

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**WESTERN DIVISION**  
**CIVIL JURISDICTION**

**CASE No -HBM: 13 of 2019**

**BETWEEN** : **POONAM JYOTIKA KOHLI** of Toko, Tavua as **Administratrix of the Estate of AVINESH SANJAY RAM**  
**APPLICANT**

**AND** : **THE MINISTRY AND THE MINISTER OF LANDS & MINERAL RESOURCES**  
**1<sup>ST</sup> RESPONDENT**

**AND** : **THE ATTORNEY GENERAL OF FIJI**  
**2<sup>ND</sup> RESPONDENT**

**Appearances** : **Mr Krishnil Patel for the applicant.**  
: **Mr Josefa Mainavolau for the respondents.**

**Hearing** : **Thursday, 04<sup>th</sup> July, 2019**  
**Ruling** : **Friday, 13<sup>th</sup> September, 2019**

**R U L I N G**

**[A] BACKGROUND FACTS**

- (1) By notice of Motion filed on 17-04-2019, the applicant seeks the following orders;
- (i) *A declaration that the applicant as the administratrix and wife of late Avinesh Sanjay Ram is entitled to full disclosure of the investigation report compiled by the Mineral Resources Department into the incident which resulted in her husband's death;*
  - (ii) *An order for unconditional release of the Mineral Resources Department's full investigation report to the applicant without delay;*
  - (iii) *Costs of this application be costs in the cause;*

- (iv) *Such further or other order(s) that the Honourable Court may deem fit, just, expedient and necessary in the circumstances.*
- (2) The application is made pursuant to Section 25 and 44(1) of the Constitution of the Republic of Fiji and Rule 3(1) of the High Court (Constitutional Redress) Rules 2015 and inherent jurisdiction of the Court.
- (3) The application was supported by an Affidavit sworn on 16-04-2019 by the applicant. The application was opposed. An Affidavit in Reply sworn on 28-05-2019 by Mr Raymond Mohammed, the State Mining Engineer and Manager Mining Division at the Mineral Resources Department was filed on behalf of the respondents.
- (4) The Supporting Affidavit which is as follows sets out sufficiently the facts surrounding this case.
1. *I am the Administratrix for the Estate of Avinesh Sanjay Ram, my husband, the deceased. Annexed is a copy of the death certificate of the deceased and Letters of Administration marked "PJK-1" and "PJK-2" respectively.*
  2. *I have either personal knowledge of the matters to which I depose in this affidavit or, in so far as they are not within my personal knowledge, they are true to the best of my knowledge, information and belief.*
  3. *The deceased was employed by Vatukoula Gold Mines Pte Limited as an underground miner.*
  4. *On 2<sup>nd</sup> May 2018, the deceased whilst working underground at the mine died.*
  5. *I am aware that the Mineral Resources Department (hereinafter "MRD") of Ministry of Lands and Mineral Resources had conducted an in-depth investigation into the circumstances surrounding the death of the deceased.*
  6. *I had instructed my solicitors Krishnil Patel Lawyers to liaise and obtain the investigation report from MRD which would reveal the findings of the investigation.*
  7. *Krishnil Patel Lawyers exchanged correspondences with MRD for release of the investigation report. Krishnil Patel Lawyers was informed by MRD that they are willing to release the investigation report provided a court order was obtained for the release. Annexed are copies of the correspondences marked "PJK-3".*
  8. *MRD had conducted the sole investigation into the accident at the mine as the supervising and regulating authority.*

9. *To date, my family and I are unaware of the events which transpired on the unfateful day that led to the death of my husband at the mine.*
10. *I desperately require the disclosure of the investigation report which in my opinion would provide grounds for the Applicant to pursue court action against the employer to recover compensation.*
11. *The release of the investigation report would also provide relief and comfort to me and my family and lay to rest the many unanswered questions surrounding the death of my husband which has haunted us.*
12. *In the premises, I humbly pray for order in terms of the application.*

- (5). In his Affidavit in Reply, the State Mining Engineer claimed that; (reference is made to paragraph (14) of the Affidavit)

***THAT** in reply to paragraph 10 of the Plaintiff's Affidavit, I state that the investigation report into the circumstances surrounding the death of the Plaintiff's husband at his workplace is a confidential document. The investigation was done by the Mineral Resources Department (MRD) Board and was intended only for the MRD. As such, I state that said investigation report cannot be disclosed to a third party.*

**[B] DISCUSSION**

- (1) The applicant is the wife and Administratrix of the Estate of her late husband, Avinesh Sanjay Ram. Mr Ram was employed with the Department of Mineral Resources at Vatukoula. On 02-05-2018, Mr Ram died at the Vatukoula Gold Mine while in the course of his employment with the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent had convened a board to investigate the circumstances surrounding the death of Mr Ram upon which a report was compiled.
- (2) The applicant deposed in her Supporting Affidavit that; (reference is made to paragraphs (06 to 11 of the Affidavit)
  6. *I had instructed my solicitors Krishnil Patel Lawyers to liaise and obtain the investigation report from MRD which would reveal the findings of the investigation.*
  7. *Krishnil Patel Lawyers exchanged correspondences with MRD for release of the investigation report. Krishnil Patel Lawyers was informed by MRD that they are willing to release the investigation report provided a court order was obtained for the release. Annexed are copies of the correspondences marked "PJK-3".*

8. *MRD had conducted the sole investigation into the accident at the mine as the supervising and regulating authority.*
9. *To date, my family and I are unaware of the events which transpired on the unfateful day that led to the death of my husband at the mine.*
10. *I desperately require the disclosure of the investigation report which in my opinion would provide grounds for the Applicant to pursue court action against the employer to recover compensation.*
11. *The release of the investigation report would also provide relief and comfort to me and my family and lay to rest the many unanswered questions surrounding the death of my husband which has haunted us.*

(3) It is this which has triggered the present application. The orders sought here are that;

- (i) *A declaration that the applicant as the administratrix and wife of late Avinesh Sanjay Ram is entitled to full disclosure of the investigation report compiled by the Mineral Resources Department into the incident which resulted in her husband's death;*
- (ii) *An order for unconditional release of the Mineral Resources Department's full Investigation report to the applicant without delay.*

(4) What is the respondents' reason opposing the release of investigation report? It was Mr Mainavolau's submission to me, which was challenged by Mr Patel, that this report should not be disclosed;

- Because of its confidential nature.
- That the disclosure would be against public policy.
- Sections 6(6) and 6(11) of the Civil Service Act, 1999 forbids the disclosure of internal government documents to third parties.

(5) I am concerned here with a situation where the claim is by the Ministry and the Minister of Lands & Mineral Resources to withhold the disclosure of the investigation report on the grounds that;

- (A) The report is confidential.
- (B) The disclosure of the report would be contrary to public policy.

**I must confess to surprise, and, even to some degree of indignation, that, I have not been supplied with a sworn written statement from the Permanent Secretary of Ministry of Lands and Mineral Resources regarding his claim to withhold the disclosure of the report and his written reasoned statement of the grounds for opposition.**

- (6) It is of course an elementary principle of law that the person taking the objection to production of the document should himself have read and considered the document and formed the view that on grounds of crown privilege or public interest privilege or public interest immunity the document ought not to be disclosed or produced, either because of its actual contents or because of class of document to which it belongs.

See; **Duncan v Cammell**  
(1942) AC 624

❖ **Robinson v State of South Australia**  
(1931) AC 704

❖ **Bruce v Walderin**  
(1963) VR 3

❖ **Grosvenar Hotel, London**  
(1964) 1 Ch 464

The deponent, State Mining Engineer of the Ministry of Lands and Mineral Resources does not depose in his affidavit that **he has himself perused** the investigation report regarding the circumstances surrounding the death of Mr Ram. It is obviously essential that the person asserting the claim for privilege should himself have seen the document.

The deponent State Mining Engineer does not depose that **he has himself examined** the Investigation Report. **It seems to me perfectly plain that the Affidavit in Opposition in this case falls far short of standard.** To be more precise, how did the State Mining Engineer make up his mind that the report should not be disclosed on the ground of public interest, on the ground of privilege and confidential and on the ground of public policy, without reading the contents of the report??? In the result, applying the rule of law enunciated in the above judicial decisions, I completely reject the Affidavit in Opposition of the State Mining Engineer and I give it absolutely no weight whatsoever.

Having said that I want to make it clear that on public policy the truth should always be accessible to the Court. The ultimate authority to determine the availability of privilege in a particular case is the judiciary and not the executive. [**Conway v Rimmer**<sup>1</sup>, **Sankey v Whitlam**<sup>2</sup>]

### Confidentiality

- (7) The State Mining Engineer claims that the report is confidential.

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<sup>1</sup>(1968) 1 AER 874

<sup>2</sup>(1978) 21 ALR 505.

I desire to emphasize that the mere fact that the report is confidential is not enough to establish a public interest to be weighed against the disclosure and use of relevant information and evidence.

The origin of the doctrine of confidentiality is found in **Prince Alber v Strange**<sup>3</sup>.

It has been clearly laid down that the mere fact that a document is private or is confidential does not necessarily produce the result that its disclosure and production can be withheld.

In the context of the present case, I cannot help but recall the rule of law enunciated in the following judicial decisions.

In **Duncan v Cammell Laird & Co. Ltd**<sup>4</sup>, Viscount Simon LC said;

*“It is not a sufficient ground that the documents are “state documents” or “official” or are marked “confidential”. It would not be a good ground that, if they were produced, the consequences might involve the department or the government in Parliamentary discussion or in public criticism, or might necessitate the attendance as witnesses or otherwise of officials who have pressing duties elsewhere. Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation.*

(Emphasis Added)

In **Asiatic Petroleum Co. Ltd v Anglo-Persian Oil Co. Ltd**<sup>5</sup>, Swinfen-Eldy, L.J. observed;

*“The foundation of the rule is that the information cannot be disclosed without injury to the public interests, and not that the documents are confidential or official which alone is no reason for their non-production: the general public interest is paramount to the interests of the suitor”.*

Applying the rule of law enunciated in **Duncan v Cammell** (*supra*) and **Asiatic Petroleum Co. Ltd. v Anglo-Persian Oil Co. Ltd**, (*supra*), I venture to say beyond peradventure that the doctrine of confidentiality has no application even by any stretch of imagination to the instant case.

I interpose to mention that the proposition advanced by the State Mining Engineer demonstrates a clear misconception on his part as to the scope and width of doctrine of “confidentiality”.

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<sup>3</sup> (1849) 01 HAT 01.

<sup>4</sup> (1942) 1 AER 587

<sup>5</sup> (1916) 1 K.B. 822,

Applying the principles of Duncan v Cammell & Co (*supra*) and Asiatic Petroleum Co. Ltd v Anglo-Persian Oil Co. Ltd (*supra*) to the instant case, it is clear beyond question that the confidential documents are not privileged from disclosure and production. The law has never accorded privilege against disclosure and production to confidential documents.

In light of the rule of law enunciated in the case of Duncan v Cammell & Co (*supra*) and Asiatic Petroleum Co. Ltd v Anglo-Persian Oil Co. Ltd, (*supra*) it seems to me perfectly plain that the Ministry of Lands and Mineral Resources cannot defend its interest against the applicant's claim by invoking the doctrine of public interest immunity.

In United States v Nixon<sup>6</sup>, the Supreme Court refused, in the absence of a need to protect military, diplomatic or sensitive national security secrets, to accept the argument that the very important interest in confidentiality of presidential communication is significantly dismissed by the production of such material for *in camera* inspection and went in to hold that this interest must give way to the superior public interest requiring that justice be done in cases.

### Public Interest

- (8) The State Mining Engineer claimed that the disclosure of the report would be contrary to public policy and prejudicial to the Ministry.

There are two aspects of the public interest which pull in contrary directions. It is in the public interest that full effect should be given to the normal rights of a litigant. It is in the public interest that in the determination of disputes the courts should have all relevant material before them. It is, on the other hand, in the public interest that material should be withheld if, by its production and disclosure, the safety or the well-being of the community would be adversely affected. There will be situations in which a decision ought to be made whether the harm that may result from the production of documents will be greater than the harm that may result from their non-production. [Per Lord Morris, Conway v Rimmer<sup>7</sup>].

A cursory glance at the Affidavit in Opposition reveals that the State Mining engineer merely says that the production of the document is contrary to public policy and prejudicial to the Ministry.

**For my part, I am constrained to say that the opinion of the State Mining Engineer does not really give assistance to the respondents in view of the fact that the Permanent Secretary does not say by way of a sworn written statement that he has himself perused the report and its disclosure would be contrary to public policy.**

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<sup>6</sup> (1974) 418 US 683

<sup>7</sup> (1968) AC 940

Moreover, the opinion formed by the State Mining Engineer in relation to the contents of the investigation report is very doubtful. Because he does not depose in his affidavit in opposition that he read and examined the document. How did he make up his mind that the report should not be produced on the ground of public interest without reading the contents of the report???

Strictly speaking, the number of documents the disclosure of which would involve danger to the State, State Departments, Ministries and public interest are relatively small. Certain documents are treated as immune from disclosure by their very nature. For example, where disclosure would be injurious to the national defense or to good diplomatic relations (such as cabinet papers).

It is clear beyond question that the investigation report in relation to the circumstances surrounding the death of Mr. Ram in the present case **does not** on the face of it belong to a class the disclosure of which would prejudice the public interest or involve danger to the State, State Departments or Ministries.

The disclosure of the investigation report will not affect military, diplomatic or sensitive departmental secrets. The report in question does not relate to military diplomatic or sensitive national secrets.

**Is there a statutory bar on the disclosure of the ‘investigation report’?**

- (9) Mr Mainavolau submitted that Sections 6(6) and 6(11) of the Civil Service Act, 1999 forbids the disclosure of internal government documents to third parties.

With respect, I do not accept that.

Sections 6(6) and 6(11) of the Civil Service Act 1999 read;

- 6(6) An employee must maintain appropriate confidentiality about dealings that the employee has with any Minister or any member of the staff of a Minister.*
- 6(11) An employee must not, except in the course of his or her duties as an employee, or with the express authority of the Permanent Secretary of his or her Ministry, department or parliamentary body, give or disclose, directly or indirectly, any information about public business or anything of which the employee has official knowledge.*

As I understand the wording of Section 6(6) and 6(11) there is no express or implied prohibition on the Permanent Secretary of Ministry of Lands and Mineral Resources on the disclosure of the investigation report. I have not been provided with a sworn written statement by the Permanent Secretary of Ministry of Lands and Mineral Resources that he is not permitted by statute law to disclose the investigation report. Therefore, in the absence of express or implied statutory prohibition on the Permanent Secretary, it seems



to me that in the special circumstances of this case, the interest of justice warrants the Court in making an Order for disclosure of the report in question.

- (10) I must confess that I am not in the least impressed by the objections of the State Mining Engineer and Manager Mining Division at the Mineral Resources Department.

I disallow the objections.

[C] **ORDERS**

- (i) Objections overruled.
- (ii) I order the 1<sup>st</sup> respondent to disclose to the applicant the investigation report into the circumstances surrounding the death of 'Avinesh Sanjay Ram'.
- (iii) The investigation report should be disclosed within 07 days from the date of the ruling.
- (iv) There will be no Order as to costs.



  
.....13/09/2019.  
**Jude Nanayakkara**  
**Judge**

At Lautoka  
Friday, 13<sup>th</sup> September, 2019