

ANGENETTE MELANIA HEFFERNAN v COMMODORE JOSAIIA VOREQE BAINIMARAMA and 2 Ors (HBC37 of 2007)

HIGH COURT — CIVIL JURISDICTION

5
SINGH J

28 March, 20 April 2007

10 **Practice and procedure — applications — application for order to restrain Defendants from detaining Plaintiff or interfering with her freedom of speech, assembly and movement — whether apprehensions based on newspaper clippings reasonable — newspaper reports were tendered to lay the foundation for Plaintiff’s apprehension of what would happen to her — newspaper reports considered relevant evidence in these interlocutory proceedings — court found that Plaintiff’s**
 15 **apprehensions were reasonable and she needed court’s protection — Civil Evidence Act 2002 s 4(1)(a) — Crown Proceedings Act s 15 — Emergency Powers Act 1998 — Public Order Act 1975.**

20 The Plaintiff was the director of the Pacific Centre for Public Integrity Ltd (PCPI). The PCPI was a non-government organisation interested in exposing corruption, promoting good governance and improving accountability and transparency in the public and private sector. The Plaintiff made a statement regarding the taking of various persons by the military at one time or another by relying on newspaper clippings. The Plaintiff feared that she might be arrested in the course of her duties as director of PCPI as she criticised the military. The Plaintiff made an application to the court seeking an order to restrain the
 25 Defendants from detaining her or interfering with her freedom of speech, assembly and movement.

Held — (1) The Plaintiff relied on newspaper clippings to show that various persons had been taken into custody by the military at one time or another and to show that she feared that a similar fate might befall her, and her constitutional rights would be breached.
 30 It would be virtually impossible for the Plaintiff to obtain an affidavit from every one of the persons mentioned in those newspaper clippings.

(2) The newspaper reports was not tendered to show the truth of what was stated but to lay the foundation for the Plaintiff’s apprehension of what would happen to her and whether such apprehension was reasonable. Accordingly, there was nothing objectionable
 35 in the circumstances of this case in admitting the newspaper reports as relevant evidence in these interlocutory proceedings.

(3) The interlocutory remedy sought was akin to a constitutional redress. The Plaintiff sought an order that the court exercised its discretion to protect rights which were basically given to her by the supreme law of the land. The court found that that the Plaintiff’s apprehensions were reasonable and she needed the protection of the court. The court also
 40 found that damages would not be an adequate remedy.

(4) The court found that the orders sought were too wide. There was no evidence that there had been any interference by the Defendants with Plaintiff’s legal advisers or witnesses.

(5) The court ordered that, pending the determination of the substantive matter, the
 45 Defendants were restrained and enjoined from any interference direct or indirect with the freedom of the Plaintiff to express her views and those of her employer PCPI and to move within Fiji and to leave Fiji in accordance with her rights under the Constitution except in accordance with the law of Fiji as it stood prior to midnight on 4 December 2006.

Application granted in part.

Cases referred to

50 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396; [1975] 1 All ER 504; [1975] 2 WLR 316, applied.

Air Pacific Ltd v Air Fiji Ltd [2006] FJCA 63; *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129, cited.

Vidya Wati v Rasik Kumar and Anor HBC 214/2003, considered.

- 5 *J. Cameron and T. Draunidalo* for the Plaintiff
S. Sharma, C. Pryde and A. Rokomokoti for the Defendants
Singh J.

Background

10 Angenette Melania Heffernan is the executive director of Pacific Center for
 Public Integrity Limited (PCPI). The PCPI is a non-government organisation
 interested in exposing corruption, promoting good governance and improving
 accountability and transparency in the public and private sector. Since the
 removal of democratically elected government on 5 December 2006, the
 15 Applicant alleges that she and members of the PCPI have expressed concern on
 the actions of the first (D1) and second Defendants (D2).

After certain events to which I shall refer later, she left her home with her
 children and sought refuge initially at her mother's home and later at a hotel.

20 On 30 January 2007 she was interviewed by police officers at the hotel after
 a formal complaint was made by the D1 and/or the D2 against public statements
 made by her. She had declined to voluntarily go to the police. She has not been
 charged with any offence as yet. The Applicant has returned to Suva but fears that
 she might be arrested if in the course of her duties as director of PCPI she
 criticises the military. Therefore she has made this application to the court
 25 seeking among other things orders restraining the Defendants from detaining her
 or interfering with her freedom of speech, assembly and movement.

I have before me the following affidavits:

- (a) By the Applicant three affidavits filed on 31 January 2007, 26 February
 2007 and 13 March 2007.
 30 (b) On behalf of the Defendants three affidavits filed on 14 February 2007
 and two on 22 March 2007.

Hearsay — Civil Evidence Act

The Defendants submit that there was insufficient or no direct credible
 evidence relevant to the Plaintiff brought forth by the Defendants and that her
 35 allegations rely principally on unsubstantiated newspaper reports and which are
 hearsay in any event. They also allege that no notice had been given to the
 Defendants as required by s 4(1)(a) of the Civil Evidence Act 2002. These
 articles they submit relate not to the Applicant but rather other citizens and the
 military.

40 The Civil Evidence Act 2002 is an enabling or a facilitating legislation. It
 enables evidence, which would otherwise be inadmissible under common law
 especially under the hearsay rule, to be now admitted as evidence. The court
 however can attach what weight it considers necessary having regard to factors
 outlined in s 6 of the Act.

45 The common law requires evidence must be relevant to be admissible. If it is
 not relevant, it is inadmissible. The Civil Evidence Act is silent about this
 common law rule and therefore this common law rule is deemed to apply.
 Requirement of relevance is the paramount consideration.

50 The fundamental objective behind the Act is that a party should be able to
 present the best evidence available to it. This would assist the fact finding
 exercise. It is upon the fact finding that the credibility of a process of litigation

rests. It further enhances fairness in such process. However the quality of hearsay and with it the probative value may vary enormously so the court has been given discretion as to the weight it attaches to such evidence.

5 Winter J in *Vidya Wati v Rasik Kumar and Anor* HBC 214/2003 in considering the provisions of the Act concluded that “the over-riding objective being to enable courts to deal with cases ‘justly’ including ensuring that the parties are on an equal footing, saving expense and dealing with cases in ways which are proportionate” and “constructing and arguing cases by ambush and winning them by virtue of economic power alone should no longer be acceptable”.

10 This is a case where I have before me an ordinary citizen pitted against the might of the state (albeit whose lawfulness is in question in these proceedings). The Plaintiff has relied on newspaper clippings to show that various persons had been taken into custody by the military at one time or another and to show that she fears that similar fate might befall her and her constitutional rights breached.
15 It would be virtually impossible for any Plaintiff to obtain an affidavit from every one of the persons mentioned in those newspaper clippings.

Additionally, this is not a trial by witnesses. It is an interlocutory matter where the rules relating to tendering of evidence have been somewhat relaxed under O 41 r 5(2) which permits affidavits to contain statements of information or belief
20 with the sources and grounds.

The newspaper reports I am of the view have not been tendered to show the truth of what is stated but to lay the foundation for the Plaintiff’s apprehension of what could happen to her and whether such apprehension is reasonable. The Plaintiff has also stated that members of the RFMF threatened to take her on
25 23 January 2007 and hung around outside her compound and that she received threatening telephone calls. This is what caused her to leave her home with her children.

Accordingly I find nothing objectionable in the circumstances of this case to admit the newspaper reports as relevant evidence in these interlocutory
30 proceedings.

Principles governing the grant of interlocutory injunction

The guiding principles in considering the grant of interlocutory injunctions are those set out in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396; [1975] 1
35 All ER 504; [1975] 2 WLR 316. The applicant must establish:

- (a) that there are serious issues to be tried;
 - (b) that damages would be an inadequate remedy;
 - (c) that the balance of convenience justifies the grant of interlocutory injunction.
- 40 *Air Pacific Ltd v Air Fiji Ltd* [2006] FJCA 63 adopting remarks from *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 stated that in the end the question is where the overall justice lies.

Mr Pryde for the Defendants conceded that there were serious questions to be tried. Dr Cameron in his submission elaborated those serious issues. In view of
45 the concessions made by the Defendants it would be unwise of me at this stage to consider in detail or express any conclusive views on these serious issues. All I need to do is to state what appear to be the serious issues.

The serious issues are:

- 50 (a) Whether the State of Emergency Regulations are valid in the context of Emergency Powers Act 1998 and the Public Order Act 1975.
- (b) Whether the Interim Government Regulations 2009 are validly enacted.

- (c) Whether Respondents have a legal right to arrest the Applicant or any citizen.

Damages an adequate remedy

5 The Applicant if detained loses her freedom of movement. She may or may not suffer physically and/or psychologically. In her affidavit she states she has a young family and children. The need for a mother to be with her children is obvious and needs no emphasis. Any detention of the Plaintiff would in all probability affect the harmonious development of her children. How can damages
10 compensate both the Plaintiff and her children for deprivation of maternal love albeit for a short time?

The court's attention was further drawn to immunity (Fiji Military Government Intervention) Promulgation 2007 by which immunity from criminal and civil proceedings was granted to the armed forces. Dr Cameron submitted
15 that if a similar promulgation repeated the Applicant may lose her right to damages depending on how the courts view such promulgation.

Balance of convenience

The Defendant's stand is that they have no interest in arresting the Plaintiff and that the Plaintiff had been to the military camp to talk on numerous occasions. I
20 do not know whether these visits were before 5 December 2006 or also after that date.

The court asked the counsel for the Defendants if he could give an undertaking to the court to the effect that the Plaintiff would not be interfered with. None was
25 forthcoming. If the Defendants have no interest in the Plaintiff's activity, then they will suffer no inconvenience if orders of the nature sought are made.

Overall justice

The interlocutory remedy sought is akin to a constitutional redress. The Plaintiff is seeking court to exercise its discretion to protect rights which is
30 basically given to her by supreme law of the land. In some instances as in the case of freedom of expression such rights can be limited provided such limitation is reasonable in justifiable in a free and democratic society. It is for the Defendants to justify limitation imposed but none has been shown.

I am persuaded that the Applicant's apprehensions are reasonable and she
35 needs the protection of the court. Damages would not be an adequate remedy.

Injunctive relief — Section 15 of the State Proceedings Act

Under s 15 of the Crown Proceedings Act injunctions cannot be granted
40 against the state in civil proceedings against the state. On the face of it, it appears that the Plaintiff is met with this legislative hurdle.

Dr Cameron countered that stating that only a lawful state can take shelter behind this provision not a regime which has usurped power from a legitimate government. He further stated that the Attorney-General is only an "Interim" one. He has not been appointed as provided for under s 100(1) of the Constitution.
45 Section 100(3) requires the Attorney-General to be either a member of the House of Representatives or the Senate before he can be appointed as such. While he may have other qualifications, he does not meet this qualification as he never was a member of elected House of Parliament.

The Plaintiff says the interim Attorney-General has been appointed by the
50 military regime and is legal adviser to that regime and not to a constitutionally recognised government. He in short is not a representative of the state.

There is much force in Dr Cameron's submission and is clearly an arguable matter.

Orders as sought

5 The orders 1–4 in the amended inter parties motion seeks as follows:

- 1) Until further Order(s) of this Honourable Court, an injunction to restrain the Defendants and or any of them from directly or indirectly detaining or interfering or attempt to interfere with the freedom of speech, assembly and movement of the Plaintiff and/or her Counsel and/or any of his legal advisers;
- 10 2) Until further Order(s) of this Honourable Court, an injunction to restrain the Defendants from entering or attempt to enter any dwelling house or office occupied by the Plaintiff or her counsel and/or any of his legal advisers;
- 3) Until further Order(s) of this Honourable Court, an injunction to restrain the Defendants from interfering or attempting to interfere in any manner whatsoever with the Plaintiff's legal right to travel overseas;
- 15 4) Until further Order(s) of this Honourable Court, an injunction to restrain the Defendants from interfering or attempting to interfere directly or indirectly in any manner whatsoever with Plaintiff's staff and/or with any board member of the Pacific Centre for Public Integrity;

20 I agree with the Defendants that orders as sought are too wide. They may also cause problems in their compliance. Counsels or legal advisers may change without the Defendants being aware of the change. One of the consequences of noncompliance with orders is contempt proceedings. Accordingly orders need to be sought and granted in terms which are clear and capable of being complied with.

25 However simply because the orders as sought are too wide does not result in their refusal altogether. The court can mould the orders so the purpose of relief is served adequately. Dr Cameron I suspect was aware of the breadth of the orders and he at the conclusion of his submissions gave the court a minute of three proposed orders. The first order relates to the Plaintiff; the second relates to her legal advisers; the third relates to her witnesses. There is no evidence before me that there has been any interference by the Defendants with Plaintiff's legal advisers or witnesses. Accordingly I grant only one order in the following terms:

35 Pending the determination of the substantive matter, the defendants and each of them are hereby restrained and enjoined from any interference direct or indirect with the freedom of the Plaintiff to express her views and those of her employer PCPI and to move within Fiji and to leave Fiji in accordance with her rights under the Constitution except in accordance with the law of Fiji as it stood prior to midnight on 4 December 2006.

40 I also order costs which are to be taxed by the master.

Application granted in part.

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