

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. **HBC 54 of 2008L**

BETWEEN : **NADI TOWN COUNCIL**, a body corporate established and created
by the Local Government Act Cap 125

Plaintiff

AND : **PARMEND CHANDRA GOSAI** f/n Suresh Chandra of Northern
Press Road, Martintar, Nadi, Businessman

1st Defendant

AND : **SURESH CHANDRA** f/n Ram Prasad of Northern Press Road,
Martintar, Nadi, Businessman

2nd Defendant

INTERLOCUTORY JUDGMENT

Of: Inoke J.

Counsel Appearing: Mr. Janend Sharma for the Plaintiff
Mr. Rupesh Singh for the Defendants

Solicitors: Janend Sharma Lawyers for the Plaintiff
Messrs Patel & Sharma for the Defendant

Date of Hearing: 10 August 2009
Date of Judgment: 20 August 2009

INTRODUCTION

[1] This is an application by the Plaintiff Town Council for an interim injunction restraining the Defendants from doing certain things on its land pending the final hearing.

THE MOTION AND AFFIDAVIT MATERIAL

[2] The Plaintiff's motion was filed on **2 April 2008**. The Plaintiff also filed an Affidavit in support on 2 April 2008 sworn by the Town Clerk **[P1]** and a second Affidavit on 13 August 2008 sworn by the Council's Manager Engineering **[P2]**. A further Affidavit by the Town Clerk was filed on 14 October 2008 **[P3]**. A second Affidavit by the Manager Engineering was filed on 6 March 2009 **[P4]**.

[3] The Defendants' material consisted of an Affidavit by the First Defendant filed on 17 July 2008 **[1D1]** and a second Affidavit filed on 2 April 2009 **[1D2]**.

[4] The parties filed written submissions, two sets each. The Plaintiff's submissions are dated 20 February 2009 and a supplement dated 3 April 2009. The Defendants are dated 20 February 2009 and 4 April 2009, respectively.

[5] The matter was argued in Court on **10 August 2009**. This is my judgment.

THE BACKGROUND

[6] The First Defendant is the son of the Second Defendant. They own and occupy land in Northern Press Road in Nadi (the '**Lot**') within the Nadi Town boundary so it falls within the area that is the responsibility of the Plaintiff Town Council.

- [7] The Lot is zoned "Residential B". The Council alleges that the Defendants use the Lot as a works depot, storage and servicing area for heavy plant, machinery, vehicles and trucks, contrary to the zoning of the Lot. The Defendants of course deny the allegations.
- [8] The Council has been trying for years to stop the Defendants by sending them notices without success. It eventually filed a Writ of Summons and Statement of Claim on **2 April 2008** seeking permanent injunctions restraining the Defendants from continuing to use the Lot in breach of the zoning regulations.

THE LONG DELAY

- [9] The Affidavit material is voluminous. I do not understand why so many affidavits, six in all, had to be filed for such a simple and uncomplicated matter both on the facts and on the law. It has taken over a year for this application to be heard which is totally unsatisfactory. This Court has been blamed in the past for the delays but a lot of the blame must lie at the feet of the lawyers. This case clearly illustrates that. Many adjournments in this matter have been given for Counsel to file Affidavits. It was first set down on 15 August 2008 for hearing on 12 September 2008. The hearing did not proceed on that day apparently because an offer of settlement had to be put to the Council in meeting. It was reset for hearing on 17 October 2008. Again the hearing did not proceed because the parties were still awaiting the Council's response. The matter was further adjourned to 14 November 2008 for mention. The Court was finally advised that settlement talks had broken down so the matter was further adjourned to 5 December 2008 to fix another hearing date. I find it difficult to understand how a matter such as this can be settled. As is often the case, the parties use settlement talks as an excuse for an adjournment only to tell the Court weeks and sometimes months later that settlement talks had broken down. It is commendable that parties endeavour to settle disputes themselves

but that process should not be used to delay and frustrate the timely delivery of justice. On 5 December 2008 the matter was set down for hearing on 30 January 2009 with Counsel being ordered to file submissions. On 30 January 2009 the hearing was adjourned by consent. No reason was given. The matter was adjourned to 20 February 2009 for hearing. The hearing commenced on 20 February 2009 and continued on 27 February 2009. At the end of that hearing, the Court ordered that the Plaintiff file a supplementary affidavit on an issue raised in the hearing. The hearing was further adjourned to continue on 3 April 2009. It was further adjourned to 17 April 2009 and of course that fixture did not take place. I had the matter called before me on 18 June 2009 and the hearing date of 10 August 2009 was fixed for the application to be heard *de novo*.

CONSIDERATION OF THE AFFIDAVITS

[10] The Town Clerk says in his first affidavit that the Defendants are the owners of CT 7081, being Lot 11 on DP 1026 at the Northern Press Road, Nadi (the “**Lot**”).¹ The Lot is zoned “Residential B” and falls within the Nadi Town boundary.² The Town Clerk alleges that the Defendants have been using the Lot as a “Works Depot, Storage and Servicing area for heavy plants (sic), machinery and vehicles/trucks” contrary to the Residential B zoning.³ Such usage by the Defendants is for land zoned “Industrial General” and not land zoned “Residential B”.⁴

[11] As early as 13 March 2006, the Council has sent various notices to the Defendants asking them to stop using the Lot for purposes other than for

¹ Para 3 P1

² Para 4,5 P1

³ Para 9 P1

⁴ Para 10 P1

Residential B purposes.⁵ Despite the notices the Defendants have refused to stop.⁶

[12] The Council has also received several complaints from the individuals that live along the Northern Press Road.⁷ One of the complaints was dated 20 October 2000 which in turn referred to an earlier complaint by him made in 1994.⁸ Another letter dated February 1996 complained of the lack of action by the Council. A letter dated 28 November 1994 refers to the “garage and business” of the Defendants and complains that the author had lodged several complaints with the Council but nothing had been done.⁹ He complains of the disturbance and nuisance caused by the Defendants’ operation.¹⁰

[13] The Council carried out a public participation exercise on 13 March 2008 with the residents along the subject road and the residents confirm that heavy trucks still use the road.¹¹ Annexed to the affidavit was a series of photographs showing heavy trucks parked along a dirt road which the Town Clerk says is the Northern Press Road.¹²

[14] The First Defendant says in his first affidavit in reply that he admits he is one of the owners of the Lot and that it falls within the Nadi Town Boundary but denies that the Lot is zoned Residential B.¹³ No reason is given for his denial other than to require the Plaintiff to strictly prove it.¹⁴ He admits that activities allowed in Residential B zoned land is as alleged by the Council.¹⁵ He denies using the Lot as alleged by the Council contrary to its zoning but he admits that at times he

⁵ Para 13 P1

⁶ Para 14 P1

⁷ Para 15 P1

⁸ Annex RKA6 P1

⁹ opcit

¹⁰ opcit

¹¹ Para 17 P1

¹² Annex RKA8b,c,d P1.

¹³ Para 3,4,5 1D1

¹⁴ Para 5 1D1

¹⁵ Para 6 1D1

has parked his vehicles on his father's portion of the Lot.¹⁶ He says that he was charged with an offence under the Local Government Act in regards to the use of the Lot but was subsequently acquitted as there was insufficient evidence.¹⁷ In respect of the individual's complaints, he says that the complainant is his neighbour and there are personal differences between them and their respective families.¹⁸ He further says that this application has been made purely because of the complaint of his neighbour and of no one else in the neighbourhood.¹⁹ He says that the letters of complaint do not show that he is using the land contrary to its zoning and puts the Council to strict proof.²⁰ He admits that the Council notices have been served on his father.²¹

[15] The next in the series of affidavits is that sworn by the Town Manager Engineering and filed on 13 August 2008. His affidavit is in response to the First Defendant's first affidavit. Much of this affidavit is confirming what the Town Clerk has said in his first affidavit. He says that the Defendant was acquitted because the Council was unable to produce the required witnesses and evidence.²² This was confirmed by the Court record that was annexed to the affidavit.²³ He also says that "heavy machinery/vehicles accessing the road are a nuisance to the residents and also poses [a] danger to children to which the residents of he area have objected and lodged complaint".²⁴ Annexed to the affidavit was a letter of complaint to the Town Clerk dated 22 July 2008 signed by 17 persons objecting to the use of the Lot by the Defendants as a "works depot, storage and servicing area for heavy plants, machinery and

¹⁶ Para 9 1D1

¹⁷ Para 10 1D1

¹⁸ Para 12 1D1

¹⁹ Para 16 1D1

²⁰ Para 14 1D1

²¹ Para 13 1D1.

²² Para 5.

²³ Annex BS1 P2

²⁴ Para 7 P2

vehicles/trucks.”²⁵ The letter further complains that the Defendants’ heavy machines and trucks are noisy and use the road and is a nuisance and poses a danger to residents especially to children.²⁶ Also annexed were more photographs of several heavy trucks and machines parked at the Lot.²⁷

- [16] The fourth affidavit is that of the Town Clerk filed on 14 October 2008 saying that the Council is able to meet its undertaking as to damages. With respect no such undertaking is required in the circumstances of this case. There is no denial that the Council is only trying to enforce what it says is the law. It has a duty imposed by law to do that. It would be ridiculous if the performance of its duty is dependent on whether the Council can provide an acceptable undertaking as to damages.
- [17] The fifth affidavit is that of the Council Manger Engineering filed on 6 Mar 2009. The affidavit simply states that the Council has not deliberately delayed pursuing this matter.²⁸ It explains that the matter was referred to the Director of Town and Country Planning as there was confusion as to which was the right authority to prosecute this matter and the Director has given his approval for the Council to pursue legal action.²⁹
- [18] The final affidavit by the Defendant filed on 2 April 2009 disagrees that the Council had not delayed the matter and adds nothing new.

²⁵ Annex B2 P2

²⁶ opcit

²⁷ Annex B3 P2.

²⁸ Para 3 P3

²⁹ Para 4,5 P3

ANALYSIS OF THE EVIDENCE AND ISSUES

- [19] The Defendants admit that they park their trucks and other heavy machinery on or near their Lot. They challenge this Court to find that such use does not contravene the uses allowed for land zoned Residential B.
- [20] The Defendants also admit that the permitted uses for such land is as set out in the Plaintiff's first affidavit at paragraphs 6 and 7.³⁰ They also admit that permitted uses for land zoned "Light Industrial A" are as set out in paragraph 8 of the same affidavit.³¹ Paragraph 12 of the same affidavit sets out the permitted uses for land zoned "General Industrial Development". The Defendants make no reply to this allegation so I take it as admitted. The Plaintiff alleges that the Defendants' use of the Lot contravenes the Lot's current zoning.³² The Council alleges further that such use is permissible only if the Lot is zoned "Industrial General".³³ The Defendants deny these allegations.
- [21] I find that the Defendants attitude to the Council and to their neighbours contemptuous. This is evident from what was said in their affidavit material and the way their Counsel has argued their case. Put simply, the Defendants challenge the Council and this Court, in their words, to strictly prove that they have broken the law. I would have thought that this was a simple matter of the Defendants inviting the Council officers to come on to the Lot to inspect and see for themselves that their Lot was being used in accordance with its zoning. There is no where in the affidavit material where the Defendants say that they have done that and the Council has refused. I think the Defendants have been less than frank and deliberate in their attempts to frustrate the work of the Council. The First Defendant says in his affidavit that he admits that "at times"

³⁰ Para 6 1D1

³¹ opcit

³² Para 9 P1

³³ Para 10 P1

he had parked his vehicles on the Lot.³⁴ The photographs and the submissions of Counsel suggest however that it is a regular event and not occasionally that his vehicles are parked at or near the Lot and on the road itself. This is why I say the Defendants behaviour is contemptuous of the Council and other members of the public that live along the Northern Press Road.

THE LAW

[22] The law in this area is well settled since the decision in the **American Cyanamid**³⁵ case and the adoption of those principles in Fiji. See for example: **Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd [2004] FJCA 59; ABU0011.2004S & ABU0011A.2004S (26 November 2004)** where the Court of Appeal said:

"...the three principal questions which fell to be answered (were) as follows:

(i) Is there a serious question to be tried?

(ii) Are damages an adequate remedy? and

(iii) If the answer to (ii) is in the negative then where does the balance of convenience lie?

SERIOUS QUESTION TO BE TRIED

[23] I disagree with Counsel for the Defendants that there is no serious question to be tried. Even Counsel himself must admit that the decision of whether "parking" heavy vehicles on or near the Lot is a use permitted for land zoned Residential B is such a question. As I have said above, the Defendants themselves challenge the Council to strictly prove that they are using the Lot contrary to its zoning. That would require an inspection of the Lot by the

³⁴ Para 7 1D1

³⁵ [1975] AC 396

Council, evidence given by witnesses from both parties and witnesses cross examined, the facts and the law analysed and the Court to make findings of fact and law. Whether the evidence as it appears from the affidavit material is sufficient to prove the alleged unlawful use is not the question in issue. Clearly, in my view, there are serious issues to be tried.

- [24] Further, with respect to Counsel for the Defendants, the law does not operate in a vacuum or in a strict technical way. The law must be followed in spirit and substance. His interpretation that parking is not within the prohibited uses of Residential B land is too narrow and technical. I would agree with Counsel for the Plaintiff that one would expect private passenger vehicles to be parked on residential land; not heavy machinery and trucks on a regular basis. Again, this is a serious question to be tried and determined after hearing evidence.

DAMAGES ADEQUATE REMEDY?

- [25] The Nadi Town Council has a duty imposed on it by law to ensure that the zoning laws are complied with and that nuisance does not result from breaches of those laws. As Counsel for the Council submitted, **s 25** of the **Town Planning Act** charges the Council with the responsibility of ensuring that the town planning scheme is adhered to. The section provides:

"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."

- [26] Even Counsel for the Defendants submitted that **section 54** of the **Public Health Act** imposes a duty on the Council to inspect property and ensure abatement of nuisances.
- [27] In this situation, the question of adequacy of damages does not arise in my view, simply because of the fact that the duty to act is imposed by law. The need to act is for the benefit of the public. Damages are clearly not an adequate remedy or even a remedy to be considered.
- [28] As I have said above, the giving of an undertaking to damages by the Council is totally unnecessary. The Council's obligation to act should not be restricted or prevented simply because it did not give an undertaking or that its undertaking is inadequate. Counsel for the Plaintiff also submitted that his client is immune from a claim for damages for complying with its obligations under the **Town Planning Act** by virtue of **s 29(2)(h)**.

THE BALANCE OF CONVENIENCE

- [29] The Defendants' main argument that the balance of convenience lies in favour of the Defendant is based on an allegation that the Council failed to act for some 15 years. Counsel for the Defendants cited several cases in support of his argument.
- [30] I agree with Counsel for the Plaintiff that this argument ignores the special facts of this case. The Council is charged by law with public duties. Issues of public policy arise. The cases of **Bovill v Crate (1865) LR 1 Eq 388**, **Cabot Corporation v J Blackwood & Sons Ltd** cited **11 IPR 487 (S Ct NSW)**, **B M Auto Sales v Budget [1976] 12 ALR 363** and **APSA v Tolbrush [1985] ALR 62 521** cited by Counsel for the Defendants deal with private transactions between private individuals and do not apply to the present case. There is no

time limit as to when the Council is required to act. There is no statute of limitations in respect of breaches of the two Acts referred to above.

- [31] Counsel for the Council submitted that public interest should prevail over the private interests of the Defendants. He cited **Smith v ILEA [1978] 1 All E R 411** and **Miller v Jackson [1977] QB 966** in support of his submission. In **Miller** (supra), the plaintiffs sought an injunction against the local cricket club to stop them playing cricket on the ground adjacent to the plaintiffs house and garden and damaging them by flying cricket balls. They failed but Lord Denning said this at page 981-2:

"This case is new. It should be approached on principles applicable to modern conditions. There is a contest here between the interest of the public at large; and the interest of a private individual. The public interest lies in protecting the environment by preserving our playing fields... The private interest lies in securing the privacy of his home and garden without intrusion or interference by anyone. In deciding between these two conflicting interests, it must be remembered that it is not a question of damages... No, it is a question of an injunction. And in our law you will find it repeatedly affirmed that an injunction is a discretionary remedy...As between their conflicting interests, I am of opinion that the public interest should prevail over the private interest..."

- [32] In **Smith** (supra) an injunction against an education authority charged with responsibilities under an Act was dissolved by the English Court of Appeal. Browne LJ at page 422 said this:

"...but I think counsel for the authority is right in saying that where the defendant is a public authority performing duties to the public one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed."

- [33] Counsel for the Defendants mentioned during his submissions that other persons in the same road are carrying on activities which are not allowed if their lands are zoned Residential B. That may well be so but they may be doing so because

their lands have been rezoned. More importantly however, if what Counsel said is correct, then there is all the more reason for the balance of convenience to lie in favour of an injunction being granted lest like minded persons like the Defendants decide to do as they wished not caring whether what they do is allowed under the law.

FINAL OUTCOME

[34] In the final analysis therefore, I am of the opinion that there are serious issues to be tried and the balance of convenience lies in favour of the public interest being upheld. The questions of adequacy of damages and undertaking as to damages do not arise. I therefore grant the interim injunction sought against the Defendants but I will give them time to comply with it.

[35] I also think the Council should be allowed to inspect the Defendants Lot to ascertain for itself whether it has been used in contravention of its zoning.

COSTS

[36] The Plaintiff wins and is entitled to costs. It has asked for indemnity costs and is entitled to such costs if special circumstances exist.

[37] I recently considered the law in this area in **Khan v Carpenters Fiji Ltd [2009] FJHC 149; HBC132.2003 (23 July 2009)** and do not intend to repeat it here other than to say that special circumstances must be shown. The facts of a particular case may be so unusual that it warrants the Court departing from the general rule in the exercise of its discretion. I have referred to the contemptuous behaviour of the Defendants and I think this is sufficient reason to depart from the general rule. This matter has been necessitated by the actions of the Defendant. The delay that their Counsel has argued should be looked at

in their favour has been a direct result of the Defendants behaviour. Their failure to invite the Council to inspect the Lot in my view suggests that they are doing exactly what they deny doing and what the Council alleges is happening.

[38] The matter has been heard twice through no fault of the Plaintiff. It should be entitled to the costs of both hearings. I therefore award costs to the Plaintiff on an indemnity basis of **\$3,000**.

FINAL ORDERS

[39] My **Orders** are therefore as follows:

- 1. After seven days from the date of this judgment, the Defendants their servants and agents are restrained by injunction from parking their trucks and heavy machinery at or near their property described in CT 7081 and situated at Northern Press Road, Nadi or along the said Road.**
- 2. After seven days from the date of this judgment, the Defendants their servants and agents are restrained by injunction from using the said property for any purposes other than those allowed for properties zoned "Residential B".**
- 3. These injunctions are to remain in force until the final determination of this action or as otherwise ordered.**
- 4. The Defendants shall allow the Plaintiff's officers, servants or agents immediate access to the said property and as and when required for the purposes of inspection.**
- 5. The Defendants are to pay the Plaintiff's costs of \$3,000 within 7 days of the date of this judgment.**

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Sosefo Inoke
Judge