

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. **HBC 429 of 2003L**

BETWEEN : **ANWAR HUSSEIN** (father's name Mohammed Hussein) of
Namaka, Nadi, Businessman

Plaintiff

AND : **NADI TOWN COUNCIL** a statutory body under the Local
Government Act. Cap. 125

Defendant

AND : **THE ATTORNEY GENERAL OF FIJI** of Suva

3rd Party

FINAL JUDGMENT

Of: Inoke J.

Counsel Appearing: Mr. H. A. Shah for the Plaintiff
Mr. A. Sahu Khan for the Defendant
Mr. R. Green for the 3rd Party

Solicitors: Haroon Ali Shah Esquire for the Plaintiff
Messrs M. K. Sahu Khan & Co for the Defendant
State Solicitors for the 3rd Party.

Date of Hearing: 20 February 2007, 23 April 2007.

Date of Judgment: 28 August 2009

INTRODUCTION

[1] This is a claim by Mr Hussein against the Nadi Town Council based on a refusal by the Council to release plans which he says had been approved by the Department of Town and Country Planning for the rezoning of his property from Residential "B" to Commercial "C".

[2] Mr Hussein says that as a result of the Council's refusal he was not able to develop his property and has suffered losses which he now claims from the Council.

[3] The Council denies responsibility and says that the approval was not given by the Director of Town and Country Planning but by someone who was acting in that position and therefore did not have the necessary authority to give such approval. That approval is said to be *ultra vires*. The Council makes other allegations against the Acting Director but the main thrust of the Council's defence is the lack of authority.

[4] The Attorney General was joined by the Council as Third Party representing, specifically, the Acting Director of Town and Country Planning.

BRIEF CASE HISTORY

[5] Mr Hussein filed his Writ of Summons and Statement of Claim on **4 December 2003**. His case eventually went to trial on **20 February 2007** and **23 April 2007** and two witnesses were called by him and one by the Council. The Third Party did not call any witnesses. Unfortunately, the learned trial Judge was not able to deliver the Court's judgment. Both parties, however, agreed that judgment be delivered based on the trial Judge's notes of evidence and other material submitted at the trial rather than the matter reheard *de novo*. This judgment is delivered under those circumstances.

PRELIMINARY POINT OF LAW

[6] Before I consider the evidence, I think there is a preliminary point of law which should be decided first because the outcome of that inquiry will determine what evidence is relevant in the resolution of this claim.

[7] The preliminary point is that raised by the Council¹ and that is whether an approval given by a person acting in the position of Director of Town and Country Planning is valid.

THE FACTS RELEVANT TO THE PRELIMINARY POINT

[8] The facts relevant to this preliminary point are these:

1. The person in question was appointed to the position of Acting Director of Town and Country Planning with effect from **21 March 2001**.²
2. On **24 May 2003** the Acting Director gave provisional approval for the rezoning of Mr Hussein's land from "Residential B" to "Commercial C".³
3. On **6 October 2003** the Acting Director gave final approval of the rezoning.
4. On **29 October 2003** the Council appealed against this decision to the Minister for Local Government.
5. On **7 November 2003** the Council was advised that its appeal had been declined.
6. The letter of provisional approval from the Acting Director to the Council dated **24 May 2003** enclosed plans and Notification of Suspension of part of the Nadi Town Planning Scheme (the Suspension Notice) issued and signed by the Minister for Local Government dated 20 May 2003.⁴ The Suspension Notice was issued pursuant to the provisions of the **Town Planning Act [Cap 139]**. All notices were published in the Gazette and the newspapers.

¹ Para 15 Statement of Claim Against The Third Party

² Para 14 Defence of The Third Party.

³ Para 5 Statement of Claim Against The Third Party.

⁴ Defendant's Docs. pp 13-17.

7. The Acting Director's letter of final approval dated **6 October 2003** to the Council explained the process taken by him in reaching his decision to give final approval.⁵

THE LAW ON THE PRELIMINARY POINT

[9] **Section 2** of the **Town Planning Act [Cap 139]** defines the position of "Director" as "the Director of Town and Country Planning for the time being appointed under the provisions of section 3".

[10] **Section 3** of the Act provides:

"3.-(1) There shall be an officer appointed by the Public Service Commission with the title of Director of Town and Country Planning who shall be responsible to the Minister.

(2) The Director shall carry out such duties as are set out in this Act and in the Subdivision of Land Act and such other duties as the Minister may from time to time direct.

[11] One of the duties of the Director is to give approvals for Town Planning Schemes and any changes to them, such as the rezoning of land from Residential B to Commercial C as was the case here. I set out the relevant provisions of the Act for completeness:

"Final approval of scheme by Director

"s. 24.-(1) After all objections have been disposed of, and the requirements of the Director, if any, for the modification of the scheme have been complied with, the Director shall finally approve the scheme, and shall signify his approval by signing the same.

Public notification of scheme

(2) When the Director shall have finally approved a scheme the local

⁵ Defendant's Docs, p 41.

authority concerned shall publicly notify the same in accordance with regulations to be made under this Act.

Approved scheme to be open to inspection

(3) The approved scheme and a copy of all maps, plans and other particulars comprised therein shall be exhibited at some convenient place in the offices of the Director, and the local authority, and shall be open to the inspection of the public free of any charge whatsoever at any time during the office hours of the Director and the local authority.

Operation of scheme

s. 25. When a scheme has been finally approved by the Director as aforesaid it shall be the duty of the local authority to observe and to enforce the observance of the requirements of the scheme in respect of all development of any description thereafter undertaken within the area to which the scheme applies, whether by the local authority or by any person, and, save with the consent in writing of the Director, the local authority shall not thereafter undertake or permit any alteration or modification of any existing buildings or works if such modification or alteration would tend to prevent or delay their being brought into conformity with the requirements of the approved scheme.

Modification and suspension of approved scheme

"s. 26.-(1) Any local authority may from time to time of its own motion, and shall if so required by the Director or by the Minister, elaborate any of the provisions of an approved scheme, enlarge the scheme, modify or alter any of the details of the scheme or substitute a new scheme for the approved scheme.

"(2) The foregoing provisions as to the public notification of a scheme, the hearing of objections to a scheme, and the approval of the scheme by the Director, shall apply with respect to every alteration or addition to a scheme, and to every new scheme substituted for an approved scheme.

"(3) In any case where a local authority proposes, or is required by the Director or by the Minister, to modify or alter any of the details of an approved scheme or to substitute a new scheme therefore, the Minister may, by notification in the Gazette, notify the suspension of such of the provisions of the approved scheme as he may consider necessary or expedient pending the approval of such modifications or alterations or the substitution of a new scheme and, as from the date of publication of such notification, such provisions of the approved scheme shall be suspended accordingly either with respect to the whole of the land to which the modifications or alterations or

the new scheme are or is to apply or with respect to any portion thereof specified in the notification.

"(4) Where a notification has been published under the provisions of subsection (3), the provisions of this Act relating to interim development shall apply, as from the date of such publication, to development of the land specified in such notification as though no scheme had been approved in respect thereof.

[12] The Act makes no mention of the position of "Acting Director" or for such a person exercising the powers and functions of the Director. Thus, the Council argued, any approval by the Acting Director was null and void for lack of authority under the Act.

[13] Equally so, it can be said that the Act does not expressly prohibit a person in an acting position from exercising the powers and functions of the Director.

[14] Mr Sahu Khan, Counsel for the Council, referred in his submissions to **s 7** of the **Public Service Act [Cap 74]**, **s 29** of the **Interpretation Act [Cap 7]** and **s 88** of the **Local Government Act [Cap 125]** which I do not think assist the Council's case on this point.

[15] I think the law is as set out in the following sections of the **Interpretation Act [Cap 7]**:

Powers and duties of holder of office

S. 36. Where any written law confers any powers or imposes any duty on the holder of any office as such, then, unless a contrary intention appears, the power may be exercised and the duty shall be performed by the person for the time being holding that office.

Appointment of officers by name or office

S. 38. Where, by or under any written law, ... any Minister or any public officer or public body is empowered to appoint or name a person to have and exercise any powers or perform any duties, ... such Minister or such officer or body may either appoint a person by name or direct the person

for the time being holding any office designated by ... such Minister, or by such officer or body, to have and exercise such powers or perform such duties; and thereupon, or from the date specified by ... such Minister or by such officer or body, the person appointed by name or the person holding the office aforesaid shall have and may exercise such powers or perform such duties accordingly.

Reference to holder of office includes person discharging functions of that office

S. 39. In any written law, instrument, warrant or process of any kind, any reference to a person holding an office shall include a reference to any person for the time being lawfully discharging the functions of that office.

Power to appoint substantively pending retirement, etc., of existing office holder

S. 40.-(1) Where the substantive holder of any public office constituted by or under any written law is on leave of absence pending relinquishment by him of such office, or has been instructed by the Government to take up a special duty or is otherwise absent, it shall be lawful for another person to be appointed, substantively to the same public office.

(2) Where two or more persons are holding the same office by reason of an appointment made, in accordance with subsection (1), then, for the purpose of all written law and in respect of every power conferred or duty imposed upon the holder of such office, the person last appointed to the office shall be deemed to be the holder thereof.

Construction of enabling words

S. 41. Where any written law confers power upon any person to do or to enforce the doing of any act or thing, all such powers shall be deemed to be also conferred as are necessary to enable the person to do or to enforce the doing of the act or thing.

CONSIDERATION OF PRELIMINARY POINT

[16] The way this matter was tried and argued, the fact of the appointment of the person holding the office of Acting Director was taken as admitted or at least conceded. Indeed paragraph 14 of the Third Party's Defence pleads that the person holding the office of Acting Director was appointed and made effective from **12 March 2001**. The

pleading was not traversed by the Council. What was not admitted however was the authority for the office holder to exercise the powers of the Director.

[17] The provisions of **ss 38, 39 and 40** of the **Interpretation Act** clearly in my view authorise the person then holding the position of Acting Director to exercise the powers and functions of the Director given by the **Town Planning Act**.

[18] I therefore find that the Acting Director of Town and Country Planning had the necessary authority to give the final approval contained in his letter of **6 October 2003**.

[19] Having come to this conclusion, much of the evidence given at the trial becomes irrelevant.

BREACH OF NATURAL JUSTICE

[20] However, that still leaves the matter of whether the Acting Director's decision was reached in breach of natural justice or without complying with the provisions of the Act. The Council argued that members of the public, in particular, the residents in the area of the proposed rezoning, were not given ample opportunity to object to the proposal.

[21] I have to disagree. I accept the explanation given by the Acting Director in his letter of **6 October 2003** as showing that there was no breach of natural justice or the procedures required under the **Town Planning Act**. The letter said:

"I have noted the Council's concern as raised in your letter of 5/8/03 and also your letter of 24/9/03 where you informed me that there were no written objections received on this rezoning application after the end of the objection period.

Firstly on the concern regarding the public participation exercise, my apology for the Department's inability to undertake this exercise during the period of objection as was conveyed to you. This was due to the breakdown in

communication and some misunderstanding on when to undertake the exercise which was scheduled during the formal objection period. I wish to inform you that this procedure is not a requirement of the scheme amendment process as the avenue to raise any objection is during the objection period; in this case from 30/5/03 – 13/6/03. We have been doing this to create better awareness and to enable property owners to be well informed on rezoning proposals thus enable them to submit comments/objections that will enable me to decide on an application.

While I note that your council did not support the proposal initially, the decision taken by me is based on the material change to the development and those intended on the site as stated by the applicant. In the absence of the public participation exercise, the legal avenue to raise any objection is covered under section 26(1-4) of Cap 139. Public participation is a planning tool used when it is required. I further note that while Council was not supportive of the rezoning application, it did not make any effort at all to object to the provisional approval of the rezoning as notified in both the newspaper and the gazette. Aside the residents, Council itself knew of the advertisement and the opportunity open to it to formally object to the scheme amendment as this was the only legal avenue open.

Given that there were no objections received by the Council as conveyed to me in your letter dated 24/9/03, I have decided that this rezoning be finally approved. Two copies of the finally approved plans and a copy of the final approval notice are submitted to you for your necessary action.

Finally, I wish to inform you that if you are dissatisfied with the decision that I have made on this application, you have the right of appeal to the Minister under section 5(2) (e) of Cap 139.”

[22] Council argued that there was a requirement for a 9 m setback. I note that the letter of 6 October 2003 had enclosed copies of the approved plan which stated that one of the conditions of approval was “that the 9m loading/unloading and carparking bay be provided on site and formed to the satisfaction of Council”. Thus, the requirement has not been waived and must be complied with to the satisfaction of the Council.

[23] These findings effectively disposes of the Council’s defence and leaves me with the decision on whether the Plaintiff has suffered loss and damage as a result of the refusal by the Council to release the approved plan.

DAMAGES FOR ECONOMIC LOSS

[24] It is clear in my view that the Council had no right to hold on to the approved plan and rezoning of Mr Hussein's property and that its refusal had caused delay in the development of the property.

[25] His claim is for pure economic loss. At the trial, Mr Hussein called a witness who had prepared a report⁶ containing projected income for the property based on income from apartments and hotels in the neighbourhood for the period from October 2003 to February 2007. He relied on this report as proof of his loss.

[26] With respect, this is neither sufficient nor acceptable proof. Apart from the expertise of the witness to give such evidence, there were too many contingencies involved. For example, there was no evidence that, on the balance of probabilities, the development, if built, would be rented or even realise the projected income. There was no evidence, other than Mr Hussein's statement of intent, that the proposed development would go ahead in any event.

[27] I therefore dismiss the Plaintiff's claim for damages for lack of proof.

"MALA FIDES" CLAIM

[28] Mr Hussein sought a declaration that the Council acted "*mala fides*". I do not agree that he has made out a case for it. I accept the Council's explanation that they withheld the plans pending legal advice but Mr Hussein went ahead and issued these proceedings whilst that advice was forthcoming. Although Mr Hussein said that he had political differences with the Town Clerk and the Mayor but that of itself is not sufficient in my view to prove mala fides.

COSTS

⁶ Plaintiff Exhibit 8.

[29] As between Mr Hussein and the Council neither of them has won so each should pay their own costs and I therefore make no order as to costs.

[30] However, the Defendant has lost against the Third Party. I think this is a case where indemnity costs are justified. See: **Singh v Naupoto [2008] HBC 199/08**, Costs Decision of 8 August 2008, and **Rokotuiviwa v Seveci [2008] FJHC 221; HBC374.2007 (12 September 2008)**. The special circumstances which take this matter out of the normal rule are the hopelessness of the Defendant's claim against the Third Party and, secondly, the unnecessary joinder of the Acting Director of Town and Country Planning as a party – he could have simply been subpoenaed as a witness. Thirdly, I accept the Mr Hussein's evidence that there were political differences between him and the Town Clerk and the Mayor and, although not sufficient of itself to prove mala fides, partly explained the stance that the Council took with regards to his application for rezoning and the unnecessary continuation of the claim against the Acting Director. I therefore order that the Council pay the Third Party's costs on an indemnity basis summarily assessed at \$4,000.

ORDERS

[31] I therefore make the following **Orders**:

- 1. A declaration that the approval given by the Acting Director of Town and Country Planning in his letter of 6 October 2003 for the rezoning of CT 28025 being lot 14 on DP 7187 in Namaka, Nadi from Residential "B" to Commercial "C" is valid and binding on the Nadi Town Council, subject to the conditions contained therein.**
- 2. The Nadi Town Council immediately releases to the Plaintiff copies of the approved plans for the said property.**
- 3. The Nadi Town Council pays the Third Party's costs of \$4,000 within 21 days.**

.....
Sosefo Inoke
Judge