IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 08 of 2016

BETWEEN : **SALASEINI DENARAU** of Navakai, Nadi as the administrator of the Estate of Serevi Vananalagi.

PLAINTIFF

A N D: **COMMANDER REPUBLIC OF FIJI MILITARY FORCES**
Queen Elizabeth Barrack, Nabua, Suva

1ST DEFENDANT

A N D: **ATTORNEY GENERAL OF FIJI**

2ND DEFENDANT

Appearances: Mr Maopa E. for the Plaintiff (Respondent)
Mr Tawake P. for the Defendant (Applicant)
Date of Hearing: 21 October 2019
Date of Ruling: 06 December 2019

RULING

INTRODUCTION

1. Before me is a Summons for stay of execution pending appeal.

2. The judgement in question was handed down by this court on 27 May 2019. That judgement was in favour of Salaseini Denarau.

3. Denarau is the widow of the late Mr. Serevi Vananalagi. She is also the personal representative of the estate of Serevi.

4. Serevi died on Wednesday 25 February 2015 at the naval base in Walu Bay when an empty fuel drum he was cutting using acetylene torch exploded in his face. He was only twenty seven years of age.

5. By that judgement, I had found that the defendants (now applicants) were liable to the plaintiffs (now respondent) in the sum of $133,922.88 for lost years pursuant to the Law Reform (Miscellaneous Provision)(Death & Interests) Act plus costs and interest.

REPORT OF BOARD OF INQUIRY

6. In my judgement, I relied on a Report of a Board of Inquiry which was commissioned to investigate the circumstances surrounding the death of Serevi.

7. The Report sets out the Board's findings, conclusions and recommendations. One of the key things highlighted in the Report was that the Naval Department had no standing operating procedures in place.

GROUNDS OF APPEAL

8. The applicant is the Commander of the Republic of Fiji Military Forces. Although the Office of the Attorney General had defended the claim in the first-instance-trial before me, they are not party to this appeal.

9. Mr. Mainavolau has stated in court that the Attorney-General's Office had advised the Army Legal Services against pursuing this appeal. However, the RFMF is of the view that there is a valid issue of law at stake.

10. The affidavit in support of the Summons sworn by a Captain Paka on 29 October 2019 does not annex a draft purported grounds of appeal.

11. However, Captain Paka deposes that "the appeal raises important questions of law specifically pertaining to the application of the Army Act 1955 (Military Law) which limits the admissibility of the Board of Enquiry Report in civil proceedings against general civil law which allows for it".

SOME COMMENTS

12. The decisive fact in the case is that there was no OHS Standing Operating Procedure ("**SOP**") in place at the workshop where the accident happened.

13. The evidence which highlighted that decisive fact were, firstly, the oral evidence of DW1 and DW2 in cross-examination and, secondly the Report.

14. What the Commander of The Republic of Fiji Military Forces wishes to appeal is the admission into evidence of the Report.

15. The argument is that the Report is not admissible into evidence in any civil court by virtue of sections 70 and 135 of the Army Act.

ACADEMIC APPEAL

16. Whether or not the Report was admissible into evidence is an academic point, in my view.

17. I say that for several reasons.

18. Firstly, I accept that the Report was material in the sense that it was evidence of the fact that there was no SOP in place at the Naval Workshop in Walu Bay where the accident happened.

19. However, the Report was not the only evidence of that fact. DW1 and DW2 also confirmed the same during cross-examination before the Report was even admitted.

20. Had the Report not been admitted into evidence, and assuming that DW1 and DW2 had insisted in their evidence that there was an SOP in place (which, to their credit, they did not try to do), their cross-examination most certainly would have spotlighted the defendants' inability to furnish a written copy of the SOP. This would have been a matter of credibility, and it could only have worked against the defendants.

21. In other words, even if the Report had not been admitted into evidence, I would still have found that there was no SOP in place, and I would have given judgment in favour of the plaintiff in any event.

22. Secondly, the Attorney-General's Office had voluntarily discovered the Report to counsel for the Plaintiff prior to the trial. However, at trial, the A-G's office would object to its being admitted into evidence.

23. In my view, any privilege (which, in any event, I do not think there is any) attaching to the Report would have been lost when the Report was voluntarily discovered.

24. Thirdly, as to whether or not the Report was indeed privileged, the argument raised before me by the Office of the Attorney-General at trial was based entirely on the Official Secrets Act. However, no specific provision of the OIA was cited to me, and there was no argument raised on any provision of the Army Act.

25. I did give a brief written ruling on the same day before trial. What the counsel for the Office of the Attorney-General should have done was seek leave to appeal it right there and then. They did not. Instead, they proceeded with the trial.

26. Fourthly, had the Office of the Attorney-General proceeded to appeal my decision then, it would have been an appeal of an interlocutory decision.

27. Fifthly, and flowing from the above, I think it is an abuse of process to be attempting to appeal that interlocutory decision at this stage after final judgement has been handed down.

28. Sixthly, and in any event, I have looked at the provisions of the Army Act relied on and in my view, they do not attach any privilege to the Report in question.

29. Seventhly, even if I am wrong on the above point, that is, even if the provisions of the Army Act relied on by the applicant do forbid the admissibility of the Report in question in the type of proceedings before me, the fact remains that there was no evidence before me that the Naval Division had a standard SOP in place at all material times.

30. The evidence of DW1 and DW2 is that, "to this day" (i.e. at the time of trial), there was still no written SOP in place. In other words, my decision would have remained unchanged.

31. The relevant principles of stay were set out by the Fiji Court of Appeal in **Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd** Civil Appeal ABU0011.04S, 18th March 2005. They are:

a) whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative). See Philip Morris (NZ) Ltd v Liggett & Myers Tobacco Co (NZ) Ltd [1977] 2 NZLR 41 (CA).
b) whether the successful party will be injuriously affected by the stay.
c) the bona fides of the applicants as to the prosecution of the appeal.
d) the effect on third parties.
e) the novelty and importance of questions involved.
f) the public interest in the proceeding.
g) the overall balance of convenience and the status quo.

32. I am not convinced, taking account of all the above factors, and the fact that the only ground of appeal is the point of law raised by the Army Act, that I should stay the execution of the judgement in question.

33. As I have stated, even if the Court of Appeal was to find that I was wrong in admitting the Report, it does not take away the fact that there were other supporting evidence, namely the oral evidence of DW1 and DW2, to the fact that there was no SOP in place at all material times.

34. Stay refused. Costs to the respondent which I summarily assess at $1,500 only.

HIGH COURT OF FIJI
LAUTOKA

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Anare Tuilevuka
JUDGE
Lautoka