IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 75 OF 1991
(High Court Civil Action No. 173 of 1990)

BETWEEN:

NATIVE LAND TRUST BOARD RATU MELI NAEVO	APPELLANTS
-and-	
MAIKELI NAGATA	RESPONDENT

Mr. N. Nawaikula for the 1st Appellant
Mr. E. Tavai for the 2nd Appellant
Mr. R. Matebalavu for the Respondent

Date of Hearing : 27th May, 1992
Date of Delivery of Judgment : 17th June, 1993

FINAL JUDGMENT OF THE COURT

The long delayed judgment in this matter was delivered on 11th February 1993, and we add that the delay in this Court was not attributable to the parties or their legal advisers. The judgment was given in an appeal from a decision of Byrne J. His Lordship made four declarations and orders. The first two of these related to ownership, and in our reasons for judgment we indicated that we would uphold the Judge's decision on this appeal. His Lordship went on to make the following two further orders and declarations (record p 138):-

> "*(iii) That the proper and lawful payee of all the rent in respect of the Namulomulo Town land is the Namulomulo Villagers as members of the several Mataqalis within the village who are to be considered "owners-in-common" of the land as long as they continue to occupy and use it.*

(iv) *That Mandamus issue to compel the Native Lands Commission to recognise and abide by its own decision vesting the ownership of the Namulomulo Town Land in the several Mataqalis as "owners-in-common" and to compel the Commission to direct the Native Land Trust Board to pay all rent due from the Namulomulo Town Land or any part thereof to the Namulomulo Villagers exclusively and that the Native Land Trust Board shall consult only with the Namulomulo Villagers in respect of land dealings relating to the Namulomulo Town Land as long as they remain in the use and occupation of such land."*

In their original notice of appeal the appellants appealed against these orders as well as the two in respect of which we have already expressed our concurrence. Because the matter of who was entitled to the royalties was not specifically made the subject of argument at the hearing, we gave the parties a further opportunity to put submissions to us on this aspect. It is appropriate to add that in the summons by which these proceedings were commenced a declaration was sought that the Namulomulo villagers were entitled to all "rent" in respect of the Namulomulo Town Land, and two orders were sought, one that the Native Land Trust Board be directed by the Native Lands Commission to pay all "rent" to the villagers, and the other to prevent the Board from paying out the "rent" until the case had been decided.

We are informed that the Board has been collecting the royalties from the person(s) or body(ies) paying the same and is

in effect holding it in trust for whomsoever may be entitled. The affidavit in support of the summons asserts that until 1989 the rent had been paid by the Board to the villagers, and that this was stopped when the dispute as to ownership arose. This is not in dispute. How the Board came to be collecting the rent and why and for how long is simply not known.

Because it was mentioned in submissions to this Court as being relevant to this aspect of the dispute, we draw attention to s.3 of the Native Lands Act (Cap 133). That section deals with tenure of native lands, and we are of the view that it is not necessary to set the section out here. The High Court decided the question of ownership, and that decision has been upheld in this Court. No question now arises concerning tenure or custom or any other dispute about the ownership or tenure of the land in question.

It is necessary to consider the provisions of the Native Lands Trust Act (Cap 134). This is an Act relating to the "control and administration of native land". By it, the Native Land Trust Board is constituted, and s.4 found in Part II headed "Control of Native Land", provides:-

> *"4.-(1) The control of all native land shall be vested in the Board and all such land shall be administered by the Board for the benefit of the Fijian owners."*

There is simply no evidence at all as to what has been or is going on on the subject land. Although the Court was told that the dispute arose out of the extraction of gravel and the proper destination of royalties therefrom, and although the Court sought assistance as to whether such extraction might excite a doctrine akin to waste being applicable (it received no assistance), and although it was told that the Board was holding all moneys collected from the royalties and had been for some time which made the resolution of the problem of their proper destination urgent, the only evidence was (record p 15):-

> *"19. That rent for the Namulomulo Town Land had, until December 1989 been paid also to the Namulomulo villagers by the Native Land Trust Board. Since that date the Board has stopped the payment of rent theretofore paid to the Namulomulo villagers, such freezing of rent being the result of an administrative decision by the Board as a result also of receipt by it of notification including by the Native Lands Commission that ownership of Namulomulo Town Land is the subject of a dispute between the Tui Nawaka Ratu Meli Naevo and his Mataqali Nalagi of the one part and the Namulomulo villagers of the second part."*

This evidence was not denied. One can see that the orders sought in the proceedings and made by Byrne J reflected this evidence.

In so far as it has been possible to do so, in the absence of any evidence, we have directed our reasons for judgment to the problem as it was explained to us. In so far as what we say here

might be thought to have a wider application, then it would be proper to regard it as obiter dicta. We believe it would be totally inimical to the interests of the parties involved, and to the proper administration of justice, if we were to remit these proceedings to the High Court to ascertain exactly what the parties were in dispute about on this aspect and what the circumstances were or are that gave rise to it. The fundamental question that was at the heart of these proceedings was: who owned the land? No attempt was made in the High Court to ask the Judge if he determined ownership in a particular way, then to embark on a separate excursion in order to decide who was entitled to the proceeds of whatever was going on in this particular instance. So this Court, like the High Court, has proceeded to decide who is entitled to the royalties paid or payable in respect of gravel extraction. In relation to that activity the parties will be bound by this decision.

We have explained this because the Native Land Trust Act goes on, in s.5, to provide:-

> *"5.-(1) Native land shall not be alienated by Fijian owners whether by sale, grant, transfer or exchange except to the Crown, and shall not be charged or encumbered by native owners, and any native Fijian to whom any land has been transferred heretofore by virtue of a native grant shall not transfer such land or any estate or interest therein or charge or encumber the same without the consent of the Board.*

(2) All instruments purporting to transfer, charge or encumber any native land or any estate or interest therein to which the consent of the Board has not been first given shall be null and void."

It has never been suggested that under whatever agreement or arrangement with the Namulomulo villagers the extraction of gravel has been taking place, that agreement or arrangement is caught by s.5. Indeed, in the written comments relating to this question which the parties were asked to and did supply to this Court, this matter was not raised. Quite clearly the section does not apply. We mention this only to indicate that the matter has been the subject of consideration, and could not be raised again in relation to this dispute.

The Native Land Trust Act draws a distinction between leases and licences granted in respect of native lands. It draws a distinction between rents on one hand, and fees or other charge payable under any license on the other (s.13). It will be recalled that the writ of summons seeks orders in relation to rent and the orders made by the Judge refer to it. The relevant sections of the Act that deal with this for the purposes of this case are as follows:-

"8.-(1) Subject to the provisions of section 9, it shall be lawful for the Board to grant leases or licences of portions of native land not included in a native reserve for such purposes and subject to such terms and conditions as to renewals or otherwise as may be prescribed.

(2) Any lease of or licence in respect of land under the provisions of this Act shall be made out from and in the name of the Board and such lease or licence shall be executed under the seal of the Board (Substituted by Ordinance 30 of 1945, s.6.)

9. No native land shall be dealt with by way of lease or licence under the provisions of this Act unless the Board is satisfied that the land proposed to be made the subject of such lease or licence is not being beneficially occupied by the Fijian owners, and is not likely during the currency of such lease or licence to be required by the Fijian owners for their use, maintenance or support.

10.-(1) All leases of native land shall be in such form and subject to such conditions and covenants as may be prescribed, and such leases shall be recorded in a register to be kept by the Registrar of Titles entitled "Register of Native Leases", and it shall be lawful for the Board to charge and collect in respect of the preparation of any lease or for any matter in connection therewith such fees as may be prescribed.

.....

11. All licences of native land shall be in such form as may be prescribed, and such licences shall be recorded in a register to be kept by the Board entitled "Register of Licences in respect of Native Land", and it shall be lawful for the Board to charge and collect in respect of the preparation and registration of any licence and for any matter in connection therewith such fees as may be prescribed."

It can be seen at once that so far as this case is concerned there is no suggestion that there was any lease or licence granted by the Board to the extractor(s) of the gravel. If there was, then, subject to one matter, the rent, proceeds, royalties or whatever would seem to be required to be dealt with by the Board in accordance with s.14 of the Act and regulation 11 of the

Native Land Trust (Leases and Licences) Regulations, but on the basis that the proprietary unit is the Namulomulo villagers and the heirarchy there referred to is determined accordingly (there is no reason to suppose that the "proprietary unit" referred to does not mean owner). The one matter referred to above arises out of the expression "rents and premiums received in respect of leases or licences". Section 14 provides for "distribution of rents and purchase money" and sub section (1) provides:-

> *"Subject to the other provisions of this section, rents and premiums received in respect of leases or licences in respect of native land shall be subject to a deduction of such amount as the Board may from time to time determine not exceeding 25 per cent of such rent or premium, which shall be payable to the Board as and for the expenses of collection and administration, and the balance thereof shall be distributed in the manner prescribed."*

However, lest it be thought that the word "rents" when so used is confined to the periodic sums paid and received pursuant to the grant of a lease, s.13 would seem to make it clear that that word is also used to refer to the fees or whatever other periodic sums might be paid and received as the result of the grant of a licence. The Board would be entitled to proceed on that basis.

Because of what we have said we do not feel we should leave this case without adverting to the possibility that there was no lease or licence granted by the Board to the extractor(s) of the gravel pursuant to any power in it to do so. If whatever was

done to permit extraction of gravel was done by the villagers and amounted to the grant of a lease or licence, and if the word "alienate" in various forms is to be given a consistant meaning throughout the Native Land Trust Act, then the provision of s.5 of that Act might be relevant. We have already stated that it was never suggested that this section was applicable, and it seems, on the meagre information before us, that it would be very difficult for the Board to deny that it had not given its consent or to assert that it had not. If it had not, then it would seem it had and has no right to any of the royalties at all. Quite clearly s.14 would only permit deductions in respect of leases or licences validly granted under the provisions of that Act. The decision in Natukuya v Director of Lands & Anor (1957) AC 325 to which we were referred is of no assistance at all. The decision in Ratu Jone Matainavora v Vula Nasenibua No. 298 of 1972 does not touch this case at all.

In the absence of any evidence at all about how the royalties or whatever is payable in respect of the extraction of gravel came to be generated, we do not think that any further orders should be made with respect to them. The Court has already indicated that it will endorse the two orders made by Byrne J relating to ownership. This means that the Namulomulo villagers, in one way or another, are entitled to receive the proceeds from the extraction of gravel from their land.

The formal orders will be:

Orders (iii) and (iv) made and entered on 2nd August 1991 be vacated. Otherwise appeal dismissed. Order the appellants to pay the respondent's costs of the appeal.

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Mr. Justice Michael M. Helsham
President Fiji Court of Appeal

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Sir Moti Tikaram
Resident Justice of Appeal

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Mr. Justice Michael Scott
Justice of Appeal