislation and reporting on the performance and condition of each licensed financial institution. The regulator carries out this responsibility based on returns and information submitted by the institution.*
- (iv) *The NBF AMB, as a legal entity, was controlled by its own Board of Directors whose responsibility included, inter alia, the operational management of the bank's various departments and its employees and ensuring that the bank complied with regulatory and supervisory policies and guidelines set by the regulator.*
- (v) *Prior to 2006, all transactions above \$50k were reported to the RBF by the commercial banks who are the receivers of these information. It was not, and still is not, the RBF's role to inform commercial banks of incoming funds transfers since it does not receive the information directly from transferors.*
- (vi) *The Reserve Bank opposes this application and reiterates that at no time was it or is it responsible for the actions of employees of any of its licensed institutions and therefore cannot be held vicariously liable for alleged negligent and fraudulent actions such as those alleged in this matter.*

Responsibilities of Controller

- (vii) *Pursuant to the Banking Act, NBF AMB was placed under controllership of the Reserve Bank of Fiji on 1 April, 2007 and gazetted 1st May, 2007.*
- (viii) *The effect of Controllership is that no action may continue against the NBF unless leave of the Court or the Controller is obtained. When a financial institution comes under controllership it becomes subject to a regulating mechanism, which means that it still functions as an entity.*
- (ix) *Under sections 41 and 42 of the Banking Act, any controller just comply with the directions of the Reserve Bank and must consult with t and provide any such reports as required by the Reserve Bank.*

- (x) In *Ajit Kumar v Governor of the Reserve Bank of Fiji and Munesh Prasad*, Civil Action No.: 05/10 on a summons for leave to include the Governor of the Reserve Bank, Master Robinson held that "s.43 (1) (a) is very clear about the fact that no person shall commence or continue any action or proceeding against a financial institution subject to controllership. However, in spite of this provision an action or proceeding may be commenced or continued against the financial institution for the purpose of determining whether any right or liability exists if the leave of the controller or the High Court is obtained."

ANALYSIS AND DETERMINATION

10. This **issue** that this Court needs to determine is whether to allow the Plaintiff's **joinder application** to join **Reserve Bank of Fiji** as a party to this proceeding.
11. The current action was commenced by the Plaintiff in **1997** following debt recovery actions for \$25 million against the Plaintiff by the NBF AMB.
12. The action claimed **damages based on alleged vicarious liability and negligence** against NBF AMB employees whom the Plaintiff alleges to have used monies from his Indonesian business partner.
13. On **4th May, 2007**, the **Reserve Bank of Fiji** took **regulatory control** over the administration of the **National Bank of Fiji ("NBF") Asset Management Bank** pursuant to the **Banking Act s.30 (2) (c) (i)** and effectively became the 'controller' of NBF AMB.
14. The Reserve Bank was served with a notice on **25th May, 2016** to include and join the Reserve Bank as the third Defendant "**by virtue of vicarious liability on its failure to instruct the corresponding and receiving bank of the recipient to the accounts**".
15. Both, the **First and Second Defendants** coupled with the **Reserve Bank of Fiji** opposes the application to add '**The Reserve Bank of Fiji**' to this proceeding.
16. The current application made by the Plaintiff is seeking an order to include and join the Reserve Bank as the third Defendant. The application is made on the basis that "**by virtue of vicarious liability on its failure to instruct the corresponding and receiving bank of the recipient to the accounts**".

17. This court takes note that the application to join Reserve Bank of Fiji (RBF) has been made after a lapse of 19 years for the reasons best known to the Plaintiff when the same action could have been taken much earlier.
18. The primary objection taken by the intended Third Party (RBF) is that in order to prove vicarious liability, the Plaintiff would need to show that a relationship of principal/employer and agent/employee existed.
19. The Reserve Bank opposed this application and reiterated 'that at no time was it or is it responsible for the actions of employees of any of its licensed institutions and therefore cannot be held vicariously liable for alleged negligent and fraudulent actions such as those alleged in this matter.
20. The Reserve Bank is the regulatory supervisor of the financial system and as the regulator it is responsible for developing legislation and regulations for the financial system, carrying out inspections are safe and in compliance with legislation and reporting on the performance and condition of each licensed financial institutions, including the Defendants, the National Bank of Fiji (NBF) and the NBF Asset Management Bank (AMF).
21. The National Bank of Fiji and the Asset Management Bank, as legal entities, were controlled by its own Board of Directors whose responsibility included the operational management of the bank's various departments and its employees and ensuring that the bank complied with regulatory and supervisory policies and guidelines set by the regulator.
22. Pursuant to the Banking Act, the National Bank of Fiji and the Asset Management Bank were placed under controllership of the Reserve Bank of Fiji on 1 April, 2007. The effect of the Controllership was that no action may continue against the National Bank of Fiji unless leave of the Court or of the Controller is obtained. When a financial institution comes under controllership it becomes subject to a regulating mechanism, which means that it still functions as an entity. Therefore the same rule and policy applies to the Defendants, the National Bank of Fiji and the Asset Management Bank respectively.

23. Under **sections 41 and 42 of the Banking Act**, any controller will just comply with the directions of the Reserve Bank and must consult with it and provide any such reports as required by the Reserve Bank.
24. In *Ajit Kumar v Governor of the Reserve Bank of Fiji and Munesh Prasad, Civil Action No.: 05 of 2010* on a summons for leave to include the Governor of the Reserve Bank, the Court held that "s.43 (1) (a) is very clear about the fact that no person shall commence or continue any action or proceeding against a financial institution subject to controllership. However, in spite of this provision an action or proceeding may be commenced or continued against the financial institution for the purpose of determining whether any right or liability exists if the leave of the controller or the High Court is obtained."
25. Further, I must reiterate that the Plaintiff was first required to take the leave of the Court and or the Controller which is the Reserve Bank of Fiji in this case. Upon the perusal of the Plaintiff's joinder application, it does not seek **an order for leave** but is directly seeking an order to add the **Reserve Bank of Fiji (RBF)** to the **current proceedings as the Third Defendant**. Therefore, the Plaintiff's application prima facie is **fatal** in the circumstances.
26. Further, the Plaintiff's affidavit in Reply deposed by Samisoni Bale has added new points which allegedly were not put to the National Bank of Fiji and the Asset Management Bank or to the proposed Defendant, the Reserve Bank of Fiji (RBF). Also I note that the alleged facts as enumerated at paragraph 2.4 in terms of the Plaintiff's Affidavit at paragraph 6 are completely new and were not put to either the current or proposed Defendant. There is no evidence of the same on the Court file. This is not procedurally correct and not within the ambits of the Rules. I therefore have no alternative but to disallow the Plaintiff's Affidavit in Reply accordingly.
27. For the aforesaid **Rational** and in particular taking into consideration **section 43 (1) (a) of the Banking Act** which provides thus-

'That no person shall commence or continue any action or proceeding against a financial institution subject to controllership. However, in spite of this provision an action or proceeding may be commenced or continued against the financial institution for the purpose of determining whether any right or liability exists if the leave of


the controller or the High Court is obtained," I now proceed to make the following Orders-

FINAL ORDERS

- (a) That the Plaintiff's joinder application is hereby Dismissed.
- (b) Costs is summarily assessed at \$500 to the Defendant and the Reserve Bank of Fiji (RBF), a total of \$1,000 to be paid within 14 days.
- (c) An 'Unless Order' is imposed on the Plaintiff and upon default or non-compliance of the Costs Order, the Unless Order would be activated accordingly.
- (d) The matter stands adjourned to 12th October, 2016 at 9am for further directions.

Dated at Suva this 23rd day of September, 2016




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MR VISHWA DATT SHARMA
Master of High Court, Suva

cc. Vakaloloma & Associates, Suva
Jamnadas & Associates, Suva.
Reserve Bank of Fiji.