

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO: HBC 420 of 2009

BETWEEN : **THE ATTORNEY GENERAL OF FIJI** **PLAINTIFF**

A N D : **NATIONAL BANK OF FIJI T/A COLONIAL NATIONAL BANK, Suva**
FIRST DEFENDANT

AND : **NAWIN AVIKASH DEWAN** of 54 Namena Road, Suva, Fiji,
Sales Manager.
SECOND DEFENDANT

AND : **SODEXO LAOS PVT SOLE CO.** a duly incorporated
company with its head office in Thailand.
INTERVENER

COUNSEL : Ms. S. Ali for the Plaintiff
Mr. A. Chand for the First Defendant
Mr. R. Prakash with Mr. R. Dayal for the Second
Defendant
Mr. N Barnes for the Intervener

Date of Hearing : 8 February 2016

Date of Ruling : 4 May 2016

RULING

Introduction and Background

- [1] This is an application made by the Plaintiff, the Attorney General, by way of Ex Parte Summons. The order sought was that the Defendant Bank (The First Defendant) be restrained by themselves or their directors, servants, officers, contractors, and agents or any of them or otherwise howsoever from carrying out any further transaction in respect of a SWIFT Transfer sum of US\$ 119.980.00 held by it in the name of a Nawin Avikash Dewan (Fiji Passport Number 539537), or any other international remittances sent to it for the benefit of Nawin Avikash Dewan or his wife, Ms. Thippavanh Chanhsoiphou, for a period of 28 days from the date of this order unless otherwise advised by the Financial Intelligence Unit prior to the expiry of the said period of 28 days, or further order of the Court.
- [2] At the time the application was filed the Attorney General was named as the First Plaintiff, while the Director, Financial Intelligence Unit (FIU) was named as the Second Plaintiff. The National Bank of Fiji was named as the sole Defendant.
- [3] The Summons was supported by an Affidavit deposed to and filed on 22 December 2009, by Razim Buksh, Director of the FIU.
- [4] On 24 December 2009, Court made order in terms of the Summons thereby restraining the Defendant (The First Defendant) by themselves or their directors, servants, officers, contractors, and agents or any of them or otherwise howsoever from carrying out any further transaction in respect of a SWIFT Transfer sum of US\$ 119.980.00 held by it in the name of a Nawin Avikash Dewan (Fiji Passport Number 539537), or any other international remittances sent to it for the benefit of Nawin Avikash Dewan or his wife, Ms. Thippavanh Chanhsoiphou, for a period of 28 days from the date of this order unless otherwise advised by the Financial Intelligence Unit prior to the expiry of the said period of 28 days, or further order of the Court.
- [5] On the same day order was also made that the Director of the FIU be struck out as a party to the proceedings.

- [6] On 12 February 2010, the Intervener filed a Summons to Intervene in terms of the provisions of Order 15 Rule 6 (2) of the High Court Rules, 1988. The said Summons was supported by the Affidavit of one Paula Nepote (a Law Clerk at the office of the Solicitors representing the Intervener).
- [7] In terms of the Summons to Intervene the following Orders were sought:
- i) Grant of leave for Sodexo Laos Pvt Sole Co. to intervene as a party in this matter for the purposes of other orders sought in terms of the Summons.
 - ii) That the sum of US\$ 119,980.00 held by the Defendant (The First Defendant) be returned to Sodexo Laos Pvt Sole Co. as the rightful owner of the same, the money having been stolen by Nawin Avikash Dewan.
 - iii) Alternatively that the said sum of US\$ 119,980.00 continue to be held by the Defendant pending judgment in respect of the same by way of inter-pleader or otherwise.
- [8] On 18 February 2010, Court granted leave to Sodexo Laos Pvt Sole Co. to intervene as a party in this matter for the purposes of other orders sought in terms of the Summons. Court also made order that the sum of US\$ 119,980.00 continue to be held by the Defendant pending judgment in respect of the same by way of inter-pleader or otherwise.
- [9] On 30 March 2010, the Second Defendant filed a Summons seeking to be joined and/or added as a Defendant to the action and to be granted unconditional leave to defend this action and/or such other direction as the Court deems fit. This was also in terms of the provisions of Order 15 Rule 6 of the High Court Rules, 1988. The Summons was supported by an Affidavit deposed by him on the same day.
- [10] On 9 April 2010, Order was made by consent for the Second Defendant to be joined and/or added as a Defendant in this action and he was granted unconditional leave to defend this action.

- [11] On 12 January 2011, a notice was issued by Court on the Plaintiff pursuant to Order 25 Rule 9 of the High Court Rules, to show cause why this action should not be struck out for want of prosecution or as an abuse of the process of Court. On 11 October 2011, the Master had made order that by consent the matter is *sine-die*.
- [12] This case was revived when a Summons was filed by the Intervener on 29 August 2014, seeking an Order that the sum of US\$ 119,980.00 currently held by the Bank of the South Pacific, formerly the Colonial National Bank (the First Defendant), pursuant to the Order made by Court on 18 February 2010, be paid into the Trust Account of Munro Leys, Solicitors of the Intervener in accordance with the Terms of Settlement dated 26 August 2014 (in Civil Action HBC No. 220 of 2010). The application was made pursuant to the provisions of Order 17 Rules 7 and 8 of the High Court Rules, 1988 and was supported by an Affidavit deposed to by Stuart Winters, the Regional Director of the Intervener Company.
- [13] This matter was taken up for hearing before me on 8 February 2016. Counsel representing the Plaintiff, Second Defendant and Intervener were heard. The parties also filed written submissions, which I have had the benefit of perusing. The Counsel on behalf of the First Defendant submitted that the First Defendant will abide by any Order made by Court and thus did not make any further submissions.

The Affidavit filed by Razim Buksh

- [14] The main issues that have been raised by the Plaintiff are found in the Affidavit in support filed by Razim Buksh, Director of the FIU. The contents of the Affidavit can be summarized as follows:
1. The deponent states that the FIU is empowered under Section 25(2) of the Financial Transactions Reporting Act No. 22 of 2004 to make an application to Court for an order that a financial institution be restrained from carrying out transactions in respect of funds within its possession that are reasonably suspected to involve the proceeds of a serious offence and money laundering offence.

2. The FIU suspicion was aroused when it received a report filed by the National Bank of Fiji trading as Colonial National Bank, pursuant to Section 14 of the FTR Act.
3. The Report from the Compliance Manager of Colonial National Bank relayed that a SWIFT Transfer, commonly known as electronic funds transfer, was received by the Bank on 8 December 2009.
4. The FIU conducted preliminary investigations and found that the SWIFT transfer amount was US\$ 119,980.00 and the beneficiary is one Nawin Avikash Dewan, a Fiji National, who was formerly employed by a company called Sodexo (Thailand) Limited.
5. On 11 December 2009, the FIU received information from the Regional Director of Sodexo Limited, Stuart Winters, that the said Dewan had fraudulently transferred various amounts totalling US\$ 225,000.00 from the company account to his wife's account, which was subsequently transferred to the Colonial National Bank in Fiji.
6. On the same day, the FIU issued an instruction notice pursuant to Section 25(1)(h) of the Act to all Colonial National Bank branches in Fiji to freeze any transactions involving the sum received in Dewan's name until further notice.
7. On 16 December 2009, the deponent wrote to the Criminal Investigations Department (CID) of the Fiji Police Force seeking their assistance in investigating the transaction for suspected fraud, money laundering or any other serious offence.
8. In response, the Fiji Police Force wrote to the FIU on 18 December 2009, requesting that the FIU obtain a formal restraining order from the Courts so as to facilitate the police investigations into the suspicious transactions.
9. The deponent verily believes that the monies received by the Colonial National Bank in the name of Dewan is suspicious and is therefore inconclusive until further investigations are conducted. The current information available to the FIU and the Fiji Police is insufficient to draw any conclusions and more time is needed to conduct further analysis and investigations to substantiate the actual source, movements, legitimacy and the recipients of the funds.
10. In the circumstances, the deponent requested Court to issue restraining order as prayed for.

The Affidavit by Paula Nepote

- [15] In the Affidavit filed by Ms. Nepote, in support of the Summons to Intervene filed by the Intervener, it is deposed that the sum of US\$119,980.00 which is been held by the Colonial National Bank, be returned to the Intervener, Sodexo Laos Pvt Sole Co. The deponent states that the Intervener is the rightful owner of the said sum of money which has been defrauded by Navin Avikash Dewan. In the alternative, the deponent states that the said sum of money continue to be held by the Defendant bank pending judgment in respect of same by way of inter-pleader or otherwise.

The Affidavit of Navin Avikash Dewan

- [16] In his Affidavit filed in support of the Summons seeking to be joined and/or added as a Defendant to the action, the Second Defendant claims that he has been working in Laos for Sodexo Laos Pvt Sole Co. as an Operations Manager from November 2007 until December 2009.
- [17] Upon the expiry of his contract of employment with the company, he states that he made arrangements to come back to Fiji permanently. He deposes that part of the arrangements included the transfer of the sum of US\$120,000.00 to the Colonial National Bank in Fiji. He states that the funds belonged to him and was transferred from his personal bank account held at Phongsavanh Bank, Vientiane, Laos. Further he categorically denies the allegation of any fraudulent act or acts of wrongdoings on his part in relation to the transfer of the said funds to his bank account at the Colonial National Bank.

The Affidavit of Stuart Winters

- [18] The Summons filed by the Intervener on 29 August 2014, seeking an Order that the sum of US\$ 119,980.00 currently held by the Bank of the South Pacific, formerly the Colonial National Bank (the First Defendant), pursuant to the Order made by Court on 18 February 2010, be paid into the Trust Account of Munro Leys, Solicitors of the intervener in accordance with the Terms of Settlement dated 26 August 2014 (in Civil Action HBC No. 220 of 2010), was supported by an Affidavit deposed to by Stuart

Winters, the Regional Director of the Intervener Company. In his Affidavit the deponent reiterates that the Intervener is the rightful owner of the said sum of money which has been defrauded by Navin Avikash Dewan.

Legal Provisions and Analysis

[19] In this case Court is called upon to adjudicate upon two issues.

1. The Notice pursuant to Order 25 Rule 9 of the High Court Rules, 1988; and
2. The Summons filed by the Intervener for funds to be released to them.

The Notice Pursuant to Order 25 Rule 9 of the High Court Rules, 1988

[20] Order 25 Rule 9 of the Rules read as follows:

(1) If no step has been taken in any cause or matter for six months then any party on application or the Court of its own motion may list the cause or matter for the parties to show cause why it should not be struck out for want of prosecution as an abuse of the process of the court.

(2) Upon hearing the application the Court may either dismiss the cause [or] matter on such terms as may be just or deal with the application as if it were a summons for directions.

[21] In this case, on 12 January 2011, the Court on its own motion, issued a Notice on the Plaintiff to show cause why this action should not be struck out for want of prosecution or as an abuse of the process of Court.

[22] It is clear from the records that the matter had been duly dealt with on 11 October 2011. The submissions made by parties in the proceedings before the Master that day have been summarized and recorded as follows:

Plaintiff: No need to call this matter. The funds are frozen.

Defendant: Consent to *sine-die*.

- [23] Based on these submissions the Master had made Order that by consent the matter is *sine-die*.
- [24] The Plaintiff states in their written submissions that “It was always the Plaintiff’s intention that this action would be discontinued once the criminal investigation by the Director of Public Prosecution (DPP) was complete regarding the Second Defendants alleged breaches against the Financial Transaction Reporting Act No. 22 of 2004 and the Proceeds of Crime Act No. 27 of 1997. However, there was no further communication with the DPP’s Office in this regard. As such, the action lapsed and remained latent until the Intervener filed its Summons.”
- [25] It is the view of this Court that since this matter has already been duly dealt with, on 11 October 2011, it is no longer necessary for this Court to make any further order in relation to the show cause notice.

The Summons Filed by the Intervener for Funds to be Released to Them

- [26] As stated earlier, on 29 August 2014, the Intervener filed Summons seeking an Order that the sum of US\$ 119,980.00 currently held by the First Defendant bank, pursuant to the Order made by Court on 18 February 2010, be paid into the Trust Account of Munro Leys, Solicitors of the Intervener, in accordance with the Terms of Settlement, dated 26 August 2014, in Civil Action HBC No. 220 of 2010.
- [27] Since this application is being made in accordance with the Terms of Settlement entered into in a separate Civil Action HBC No. 220 of 2010, it is important for this Court to make reference to the said Terms of Settlement. It is pertinent to mention that Sodexo Laos Pvt Sole Co. (Intervener) is the Plaintiff in the said action, while Nawin Avikash Dewan (Second Defendant) is the Defendant. The said Terms of Settlement have been signed by the Solicitors for the Plaintiff and Defendant respectively.
- [28] The Terms of Settlement in its entirety are set out below:

The Plaintiff and the Defendant have agreed to compromise this action. They now wish to formalise their agreement for the record of this Honourable Court. The terms of the agreement are as follows:-

1. The Defendant without admission of liability agrees that the sum of USD\$ 119,980 ("the sum") currently held by the Bank of South Pacific ("BSP"), formerly Colonial National Bank pursuant to an order in Civil Proceedings No. HBC 420 of 2009 be paid out to Munro Leys (Plaintiff's Solicitors) Trust Account and the Defendant:
 - a) waives all rights and claims of the sum
 - b) agrees to sign and execute all and any necessary documents for the transfer of the money to Munro Leys Trust Account (For the avoidance of doubt the Defendant's cooperation extends to consenting to an order in similar terms in proceedings No. HBC 420 of 2009).
 - c) The Defendant consents to an application by the Plaintiff for an order in similar terms as this Order in Civil Proceedings No. HBC 420 of 2009 and will cooperate and execute all necessary documents for the release of the sum held pursuant to the order of 18 February 2010 in Civil Proceedings No. HBC 420 of 2009.
2. Upon receipts of the sum (USD\$ 119,980) into Munro Leys Trust Account, these proceedings will be discontinued by consent in full and final settlement of the claim.
3. Upon discontinuance, the sum of FJ\$ 45,000 paid into Court as security of costs pursuant to Order of 1 August 2013 be paid out to Munro Leys as Solicitors for the Plaintiff.
4. No orders as to costs.

[29] Although the Terms of Settlement were entered and filed, it is apparent that the said Terms of Settlement have not been made an Order of Court in the said Civil Proceedings No. HBC 420 of 2009.

[30] The Intervener is now seeking from this Court to make the said Terms of Settlement an Order of this Court "by consent". However, it is abundantly clear that the Second Defendant is no longer consenting to the said Terms of Settlement being made an

Order of this Court. In the circumstances, this Court is not in a position to make an Order by consent enforcing the said Terms of Settlement.

The Restraining Order

- [31] The restraining order, originally made by this Court on 24 December 2009, restrained the First Defendant by themselves or their directors, servants, officers, contractors, and agents or any of them or otherwise howsoever from carrying out any further transaction in respect of a SWIFT Transfer sum of US\$ 119,980.00 held by it in the name of the Second Defendant or any other international remittances sent to it for the benefit of Second Defendant or his wife, Ms. Thippavanh Chanhomphou, for a period of 28 days from the date of the order.
- [32] On 18 February 2010, this Court made Order that the sum of US\$ 119,980.00 continue to be held by the First Defendant pending judgment in respect of the same by way of inter-pleader or otherwise, which had the effect of extending the restraining order.
- [33] On 7 November 2014, the Plaintiff filed an Affidavit deposed by the Director of FIU, in response to the Affidavit filed by Stuart Winters, on behalf of the Intervener. In his Affidavit, the Director FIU acknowledged the High Court Order, made on 24 December 2009, to temporarily restrain the funds. The Director proceeded to state that he informed the Director of the Criminal Investigation Department (CID) that the funds may constitute a money laundering offense, as stipulated under Sections 69(1), (2)(a), (3)(b), and (4) of the Proceeds of Crime Act No. 27 of 1997.
- [34] The Director's Affidavit stated that he received the notice from the Intervener's Solicitors to release the funds to its Trust Account. Subsequently, the Director informed the Solicitor-General about the High Court Summons relating to the hearing of the Intervener's application and reiterated that the funds held by Colonial National Bank are subject to the freezing order of the High Court as per Section 25(2) of the Financial Transaction Reporting Act No. 22 of 2004. In addition, the Director emphasized that the Second Defendant has been charged with a criminal offense for

committing a money laundering offense pursuant to the Proceeds of Crime Act No. 27 of 1997.

[35] In the circumstances, the Director FIU requested this Court to extend the freezing orders until the criminal proceedings against the Second Defendant are determined.

[36] However, on 22 June 2015, Mr. Ajay Singh, Administrative Officer (Litigation) at the Office of the Solicitor-General, on behalf of the Plaintiff, filed an Affidavit in this Court. In this Affidavit the deponent states that the Plaintiff considers the freezing orders of 24 December 2009 have lapsed and that this action has ceased.

In the view of this Court this is not accurate. It is clear from the proceedings that on 18 February 2010, this Court made Order that the sum of US\$ 119,980.00 continue to be held by the First Defendant pending judgment in respect of the same by way of inter-pleader or otherwise. As such, the restraining order is effectively still in force.

[37] In the written submissions filed by the Plaintiff, it is stated that given that the criminal proceedings have no bearing on the civil proceedings, any reasons to further restrain the funds was discussed with the Director FIU. The Director observed the criminal proceedings no longer required the funds to be restrained for evidential purposes and stated if the Court so ordered the FIU had no objections to the Intervener's Summons.

[38] However, this Court cannot release the funds to the Intervener without duly adjudicating upon the ownership of the funds. This Court is of the view that the proper forum to adjudicate upon the ownership of the funds would be in the Civil Proceedings already instituted by the Intervener against the Second Defendant (Civil Action HBC No. 220 of 2010).

[39] It is confirmed that the Second Defendant has now been charged in the Magistrate's Court at Suva (Case No. 677/2011), for an offence of money laundering contrary to Sections 69(1), (2)(a), (3)(a), and (4) of the Proceeds of Crime Act No. 27 of 1997 and Section 25 of the Proceeds of Crime (Amendment) Act No. 7 of 2005. The particulars of the offence is that the said Second Defendant, Nawin Avikash Dewan, between 7

December 2009 and 9 December 2009, directly engaged in a transaction that involved USD\$ 119,980.00, these monies being proceeds of crime; and knowing that the said USD\$ 119,980.00 was derived directly from some form of unlawful activity.

Conclusion

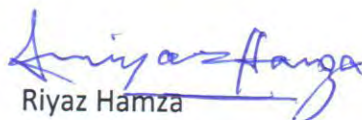
[40] For all the aforesaid reasons, this Court is of the view, the Summons filed by the Intervener, seeking an Order that the sum of US\$ 119,980.00 currently held by the First Defendant Bank to be released to the Intervener, should be struck out. Since the Plaintiff has categorically stated that the criminal proceedings no longer required the funds to be restrained for evidential purposes, Court is of the view the restraining order should now be vacated.

[41] Accordingly, I make the following Orders:

ORDERS

1. The Summons filed by the Intervener seeking an Order that the sum of US\$ 119,980.00 currently held by the First Defendant Bank to be released to Intervener is struck out.
2. The restraining order, originally made on 22 December 2009, and subsequently extended by Order of Court, on 18 February 2010, is hereby vacated.
3. I make no Order for costs.
4. For the avoidance of any doubt, these proceedings are terminated.

Dated this 4th day of May 2016, at Suva.


Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

