IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 299 of 2009

BETWEEN : FOODS (PACIFIC) LIMITED a limited liability company having its registered office at Lot 30, Wailada Industrial Estate, Lami.

PLAINTIFF

AND : LAMI TOWN COUNCIL of 59 Marine Drive, Lami.

DEFENDANT

Counsel : Plaintiff: Mr. V.Maharaj
Defendant: Ms. S. Nayacalevu

Date of Judgment : 7 February, 2019.

JUDGEMENT

INTRODUCTION

1. The Plaintiff in the statement of claim filed along with the writ of summons dated 13.4.2011 is seeking damages from the Defendant. The Defendant is local government body which had instituted legal action in the Magistrate's Court against the Plaintiff for violations under Town Planning Act, Town Planning By-laws, Local Government Act, and Town Planning Lami Order 1997 regarding storage of containers on public path and also on a land that was zoned as open space and to be dedicated for 'recreation reserve'. The Plaintiff was convicted by the Magistrate after a hearing of some of the charges and they all relate to alleged illegal placement of containers on a land comprorised in Lot 51 of S1435(Toti Park) and around that area including public path, and incidents that had arisen form that illegal placement storage of containers on a land that is allocated for public purpose, and damage to the said park, obstruction of traffic on the main road while loading and unloading and obstruction of public parth etc. On 16.6.2009, the Plaintiff obtained an *ex parte* restraining order against the Plaintiff from '*operating business or other activities from Toti Park until further orders of the Court*' within

pending criminal action. The Plaintiff alleges that it informed the Defendant as soon as they were aware of the order of the court to remove some containers which are refrigerated. The Plaintiff allege that refusal to remove such containers was unreasonable as Defendant out to have known that meat products would contaminate without constant supervision of temperature. The restraining order was quashed by the High Court **17.7.2009** for lack of jurisdiction, and the Plaintiff was allowed access to the containers. The Plaintiff instituted this action for damages by way of originating summons on 14.9.2009 and while it was pending the Defendant on 2.8.2010 removed the containers from Toti Park to a container yard. The Defendant state in several instances they had issued the notices where the Plaintiff had removed the containers stated in the notices but had placed new containers thereafter. According to the Defendant the Plaintiff had committed statutory offences, for which it was charged and also convicted by the Magistrate's Court. The Defendant is also counter claiming additional expenses that had occurred to them in the removal of containers from Toti Park to a container yard and also charges for the container yard. The Defendant is also claiming for damages to Toti Park due to use of heavy vehicles and placement of containers, which they had repaired.

FACTS

2. The Plaintiff who is engaged in the business of processing and canning meat and other food products used to place its containers including refrigerated container, in a vacant land area called Toti Park.

3. The Defendant who is the relevant local government body on several instances had served notices to the Plaintiff for the removal of the containers from the said location and they were subsequently removed, but soon some new containers were placed.

4. So, the serving of the notices for removal of containers, did not stop the Plaintiff from placing containers on the said land which is not a container yard.

5. The Lot 51 of Surveyed Plan S 1435 (marked as D 10) and in that it is ' to be dedicated to Recreational Reserve' there was no right for the Plaintiff to place containers in said lot called as Toti Park irrespective of ownership of the land is vested with the Defendant or not.

6. Director of Town and Country Planning had zoned Lot 51 as Open Space to be dedicated for Recreational Reserve. So the use of land and purpose is recreational for public and cannot be used as container yard of the Plaintiff without permission from Town and Country Planning.

7. The Plaintiff on 25.4.2008 had requested from the Defendant's permission to place containers on the roadside and this was rejected by its letter dated 18.6.2008.

8. Subsequently, the Plaintiff was granted a time limited use of Toti Park on 16.7. 2008. The Defendant was allowed to place the containers in Toti Pak for 10 days, under certain conditions.

9. Not only Plaintiff had violated the conditions, but after the expiration of time period the Plaintiff continued to place containers in Toti Park disregarding the notices issued by the Defendant.

10. After several notices to quit the premises the Defendant instituted Criminal Action for following charges on 18.3.2009

    a. Failure to cease operating storage containers from Toti Park contrary to Section 7(7) (b) of the Town Planning Lami Order 1997, Cap. 139.
    b. Obstruction of footpath contrary to Section 115(1)(f) of the Local Government Act Cap 125.
    c. Interfering with authorized use of Park contrary to Section 19(1) (f) of Town Planning By-Laws, Cap 125.
    d. Causing injuries to street contrary to Section 115(1) (g) of the Local Government Act, Cap. 125.

11. After Plaintiff entered a plea of not guilty, he continued to use it as its container yard disregarding the quit notices issued by the Defendant as well as NLTB (predecessor to iTLTB).

12. In the pending Criminal Action the Defendant sought and obtained *ex parte* interim order on 16.6.2009, against the Plaintiff restraining the Defendant *'from operating business or other activities from Toti Park until further orders of the Court'*.

13. The learned Resident Magistrate also ordered that *ex parte* order to be served to the Defendants and the matter was adjourned till 26.6.2009.

14. The Plaintiff on 22.6.2009 filed a Motion for discharge or stay of interim order made on 17.6.2009.

15. On 15.7.2009 the Plaintiff had written to the Defendant seeking removal of containers from Toti Park and had informed that there are containers with raw meat and sought removal of them, without success.

16. According to Defendant Plaintiff continued to remove containers from Toti Park while the restraining order was operative.

17. The High Court exercising its revisionary powers quashed the *ex parte* interim restraining order of the Resident Magistrate on 17.7.2009 and the Plaintiff got access to the containers places in Toti Park. Or the court also made a finding that 'it was mischievous of counsel for the complaint to apply for an injunction against an accused, knowing the case was not civil but criminal proceedings and that the Magistrate does not have jurisdiction to grant an interlocutory injunctions in criminal proceedings'

18. The Plaintiff had refrigerated containers in the park and they were connected to power supply from national grid. The connection was obtained in 2008 with the concurrence of Defendant and NLTB (predecessor to iTLTB).

19. The Plaintiff contended that refusal of the Defendants for removal of containers was unreasonable and Defendant knew or ought to have known the variation of temperature in cold storage without constant supervision could make meat products contaminated.

20. The Plaintiff alleges that they were given access to the containers only on 24.7.2009.

21. Upon the receipt of the order of High Court, quashing the interim order of the Resident Magistrate, the Plaintiff had filed the action by way of originating summons on 14.9.2009 for damages and seeking restraining orders against the Defendant and also stay of criminal proceedings instituted by the Defendant against the Plaintiff which was pending.

22. The following orders were made at the conclusion of the said originating summons:

a. Oral evidence to be adduced in respect of liability and quantum.
b. Application for stay of criminal proceedings is refused.
c. Application restraining Lami Town Council from removing the containers from Toti Park is refused.
d. Lami Town Council is ordered to return the containers to the Plaintiff at a place to be nominated by Plaintiff excluding Toti Park without cost.
e. Cos of Lami Town Council as claimed for storage and removal are to be tried in the originating summons.
f. Lami Town Council is not to interfere with containers at Food Pacific Limited upon the release of the same.

23. While the said originating summons was pending the Defendant removed the containers that were in Toti Park to a container yard after issuing notice to remove them within 48 hours.

24. The containers were removed on 2.8.2010 and Plaintiff was informed of the location of the containers and requested to obtain release upon payment of charges for removal. (See P12 annexed B)

25. Upon the orders of the court the containers were returned to the Plaintiff, but the claim for charges of container yard needed to be proved by the Defendant.

26. In the prayers the Plaintiff is seeking following orders

'An order for Damages against the Defendant (particulars of which are given in paraph 14 hereabove) caused as a result of the violation of the Plaintiff's right to due process amongst other violations in respect of which Justice Gounder made findings of fact referred to in paragraph 11 hereabove;

A Declaration that the Defendant , its servants and agents abused its powers and was in Contempt of Court in forcefully removing the Plaintiff's containers from the Plaintiff's possession and control when the parties were awaiting the ruling from Justice Anjela Wati on the issue of liability as referred to in paragraph 19 hereabove'.

27. The Defendant in its statement of defence and counterclaim stated that Plaintiff illegally stored its containers.

28. The Defendant had in numerous instances had requested the Plaintiff to stop storing containers in Toti Park, and around that area including foot path.

29. Despite the requests and warning and even while criminal action was pending the Plaintiff continued with its action of using Toti Park for storage of its containers as well as others.

30. According to the Defendant Plaintiff had also allowed third parties to store in Toti Park for a fee.

31. The Plaintiff led evidence of Jithen Kumar and marked documents and closed its case the Defendant called Director of Country Planning, and Enforcement Officer, An Accountant and also an engineer to produce a report regarding the work required to be done in Toti Park.

32. The Defendant in the counter claim is seeking two specific expenses and they are

a. Expenses for removal and storage of containers in container yard from 2.8.2010 till they were returned to the Plaintiff upon an order of the court.
b. Repair work to Toti Park.

ANALYSIS

33. The Plaintiff in the statement of claim seeking:
a. damages caused as result of the violation of Plaintiff's right to due process amongst other violations in respect of which Justice Gounder made findings of facts in the decision that are contained in paragraph 11 of the statement of claim.
b. Plaintiff is seeking a declaration that Defendants abused its powers and was in contempt of court in forcefully removing the Plaintiff's containers from the Plaintiff's possession and control.

34. For convenience I address the issue of declaration that the Defendant had 'abused its powers and or was in contempt' first. The Plaintiff was charged for certain offences in the Magistrate's court by the Defendant and it had pleaded not guilty to the said charges. While the said criminal action was pending the Defendant had filed an *ex parte* application for interim restraining order to the Resident Magistrate and the same was allowed. This interim order was later quashed by High Court in its exercise of revisionary jurisdiction.

35. Though the *ex parte* interim order restraining the Plaintiff was quashed, the criminal action was not stayed and it was pending before Magistrate's Court and the Plaintiff having pleaded not guilty was continuing usage of Toti Park which is zoned as Open Space as its container yard without a legal authority.

36. While the criminal action against the Plaintiff was pending, it filed civil action HBC 299 of 2009 by way of originating summons against the Defendant seeking following orders

a. Judgment in the sum of $81,950 being damages suffered by the Plaintiff as a result of ex parte injunction obtained by the Defendant in Magistrate's Court Criminal Division;
b. Alternatively an inquiry be made as to the damages sustained by the Plaintiff;
c. That the Plaintiff be at liberty to enter judgment against the defendant for the amouns such damages.
d. An order that Criminal Action No 356 of 2009 be permanently stayed; and
e. Cost of this action on indemnity basis"[1]

[1] Judgment of HBC 299 of 2009

37. On 30th July, 2010 the Defendant served the Plaintiff a notice an "Order to Remove All the Containers from Toti Park". When this notice was served to the Plaintiff's office at 2.15pm it had refused to sign the acceptance of the notice. (see annexed B to P11).

38. On the same day Defendant's Acting CEO had written a letter to the General Manager of the Plaintiff of its refusal to sign the notice and warned that if would take action upon expiry of 48 hours. This was also faxed to the General Manager of the Plaintiff at 4.03 PM (see letter of 30.7.2010 addressed to GM of Plaintiff, annexed B to P11).

39. On the same day at around 4.35PM the **Plaintiff's solicitors had had acknowledged the receipt of the notice served** to their client and stated that the '*notice served on our client is sub-judice. Therefore any actions taken by Lami Town Council , in attempting to remove the containers would tantamount to contempt of court*'

40. The said letter also warned the Defendant that if the containers in Toti Park are removed they would institute contempt proceedings against its officers. (See Annexed C to P11).

41. As stated by the notice and subsequent letter that was also faxed to the General Manager the Defendant commenced removal of containers on 2.8.2010 to a container yard.

42. After hearing of the originating summons , but before judgment was delivered an *ex parte* application was made by the Plaintiff on 4.8.2010 seeking:

a. Defendant by itself , its servants , agents or otherwise and howsoever be restrained from interfering with the plaintiff's containers stored at the Nakarawa Park at Toti Street, Wailada, Lami until further order of the Court;
b. The Defendant be ordered to forthwith return the containers already removed from Nakarawa Park at Toti Street to the Plaintiff;
c. Damages ; and
d. Costs

43. The said matter was converted to *inter partes* and after hearing an oral judgment was delivered on 16.9.2010 and reasons were given on 25.1.2011. (P8).

44. The Plaintiff was charged for criminal action in the Magistrate's Court and there were four specific charges made. The charges were relating to storage of containers in Toti Park which is a public open space according to the subdivision approved by the local authority.

45. There was no order restraining the Plaintiff removal of the said containers, and or undertaking as to containers. The originating summons (civil action HBC 299 of 2010) was filed by the Plaintiff for stay of the Criminal Proceedings and in the judgment delivered 25.01.2011, it was held

> *'17. ..... The civil court has no power to stay criminal proceedings. I have not been shown any authority by virtue of which I can exercise the powers to stay proceedings which is not the subject matter before the court. I is ironical as to how the Plaintiff is critical of the Defendant in obtaining and injunction in criminal court when the Magistrate's Court did not have powers to issue any injunctive orders.*
> *18.* ***The Plaintiff's counsel is committing the same deadly mistake by asking the court to grant it an order which it is not properly entitled to.***'[2](emphasis is mine).

46. The Plaintiff's contention is since it had filed originating summons seeking stay of criminal action and for damages against the Defendant for obtaining interim restraining order in the criminal action they can continue to store containers at their will at Toti Park is flowed. According to Plaintiff, Defendant is precluded from removing the containers. This cannot be accepted.

47. In the light of the findings in the judgment delivered on 25.1.2011, the action for stay of criminal prosecution lacked jurisdiction and doomed to fail. So no injunctive relief can base on this, though he had sought.

48. So, what was remaining before the court was an assessment of damages in the civil suit. It cannot be *sub judice* to the containers that are stored on Toti Park on 30.7.2009 when the notice for removal was issued.

49. The issue of notice for removal of containers was not a strange thing as notices were issued to the Plaintiff for removal of containers since 2005. The witness for the Defendant, an Assistant Enforcement Officer, explained that this had been done in the past as well and when the notices were issued Plaintiff in the past had removed the containers. Such notices were issued to the Plaintiff from 2005 (See documents marked D1).

50. Having experienced the service of notices for removal of containers from 2005 and had also complied with such notices, the Plaintiff in the originating summons did not fit proper to seek injunctive orders to restrain the Defendant from issuing new notices for

[2] Judgment of the originating summons delivered on 25.1.2011

removal and or removal of the containers till 4.8.2010 when all the containers were removed to a container yard by the Defendant.

51. There is no contempt or abuse of process by the Defendant in removal of containers from a land that was not zoned as Open Space and it was to be dedicated for a Recreational Reserve.

52. The Plaintiff cannot use it for its container yard without the change of zoning. So the activity that Plaintiff conducted was an illegal activity under Town Planning Act 1946 and Defendant had removed the containers to a container yard having notified them to remove.

53. There was no breach of court order that can be declared as contempt in the removal of the containers from Toti Park. This removal was done after issuance of notices.

54. The Plaintiff was finally served the notice for removal of containers and 48 hours granted for such removal. There were such notices for removal issued to the Plaintiff since 2005 and in two instances they were given only 24 hours to remove and in all instances containers were removed immediately upon the service but some new containers were places subsequently.

55. The Plaintiff is not entitled to seek declaration that the Defendant had abused its powers or was in contempt only because the Plaintiff had sought an order for stay of the criminal action in civil division of High Court, which was struck off *in limine* for lack of jurisdiction.

56. The Plaintiff had no authority to store containers on said location. It is estopped from denying the authority of the Defendant to issue a notice to vacate the land as they had entered the land accepting the Defendant's permission (D2).

57. The witness for the Plaintiff admitted that they had not complied with the conditions stated in letter that granted temporary permission to store containers for 10 days.

58. Not only conditions of the temporary permission was violated, but also did not stop storing containers on the location even 2 years after expiration of the permission.

59. So the removal of containers from the said location after notice for removal is not an abuse of power by the Defendant and it cannot be declared as contempt.

Damages for the Plaintiff

60. According to the originating summons the Plaintiff claimed damages for obtaining restraining order in the Magistrate's Court in criminal action which was quashed by High Court on 17.7.2009 (P4).

61. The restraining order for Defendant from operating its business or other activities from Toti Park was made on 16.6.2009.

62. On 15.7.2009 the Plaintiff's solicitors had written a letter to the Defendant's solicitors at that time and sought removal of containers and had indicated that there were meat items in the containers (P5).

63. Despite no order being made to release the containers by the Defendant, the Plaintiff had removed containers from the yard according to the number of containers that remain in the location each day during the pendency of restraining order.

64. In such a situation Plaintiff cannot attribute to any contamination only to the actions of the Defendant.

65. The claim for damages is for a sum of $81,950.08 and it is made out of $22,000 for frozen fish and $59,950.08 for frozen chicken.

66. As regard to the damage to frozen fish the Plaintiff is relying on a letter written by Seafresh (Fiji) Limited. No evidence was called from Seafresh (Fiji) regarding this letter and this letter was objected and the judge who heard this matter had clearly indicated that claim cannot solely rely on that matter at the hearing and it was not allowed to be marked though it forms part of affidavit in support of the originating summons filed on 14.9.2009.

67. So, there is no proof of damage of Plaintiff's items in the container due to the interim restraining order which was quashed on 17.9.2009 by the High Court. The Plaintiff was storing containers in an area that was zoned for different purpose. Without change of that zoning usage of that land as a container yard for the Plaintiff is illegal activity in terms of Section 27 of Town and Country Planning Act, 1946.

68. The fact that Defendant could not have obtained a restraining order in Criminal Action in the absence of a statutory provision supporting such restraining order *ipso facto* will not qualify for damages unless actual damage is proven on balance of probability . These are special damages that needs to be proved by the Plaintiff which the Plaintiff had failed.

69. There is no evidence of any payment to third parties regarding alleged damage to Fish.

70. There is no proof on balance of probability that alleged contamination was due to Defendant's activity.

Counterclaim by the Defendant

71. The Defendant is claiming for charges it incurred in the removal and storage of containers in a container yard.

72. The Plaintiff was issued with a notice to remove containers for a considerable time period. The Plaintiff in previous instances removed the containers temporarily but resumed the operation of storing containers by the side of the road blocking the path of pedestrians and also disruption of traffic flow on the main road while loading and unloading the containers. The Plaintiff admitted that they had even used cones on the road for this purpose, which proves that they were illegally operating container storage in the area.

73. The Plaintiff state that Lot 51 in Survey Plan S1435 does not belong to the Defendant. The Plaintiff being local authority entrusted with the implementation of the zoning in the area under it can act under Section 27 of Town Planning Act, 1946 to remove such illegal activity and it could also prohibit the use of such land for such activities.

74. The Defendant was given adequate notices to restrain from using Lot 51 in S 1435 as container yard. The Defendant did not stop its activities and continued its activity of container storage.

75. In such a situation Section 27(6) allows any expenses lawfully incurred by the Defendant to be recovered as a '*civil debt*'. The Plaintiff had engaged private entity to transport the containers that were remaining on Lot 51 of S 1435 and stored in a container yard. The Plaintiff was informed of the location while these were transported on 2.8.2010 according to the evidence of Assistant Enforcement Officer and he had also allowed some containers to be released to them upon request. At least one container was allowed to be emptied by the Plaintiff before they were removed, too.

76. Contrary to the evidence of the Plaintiff's evidence by letter dated 5.8.2010 the Defendant had informed the Plaintiff location of all the containers and informed that all of them could be released on payment of cartage and storage fees at that time.

77. So it is due to the non payment of fees by the Plaintiff that containers remained in the yard for a long period and the cost accumulated $44,754.09 and this was paid by the Defendant and the containers were released.

78. So the Defendant had proved that it had legally incurred expenses for $44,754.09 as its cost due to the removal of containers and storage of them in a container yard.

79. The Defendant had also claimed for the repair work done to Toti Park. There is no proof of the condition of the area before occupation of Plaintiff and without that being proved the claim for damages is not proved on balance of probability. The Plaintiff's witness also said that they had done some improvements to the area and it was not in a good condition to operate container storage.

80. So the claim for the damages to the park is not proved.

CONCLUSION

81. The Plaintiff's action for abuse of process needs to be dismissed *in limine* considering that Plaintiff was already in violation of Section 27 Town Planning Act 1946 when it utilized an area in contravention of the zoning. Lot 51 of subdivision according to the evidence is reserved for public purpose (open space). Irrespective of its ownership the purpose was not to be utilized for one company for its commercial purpose without changing the Scheme Plan or zoning. When such an activity is conducted in contravention of zoning in the Scheme Plan the local authority 'may at any time remove' any work that can bring it into conformity of the Scheme in terms of the said provision. The Defendant can also prohibit such land being used for purpose other than intended purpose of the zoning. (See Section 27(1) (a) and (b) of Town Planning Act 1946. The Defendant had given adequate notice to the Plaintiff and Plaintiff was not complying with the notices issued to vacate the land being used as container yard. The Defendant had instituted criminal action against the Plaintiff .The Defendant had obtained an interim restraining order from Magistrate's court in the same criminal action and this was revised subsequently for lack of jurisdiction to issue such an interim order. There is evidence that even during the pendency of the wrongfully obtained restraining order the Plaintiff had removed containers from Lot 51. In any event there is no proof that the damage alleged in the statement of claim occurred during the restraining order that was discharged on 17.7.2009. After that the Plaintiff was again notified to remove all the containers from Lot 51 and had removed the containers on 2.8.2010 to a container yard. The Plaintiff's employees who inquired about the location of the containers was informed about the location at the time of the removal verbally and by writing this was conveyed by 5.8.2010. The Plaintiff had failed to prove when the alleged contamination of the food

happened. So the claim for damages is dismissed. There is no contempt committed by the Defendant. From the Defendants counter claim only the cost of 44,754.09 is proved and the damage to the park is not proved as a damage only to be attributed to the Plaintiff. Each party to bear their own costs.

FINAL ORDERS

a. The statement of claim of the Plaintiff is struck off.
b. The Defendant's counter claim for 44,754.09 against the Plaintiff for charges for containers is granted.
c. The Defendant is also granted an interest of 3% for the said sum from 27.9.2010 (date of the cheque) to the date of judgment.
d. No costs.

Dated at Suva this 7th February, 2019.

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Justice Deepthi Amaratunga
High Court, Suva