

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 141 of 2013

BETWEEN: **JASWANT KUMAR** t/a Kumar's Hardware Supplies, of
Waituri Road, Nausori, Businessman

PLAINTIFF/RESPONDENT

AND: **MINISTRY OF WORKS, TRANSPORT AND PUBLIC**
UTILITIES (now known as Ministry of Infrastructure and
Transport), of 87 Ratu Mara Road, Nasilivata House,
Samabula, Suva.

FIRST DEFENDANT/APPLICANT

AND: **ATTORNEY-GENERAL OF FIJI**

SECOND DEFENDANT/APPLICANT

BEFORE: Hon. Acting Chief Justice Kamal Kumar

COUNSEL: Ms S. Kant for Mr. J. Kumar for the Plaintiff/Respondent
Ms K. Naidu for the Defendants/Applicants

DATE OF RULING: 28 May 2020

RULING

(Application for Stay of Proceedings)

1.0 Introduction

1.1 On 6 August 2015, the Defendants/Applicants filed by way of Summons, Application for an Order that the within proceedings be stayed for six months

and a review thereafter pending determination of Suva Magistrates Court – Criminal Case No. 955/15 against the Plaintiff in this action, who has been charged by the Fiji Independent Commission Against Corruption (**FICAC**) with the following offences:

- (i) Conspiracy to commit felony – contrary to section 385 of the Penal Code, Cap. 17;
- (ii) Conspiracy to defraud – contrary to section 111 of the Penal Code, Cap. 17; and
- (iii) Obtaining financial advantage – contrary to section 326(1) of the Crimes Decree 2009.

(Stay Application)

- 1.2 On 2 October 2015, Court directed parties to file Affidavits/Submissions and adjourned the Stay Application to 11 February 2016, for hearing.
- 1.3 Stay Application was called on 5 February 2015, and adjourned to 12 April 2016, for hearing.
- 1.4 Stay Application was heard on 12 April 2016, and adjourned for Ruling on Notice.

2.0 Background Facts

- 2.1 On 15 May 2013, Respondent filed Writ of Summons and Statement of Claim, claiming for building materials supplied to Government Departments including Department of Works, Transport and Public Utilities.
- 2.2 On 25 June 2013, Applicant filed Statement of Defence.
- 2.3 On 9 July 2013, Respondent filed Reply to Statement of Defence.
- 2.4 On 15 July 2013, Respondent filed Summons of Direction which was struck out due to non-appearance of Respondent.

- 2.5 On 15 August 2013, Respondent filed Summons for Directions.
- 2.6 On 16 October 2013 Defendant filed Application for Stay of Proceedings and pending outcome of criminal investigations against Plaintiff and Officers of First Defendant.
- 2.7 On 6 November 2013, parties were directed to file Affidavits and the Stay Application was adjourned to 9 December 2013, for hearing.
- 2.8 On 9 December 2013, parties were directed to file Submissions and Application was adjourned to 29 January 2014, for Ruling.
- 2.9 Ruling was delivered on 31 January 2014, when Stay Application filed on 16 October 2013, was dismissed with costs and order in terms of Summons for Directions was made.
- 2.10 On 14 February 2014, Applicants filed Affidavit Verifying List of Documents (**AVLD**).
- 2.11 On 24 February 2014, Respondent filed AVLD.
- 2.12 On 16 June 2014, Respondent filed Minutes of Pre-Trial Conference.
- 2.13 On 24 June 2014, Respondent filed Summons under Order 34 and Copy Pleadings.
- 2.14 This matter was called in the Court on 29 August 2014.

3.0 Stay Application

- 3.1 This Court being Court bestowed with inherent powers has unfettered discretion to consider the Stay Application and to determine whether to stay the proceedings or not **Takiveikata & Ors. v State** [2008] HAM 39 of 2008 (12 November 2008); **Jefferson v Bhetch** [1979] 1 ALL ER 1108; **Websyte**

Corporation Pty Ltd. v Alexander & Anor. (No. 2) [2012] FCA 562 (para 109).

3.2 In **Websyte** case, Court stated as follows:-

“109. The court has a discretion to grant a stay of civil proceedings when criminal proceedings involving the same subject matter are on foot or “on the cards”. The court’s discretion should not be exercised lightly in this context, but each case will be determined on its merits. The overriding principle is balancing the interests of justice between the parties.”

3.3 Facts that have been identified by the Court in exercising discretion in relation to stay civil proceeding until determination of criminal proceedings are:-

- (i) Whether there is real danger of causing injustice;
- (ii) Whether the issues in civil and criminal proceedings overlap;
- (iii) Whether there is real prejudice if stay is not granted.

3.4 Applicants submit that:-

- (i) Respondent was engaged by First Applicant to supply building materials and other goods and Plaintiff filed his previous claims \$63,103.62 for supply of building materials and goods.
- (ii) Respondent and eight (8) employees of the Ministry of Works, Transport and Infrastructure (PWTI) were investigated and charged by FICAC pursuant to Section 111 and 385 of Penal Code, and 49, 324(2) and 326(1) of Crimes Act 2009.
- (iii) All documents pertaining to First Applicants dealings with Respondent have been handed over to FICAC to facilitate their investigations.
- (iv) Criminal charges relate to conspiracy and collusion between Plaintiff and employees of First Applicant to deprive Government of public funds.

- (v) Criminal charges relate to goods allegedly supplied to First Applicant in 2009 and 2010.
- (vi) This proceeding concerns claim by Respondent for building materials/goods supplied during the same period.
- (vii) There is significant overlap between this proceeding and criminal proceeding against the Respondent and both are based on same set of facts, same period and same parties.
- (viii) It is in the interest of justice that this proceeding be stayed until determination of criminal proceedings being Criminal Case No. 955/15.

3.5 Respondent submits that there will be no real risk of injustice or prejudice to Applicant for following reasons:-

- (i) Applicant has failed to prove by way of documentary evidence Respondent has been charged;
- (ii) Respondent's claim is on Contract of Sale and Purchase of Goods which Respondent will have to prove on balance of probabilities.
- (iii) Total claim in proceedings is \$63,106.02 as opposed to amount subject to criminal proceedings which is \$16,029.56.
- (iv) No defence of fraud or collusion has been shown in the Affidavit in Support.
- (v) If this proceedings is stayed Respondent will be prejudiced as it will cause financial hardship for the Respondent or his family.
- (vi) Respondent has proposed to keep in Court Trust Account the sum of \$16,029.56.
- (vii) This proceeding was filed prior to criminal proceedings and as such this proceedings should take priority.

3.6 Before proceeding further this Court would like to put on record that Respondent through his Solicitors, wrote to Court stating that FICAC informed them that Respondent has not been formally charged.

- 3.7 When the Respondent's Solicitors letter was brought to the attention of Applicants' Counsel, she sought time to seek clarifications from FICAC.
- 3.8 FICAC then wrote to Office of the Solicitor-General informing them that Respondent had been charged and enclosed copies of the charge sheets with relevant documents.
- 3.9 Even though no Affidavits were filed this Court considered these evidence from the Bar table for the sole reason that it was Respondent's Counsel who wrote to Court first which resulted in Applicants submitting correspondence and evidence from FICAC to show that Respondent was in fact charged and Respondent's Solicitors were fully aware about the criminal proceedings.
- 3.10 In fact Mr. M.A. Khan from Respondent's Solicitor's Office appeared for the Respondent in criminal proceedings.
- 3.11 It is noted that Respondent filed an Application to Stay Criminal Proceedings pending final determination of this proceeding which Application was dismissed by learned Magistrate on the ground that Magistrates Court did not have power to stay proceedings.
- 3.12 This Court after analyzing the evidence and submissions made by Counsel for the parties and case authorities find that:-
- (i) Appellant will need to obtain all documents given to FICAC during the course of investigation by FICAC;
 - (ii) There is overlap of facts and evidence between the criminal proceedings against the Respondent and this proceedings;
 - (iii) Outcome of criminal proceedings will in some way resolve this proceedings as to what transpired in 2009 and 2010;
 - (iv) There is no dispute that Respondent is charged by FICAC.
- 3.13 This Court notes that Respondent on one hand claims that he will be prejudiced as he is unemployed and has a family to feed and on the other hand offers to pay \$16,029.56 into Court.

3.14 This Court in the interests of justice and to avoid undue prejudice to the Appellants will grant stay of proceedings until determination of the criminal proceedings.

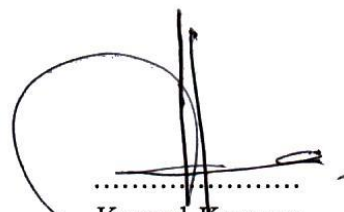
4.0 Costs

4.1 In consideration of nature of the application and both parties filed submissions, this Court is of the view that costs of the Application be costs in the cause.

5.0 Order

- (i) This proceedings be stayed pending final determination of Criminal Case No. 955 of 2015 against Respondent (Plaintiff);
- (ii) Order for Stay of Proceedings be reviewed after period of six (6) months from date of this Ruling;
- (iii) Costs of the Application for Stay of Proceedings be costs in the cause.




Kamal Kumar
ACTING CHIEF JUSTICE

At Suva
28 May 2020

Solicitors:

M.A. Khan Esq., for Plaintiff/Respondent
Office of the Attorney-General for Defendants/Applicants