

IN THE HIGH COURT OF FIJI AT LABASA

In the matter of an appeal under section
246 of the Criminal Procedure Act 2009.

[APPELLATE JURISDICTION]

PACIFIC COATINGS LIMITED

Appellant

CASE NO: HAA. 30 of 2020
[Savusavu MC Case No.326 of 2020]

Vs.

**FIJIAN COMPETITION AND
CONSUMER COMMISSION**
**("formerly known as Fiji Commerce
Commission")**

Respondent

Counsel : Mr. Ali S. for the Appellant
Mr. Gauna K. for the Respondent

Hearing on : 15 March 2021

Judgment on : 15 March 2021

JUDGMENT

1. The above named appellant ("appellant") is charged before the Magistrates Court at Savusavu under sections 44 and 54(4) read with section 129(1A) of the Fijian Competition and Consumer Commission Act 2010 ("FCCC Act"). The relevant charge was filed on 28/05/20.

2. An application to strike out the said criminal proceedings was filed by way of a motion and affidavit on behalf of the appellant on 03/08/20 on the basis that the Respondent-Commission has failed to comply with sections 44(2) and 44(3) of the FCCC Act.
3. The learned Magistrate had dismissed the said application on 28/08/20 stating *inter alia* that it is premature for the court to determine the issue raised by way of the aforesaid application.
4. Being aggrieved by the said decision of the learned Magistrate, the appellant had taken steps to file a notice of appeal dated 09/09/20, raising the following grounds of appeal;
 1. ***THAT*** the learned Resident Magistrate erred in law and fact by not considering Section 44(2) of the Fijian Competition and Consumer Competition Act in that the Respondent shall give 14 days notice and allow Appellant an opportunity of making representation to the Respondent in regards any breaches of the Fijian Competition and Consumer Competition Act.
 2. ***THAT*** the learned Resident Magistrate erred in law ad fact by stating in paragraph 12 & 13 of the Ruling that the Respondent may wish to explore Section 59 of the Fijian Competition and Consumer Competition Act to give spot fines but failed to give any consideration of section 44(2) of the said Act which allows opportunity to the Appellant to make representation on any breach alleged.
 3. ***THAT*** the learned Resident Magistrate erred in law and fact by ignoring Section 44(2) of the Fijian Competition and Consumer Competition Act in that the said section must be exhausted first before section 59 of the said Act applies.
 4. ***THAT*** the learned Resident Magistrate erred in law and fact by dismissing the strike out application when all along in the Ruling he agreed that the Respondent failed to comply with Section 59 of the Fijian Competition and Consumer Competition Act by imposing spot fines before criminal proceeding to take place without addressing why the strike out application is not granted and for the criminal charge to continue.


5. The matter was fixed for hearing today. However, this court decided to deal with the issue as to 'whether the application in question which was made before the Magistrate Court to strike out criminal proceedings was valid in law' as a preliminary issue and the parties were requested to make submissions on the said issue first. The learned counsel for the appellant was specifically requested to point out to the provisions under which the said application was made.
6. It was the submission of the learned counsel for the appellant that the said application was filed in terms of Order XXVI Rules 1 and 4 of the Magistrate Court Act.
7. The aforesaid Order deals with motions filed before the Magistrate Court and it is clear that the said Order either expressly or impliedly does not allow the filing of a striking out application against a criminal charge or criminal proceedings.
8. Thus, the learned counsel for the appellant has failed to show this court that there was a valid legal basis for the relevant application to strike out criminal proceedings to be made before the Magistrate Court.
9. The Criminal Procedure Act 2009 stipulates the procedural law that applies to criminal proceedings and the said Act does not provide for the filing of striking out applications in relation to criminal proceedings.
10. On the other hand, currently, the position is that the Magistrate Court does not have the jurisdiction to hear applications for permanent stay. It is pertinent to note that the expected outcome of the application in question that was filed and canvassed before the Magistrate Court is the same as that of an application for permanent stay. What cannot be done directly, cannot be done indirectly [*Quando aliquid prohibetur ex directo, prohibetur et per obliquum*"].
11. Therefore, this application to strike out was ought to have been dismissed by the learned Magistrate *in limine*.

12. The learned counsel for the respondent also submitted that there is no right to appeal against the impugned decision of the learned Magistrate. This submission has merit. In terms of section 246(7) of the Criminal Procedure Act, no right to appeal shall lie against an order of a Magistrate until the Magistrate Court has finally determined the guilt of the accused. Therefore an order by a Magistrate Court can be appealed before the final determination of the guilt of the relevant accused, only with leave of the High Court. In the instant case, the appellant has simply filed a notice of appeal and not an application to leave to appeal.
13. All in all, the application which is the subject matter of this appeal is frivolous and was an application filed without any legal basis. Additionally, there is no proper application before this court, given that there is no right to appeal against the impugned decision. Consequently, the dismissal of that application should be affirmed and this appeal should be dismissed *in limine*.
14. As the learned Magistrate has indicated in the impugned decision, it is still open for the appellant to properly raise the issue on the purported non-compliance before the Magistrate Court.

Orders;

- a) This appeal is dismissed; and
- b) The decision to dismiss the application to strike out the criminal proceedings made on behalf of the appellant in Savusavu MC Case No. 326 of 2020 is affirmed.




Vinsent S. Perera
JUDGE

Solicitors;

Divend Prasad Lawyers for the Appellant
FCCC for the Respondent