

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**REVISIONAL JURISDICTION**

**Criminal Revision No: HAR 004 of 2009**

**BETWEEN:**

**FOODS (PACIFIC) LIMITED**

***Applicant***

**AND:**

**LAMI TOWN COUNCIL**

***Respondent***

**Date of Hearing:** 17<sup>th</sup> July 2009

**Date of Judgment:** 24<sup>th</sup> July 2009

**Counsel:** Mr. V. Maharaj for Applicant  
Ms S. Shah for Respondent

**JUDGMENT**

**Introduction**

[1] On 17 July 2009, I quashed the *ex-parte* injunction granted by the Magistrates' Court against Foods (Pacific) Limited, on 16 June 2009, after hearing from the parties. I now publish my reasons.

### **Procedural History**

[2] On 18 March 2009, Lami Town Council (the complainant) filed a Complaint in the Magistrates' Court against Foods (Pacific) Limited (the accused), pursuant to s.78 of the Criminal Procedure Code. The offences alleged in the Complaint are:

- i) Failure to cease operating storage of containers from Toti Park: contrary to section 7(7)(b) of the Town Planning (Lami) Order 1977, Cap 139.
- ii) Obstruction of Footpath: contrary to section 115(1)(f) of the Local Government Act, Cap 125.
- iii) Interfering with authorized used of Park: contrary to section 19(1)(f), Part III & section 54, Part VII of the Lami Town By-Laws, Cap 125.
- iv) Causing Injuries to Street: contrary to section 115(1)(g) of the Local Government Act, Cap 125.

[3] On 8 May 2009, the accused appeared before the Chief Magistrate and entered a plea of not guilty to the charges. The complainant was ordered to provide full disclosures to the accused.

[4] On 12 June 2009, the complainant filed an *ex-parte* notice of motion, seeking:

1. An order of the Court restraining Foods (Pacific) Limited from operating business or activities of any kind from Toti Park until the final determination of the within action.
  2. An order that the Management and Staff of Food (Pacific) Limited be restrained from trespassing, entering or causing any damages at Toti Park until the final determination of the within action.
- [5] On 17 June 2009, the Chief Magistrate granted an interim order, restraining the accused from operating business or other activities from Toti Park, and a further order that the motion be heard *inter-parte*.
- [6] On 22 June 2009, the accused filed a motion for discharge or stay of the interim injunction, made on 17 June 2009.
- [7] On 26 June 2009, the accused appeared in court and the Chief Magistrate ordered the application for injunction be heard on 9 July 2009.
- [8] On 9 July 2009, the case was called before another Magistrate and was adjourned to 15 July 2009 for hearing.
- [9] On 10 July 2009, the accused wrote to the High Court, complaining that he is being denied access to justice. Upon receiving the complaint from the accused, I called for the Magistrates' Court file for a review.

### **Revisionary Jurisdiction**

- [10] Apart from having appellate jurisdiction over the judgments or orders of the Magistrates' Court, the High Court has revisionary powers over the proceedings

in the Magistrates' Court. The revisionary jurisdiction of the High Court is provided by s.323 of the Criminal Procedure Code:

"The High Court may call for and examine the record of any criminal proceedings before any magistrates' court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such magistrates' court."

- [11] As can be seen by the terms of s.323, the High Court has wide powers to review the correctness or legality of an order passed by a Magistrate, or the regularity of any proceedings in the Magistrates' Court.
- [12] In the present case, this Court questions the legality of the injunction granted by the Magistrate in the absence of the accused in a criminal proceedings and the propriety of the proceedings in the Magistrates' Court before and after the injunction was granted. I am satisfied that the accused has made out a case for this Court to exercise its revisionary jurisdiction to review the order of the Magistrate and the proceedings in the Magistrates' Court. I am satisfied that the right of the accused to seek revision is not restricted by the limitation contained in s.325(5) of the Criminal Procedure Code.

### **Legality of Order**

- [13] The order granted by the Chief Magistrate was an interlocutory injunctive relief. The accused was ordered to refrain from doing business pending the determination of the criminal charges filed against him. Injunctive orders are a common form of relief sought in civil litigations.

[14] In ***Tony Deamer v. UNELCO Management*** [1980-1994] Van LR 554, Vaudin d'Imecourt CJ summarized the operation of injunctions as follows:

"An injunction is an order or a decree by which a party to an action is required to do, or refrain from doing, a particular thing. Injunctions are either restrictive (preventive) or mandatory (compulsive). As regards time, injunctions are either interlocutory (or interim) or perpetual. A perpetual injunction is granted only after the plaintiff has established his right and the actual or threatened infringement of it by the defendant; an interlocutory injunction may be granted at any time after the issue of the writ to maintain things in status quo. The Court must be satisfied that there is a serious question to be tried at the hearing, and that on the facts the plaintiff is probably entitled to relief."

[15] In the High Court, the procedure and practice for granting of injunctions is governed by Order 29 of the High Court Rules, 1988. The Rules explicitly excludes its application to any criminal proceedings in the High Court (O.1 R.8(2))

[16] The basic principles for granting interlocutory injunctions are set out in ***American Cyanamid Co v. Ethicon Ltd*** [1975] AC 396:

- (a) The Plaintiff must establish that there is a serious question to be tried.
- (b) The inadequacy of damages to compensate the Plaintiff by the Defendant.
- (c) If the Plaintiff satisfies the tests, the grant or refusal of an injunction is a matter for the exercise of the Court's discretion on the balance of convenience.

[17] The ***American Cyanamid*** principles for granting interlocutory injunctions have been applied in Fiji and are the law [***Mataqali Namatua v. NLFC and 3 Others*** No. ABU0020 of 2004S, 4 March 2005]. Provided the court in which the application is filed has jurisdiction to grant injunctions, the basic principles should be applied by the court when considering the application.

[18] The question is whether the Magistrates' Court has jurisdiction to grant interlocutory injunctions in criminal proceedings. The Magistrates' Court, unlike the High Court, is a creature of statute. The jurisdiction of the Magistrates' Courts is derived from statute.

[19] The Magistrates' Court is established under s.3 of the Magistrates' Courts Act, Cap.14.

[20] The civil jurisdiction of Magistrates is provided by s.16 (1). The jurisdiction includes:

(f) to grant in any suit instituted in the court injunctions or orders to stay waste or alienation or for the detention and preservation of any property the subject of such suit, or to restrain torts or breaches of contracts;"

[21] The criminal jurisdiction of Magistrates is provided by s.46:

"The jurisdiction vested in magistrates shall be exercised (so far as regards practice and procedure) in the manner provided by this Act and the Criminal Procedure Code, or by such rules and orders of court as may be made pursuant to this Act and the Criminal Procedure Code, and in default thereof, in substantial conformity

with the law and practice for the time being observed in England in the county courts and courts of summary jurisdiction."

[22] Section 4 of the Criminal Procedure Code provides:

"(1) Subject to the other provisions of this Code, any offence under the Penal Code may be tried by the High Court, or by any magistrate by whom such offence is shown in the fifth column of the First Schedule to be triable:

Provided that where so stated in the fifth column of the First Schedule the offence shall not be tried by a magistrate unless the consent of the accused to such trial has first been obtained.

(2) Notwithstanding the provisions of subsection (1), a judge of the High Court may, by order under his hand and the seal of the High Court, in any particular case, invest a resident magistrate with jurisdiction to try any offence which, in the absence of such order, would be beyond his jurisdiction:

Provided nevertheless that in no such case shall the sentence passed exceed the limits specified in section 7."

[23] Sentences which Magistrates may pass are provided by s.7 of the Criminal Procedure Code:

"A resident magistrate may, in the cases in which such sentences are authorized by law, pass the following sentences, namely:

- (a) Imprisonment for a term not exceeding ten years;
- (b) Fine not exceeding \$15,000;
- (c) Corporal punishment not exceeding twelve strokes."

[24] In this case, the application for injunction was made pursuant to Order XXVI[III] of the Magistrates' Court Act.

[25] Section 68(a) of the Magistrates' Court Act provides for the Chief Justice to make rules of court for regulating the practice and procedure of Magistrates' Courts in matters not specifically provided for in the Act or any other Act. The Magistrates' Court Rules, under which Order XXVI falls, was created under s.68 of the Magistrates' Courts Act. Order XXVI sets out the procedure for making interlocutory applications. Order XXVI(II) 8 provides:

"On a motion *ex parte*, the party moving shall apply for either an immediate absolute order of the court, in the terms of the motion paper, on his own showing and evidence, or an order on the other party to appear on a certain day and show cause why an order should not be made in terms of the motion paper."

[26] Albeit the Magistrates' Court Act does not explicitly exclude the application of the Magistrates' Courts Rules to criminal proceedings, there is a clear intention that the Rules only apply to civil proceedings. The Rules are divided into the following orders:

Order I.	Forms, Fees, Allowances and Costs.
Order II.	Computation of time.
Order III.	Miscellaneous Provisions.
Order IV.	Employment of Barristers and Solicitors.
Order V.	Evidence.
Order VI.	Form and Commencement of Suit.
Order VII.	Service of Process.
Order VIII.	Parties.
Order IX.	Particulars of Claim.
Order X.	Guardian for Purposes of Suit.
Order XI.	Alteration of Parties.
Order XII.	Discontinuance of Suits.
Order XIII.	Place of Trial and of Instituting Suits.

Order XIV.	Amendment.
Order XV.	Admissions.
Order XVI.	Pleadings.
Order XVII.	Settlement of Issues.
Order XVIII.	Inquiries and Accounts.
Order XIX.	Appearance of Parties.
Order XX.	Arrest of Absconding Defendant.
Order XXI.	Interim Attachment of Property.
Order XXII.	Preservation of Disputed Property.
Order XXIII.	Equitable Relief, Counterclaim, Set-off.
Order XXIV.	Tender.
Order XXV.	Interrogatories, Discovery and Production of Documents.
Order XXVI.	Motions.
Order XXVII.	Listing of Causes for Hearing.
Order XXVIII.	Postponement of Hearing.
Order XXIX.	Sittings of Court.
Order XXX.	Non-attendance of Parties at Hearing.
Order XXXI.	Proceedings at the Hearing.
Order XXXII.	Judgment.
Order XXXIII.	Costs.
Order XXXIV.	Enforcement of Orders.
Order XXXV.	Interpleader other than under Executions.
Order XXXVI.	Execution.
Order XXXVII.	Appeals.
Order XXXVIII.	Recovery of Costs by Legal Practitioners.

[27] As can be seen from the Orders, the Rules provide for practice and procedure for civil proceedings in the Magistrates' Courts. Order XXVI provides for interlocutory applications in civil proceedings. It surely does not give power to Magistrates to grant injunction in criminal proceedings, as was done in this case. Nor is there any power to grant interlocutory injunctions under the statutes the charges have been brought against the accused.

[28] In this regard, I find it was mischievous of counsel for the complainant to apply for an injunction against an accused, knowing the case was not civil but criminal proceedings and that Magistrates does not have jurisdiction to grant interlocutory injunctions in criminal proceedings. That takes me to the next issue.

### **Irregularity in the Proceedings**

[29] The proceeding in the Magistrates' Court was a private prosecution against the accused, which was instigated by the complainant. The accused was entitled to natural justice or due process of law before any order that adversely affected his rights was made. It is a fundamental principle that our justice system has been founded on.

[30] Lord Bridge in ***Lloyd v McMahon*** (1987) AC 625 at page 702 said:

"The so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when anybody, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates."

[31] In ***R v Commission of Racial Equality ex parte Cottrell and Rothon*** (1980) 3 AER 265, Lord Lane at page 271 said:

"Indeed, all that the rules of natural justice mean is that the applicant should be treated fairly. Accordingly, before assessing the

fairness of the manner in which the decision complained of was taken ..., it is necessary to analyse the context in which it was made and the nature of the decision.”

[32] In **Michael Anthony Lewis** (1988) 34 A Crim. R 212, the High Court of Australia at page 216 said:

“Once it be conceded, as in our view it must be, that the Crown counsel was denied an opportunity to make a general summation of the evidence with a view to demonstrating that notwithstanding the submissions advanced for the respondent the verdict was neither safe nor satisfactory, then it must follow that the proceedings were marked by a serious irregularity in procedure whereby the Crown was denied natural justice. The Crown is as much entitled to natural justice as any other litigant.”

[33] The principles in **Lewis** were adopted by Shameem J in **State v. Tanidrala & Ors.** *Criminal Misc. Case No HAM 042 of 2005S & Crim App No. HAA096 of 2005.* In **Tanidrala**, Shameem J quashed a decision of the Magistrates’ Court to grant bail without hearing from the State.

[34] In this case, an order was made against the accused in his absence and when the accused applied to be heard, the court unnecessarily adjourned the case.

[35] The accused was charged with operating illegal business. He pleaded not guilty and was presumed to be innocent until proven guilty. He was entitled to have his day in court and allow the allegations to be proved against him by the prosecution before any punishment was inflicted on him. By granting the injunction, the court was virtually punishing the accused without first determining guilt. These were fundamental principles which the Magistrate ignored.

[36] The proceedings in the Magistrates' Court were marked by a serious irregularity in procedure where the accused was denied natural justice when an injunction was granted in his absence and without jurisdiction.

[37] I am satisfied that justice has miscarried and the injunction against the accused cannot continue to operate.

### **Conclusion**

[38] Under the revisionary jurisdiction of this Court, the injunction granted by the Magistrates' Court is quashed and the matter remitted to the Magistrates' Court for trial.

Daniel Goundar  
**JUDGE**

At Suva  
24<sup>th</sup> July 2009

### **Solicitors:**

Messrs. MC Lawyers for Applicant  
Messrs. M.A. Khan for Respondent