IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

Civil Appeal No. ABU 0044 of 2019
(High Court HBT Action No. 02 of 2017)

BETWEEN	:	**I-TAUKEI LAND TRUST BOARD**
		Appellant
AND	:	**MEREONI NABEWA**
		1st Respondent
AND	:	**NEMANI KAVURU CAGILABA** **SAVENACA SENILOLI** **JONE SALELE** **ALISI FUGAWAI**
		2nd Respondents
Coram	:	**Lecamwasam, JA** **Almeida Guneratne, JA** **Jameel, JA**
Counsel	:	**Ms. L. Komatai with Ms. K. Suveunakama for the Appellant** **Mr. N. Nawaikula for the Respondent**
Date of Hearing	:	**11 February 2020**
Date of Judgment	:	**28 February 2020**

JUDGMENT

Lecamwasam JA

[1] I agree with the reasons and conclusions reached by Jameel, JA.

Almeida-Guneratne JA

[2] I agree entirely with the judgment, reasoning and the proposed orders of Her Ladyship, Justice Jameel.

Jameel, JA

Introduction

[3] This is an appeal from the judgment of the learned High Court Judge dated 25 April 2019, whereby he ordered the Appellant Board (**'*the Appellant*'**) to pay to the persons represented by 1st Respondent, a sum of $ 89,086.15 in equal proportion, and made order to deduct from same any part already received by him or her, and ordered the Appellant to pay to the 1st Respondent costs summarily assessed at $1000.00.

The Respondent's case in the High Court

[4] In the court below, the 1st Respondent Meroni Nabewa, (representing seventeen persons) was the Original Plaintiff, the Appellant was the 1st Defendant, and four persons who were named as the Trustees of the Nasarata Boletagane Trust were jointly cited as the 2nd Defendant. By Originating Summons dated 10 August 2018, the 1st Respondent sought the following orders:

> *"(1) A Declaration that in 2015 the First Defendant made at least 3 payments to the members of the native land-owning units of Tokatoka Numbers 931 and 936 with a sum total of $221,000 (the sum).*
>
> *(2) A Declaration that by virtue of the Native Land Trust (Leases and Licences) (Amendment) Regulations 2010 (the Regulations), the Plaintiffs and other members of the said Tokatokas are entitled to equal shares of the sum paid by the ITLTB.*

> (3) *A Declaration that the First Defendant paid the sum to the Second Defendant unlawfully and contrary to its powers and responsibility under the Act.*
>
> (4) *An Order that the First Defendant pay to the Plaintiffs their lawful shares of income in equal shares."*

[5] The Originating Summons was supported by the Affidavit of the 1st Respondent, Mereoni Nabewa in which she deposed that she had instituted the action in a representative capacity on behalf of herself, as well as the members of the 2 Tokatokas who had authorized her do so on their behalf.

[6] The Trustees of the Trust established for the purposes of giving effect to section 14 of the iTaukei Lands Trust Act 1940 (*"**the Act**"*) were collectively cited as the 2nd Respondents.

[7] The 1st Respondent, in her Affidavit deposed that the Plaintiffs are members of two Land owning units who are registered as members of the *Tokatoka* VKB 931 (Kawa nei Nemani Kavuru), which owns NLC Lot 5 (12 acres in extent) on Plan F25, and *Tokatoka* VKB 936 (Kawa nei Apenisa Ralulu) which owns NLC Lot 12 (36 acres in extent) on Plan F2, 2, 5. In 2015, the Appellant had issued a Native Lease for the purposes of building a road, a dam, a power house and providing for a catchment area. In return for issuing the lease, the Appellant received rent and a premium, which in accordance with the provisions of the itaukei Land Trust Act 1940, was collected by the Appellant as trustee on behalf of the native land owners. She said that in 2015, the monies had been paid by the Appellant to the Trustees in 3 instalments, that such payment was unlawful and that the Appellant must be ordered to account for these sums. She relied on the provisions of Regulation 11 of the Native Lands (Leases and Licenses) Regulations as amended in 2010, which required *equal distribution to the members of the Land Owning Units.*

[8] It was not disputed that the monies had been paid to the Trustees. The 1st Respondent's complaint however was that the monies had been paid to the Trustees by the Appellant, contrary to the provisions of the amendment to Regulation 11, which was introduced in 2010, which she contended, required distribution in equal shares to each of the members of the Land Owning Units.

The Appellant's case in the High Court

[9] On behalf of the Appellant, an affidavit in opposition dated 11 October 2018, was filed by Nemani Tamani a Senior Estate Officer, (Operations) of the Appellant Board. He deposed that the monies had been paid into the Trust account in accordance with law. I might add right away, that the law required a scheme approved by the Minister, and that I accept the Appellant's submission that the instrument of a Trust had been approved by the Minister. This position was not rebutted. Accordingly, the 1st Respondent's Land-owning unit had requested that the monies due to the unit be assigned to the trust account in order for it to be distributed. I find that this was in accordance with the majority consent requirement specified in section 14(3) of the Act, which I will refer to later in this judgment.

[10] On behalf of the Appellant, a second affidavit in opposition was filed by Josaia Waqairatu, dated 24 October 2018. To this affidavit was attached two documents (marked JW1 and JW2), signifying the consent of the majority of the members of the land owning units, authorizing the Appellant to assign to the nominated bank account of the Trustees, the monies due to them. He deposed that this was in compliance with the Act, as well as Regulation made under the iTaukei Lands (Leases and License Regulation), as amended in 2010.

[11] In the affidavit filed by the 1st Respondent in reply to the affidavits of Nemani Tamani and Josaiah Waqairatu, she deposed that the 17 members of the proprietary unit whom she represented as Plaintiffs, had not authorized the Appellant to pay their shares of

money to anyone including the 2nd Defendant Trustees, and were awaiting payment to them by the Appellant. She deposed that the names of the 17 persons that comprise the Plaintiffs did not appear in the document JW1, relied upon by the Appellant to establish the consent of the majority of the members of the land-owning unit. This position was eventually found to be incorrect.

[12] In reply to the claim of the 1st Respondent that the members had authorized the Appellant to deposit the monies into the trust account, the affidavit, Savenaca Seniloli, one of the trustees was filed in opposition. Seniloli denied the position of the 1st Respondent and admitted the position taken by the Appellant; he deposed that the members of Tokatoka 931 and 936 are the same persons, this included the 1st Respondent, the majority of the members of the Land Owning Units agreed to have all the monies assigned to the Trust, he too had signed the said document, the names and signatures had been verified by the iTaukei Lands and Fisheries Commission, except for the 1st Respondent Mereoni Nabewa, all the other 1st Respondents had signed the said document of assignment authorizing the Appellant to pay the monies to the Trust, but some of them had subsequently reneged on their word. Seniloli pleaded that upon the Appellant transferring the monies to the Trust account and the monies being received by the Trustees, the trustees allocated to all members registered under the Vola ni Kawa Bula ('***VKB***') their respective share of the monies. This was done based on the consent of the majority of the members of the Land Owning units. The Minutes of the meeting held on 14 August 2014 in regard to the creation of the Trust, were at RHC 67.

[13] The 1st Respondent's affidavit was found to be factually incorrect, when she deposed that all the persons whom she was representing had not received their share of the money, because it transpired from Seniloli's affidavit that six of the seventeen members she represented had in fact received their shares. Eventually, the 1st Respondent had, before the conclusion of the proceedings in the court below, conceded that the sum under challenge was $89,000.00 and not $212,000.00 as deposed to by her originally. The learned Judge made order based on this amended figure.

The Judgment of the High Court

[14] The learned Judge in paragraph [15] of his judgment said that the pivotal issue for determination was whether after making the requisite deductions, the Appellant is entitled to pay the same to the Trustees, or must by law pay it to the members directly in equal shares. The learned Judge considered the provisions of section 14 (1) (3) (e) of the Act, and Regulation 11 (1). He was correct to do so.

[15] However, the learned Judge then fell into error when he proceeded to consider exclusively the word *"shall"* in Regulation 11(i), and sought to interpret the word *'shall'* to mean mandatory, with no reference to the enabling Act, and then concluded as follows:

> *"17.In my view this must necessarily mean the Board has no option or discretion as to what it may do with the money via an assignment by the majority of the members. I do not think that even the unanimous decision of all the members could have prevailed. The unequivocal intention of the draftsman has to be effected and if the Board has failed to do so then it falls to this Court to do that*."

[16] There is a fundamental matter that strikes me- firstly, the use of the word 'draftsman' in paragraph 17, indicates that the distinction between an Act of Parliament and delegated legislation has been overlooked. The word draftsman is usually used in the context of an Act of Parliament; and not delegated legislation, which was what the learned Judge was referring to, in this instance.

[17] On the other hand, Regulations are a type of delegated legislation, which are made by the Minister in order to give effect to primary legislation. Delegated legislation being subordinate to the enabling Act must necessarily be framed and interpreted to operate within the four corners of the enabling Act. Whilst delegated legislation has statutory

force and is deemed to be part of the enabling Act, it cannot be interpreted in a manner that would run counter to the purpose and object of the enabling Act.

[18] In this case the purpose of the enabling Act is the protection of iTaukei lands, with the Board administering it in the capacity of a trustee. All aspects of administration of iTaukei lands are vested in the Board. Its powers of administration are very wide and extend to the granting or withholding of consent in respect of leases, and it is empowered to administer itaukei lands under a variety of specified instances, all of which need not be elaborated in this judgment, except to assist and inform this court in the interpretation of the Act and the Regulations made thereunder.

[19] Therefore, by adopting the interpretation that the depositing of the monies to the Trust account was a breach of the equal distribution requirement, the learned Judge allowed the claim of the 1st Respondent. Before making the final order the learned Judge also found that the 1st Respondent had abandoned her original claim of $221,000.00, and had accepted that a sum of *'about $89,000.00 is the amount claimed'*. He then ordered the Appellant to pay to the 1st Respondent the sum of $89,000.00 in equal proportion.

Grounds of Appeal

[20] Although the Appellant has set out four grounds of appeal in its Notice of Appeal, since they are inter-connected, they can be effectively and conveniently dealt with compendiously. Indeed, the Appellant has conceded as much in its written submissions before this court. The grounds of appeal formulated by the Appellant are reproduced below:-

1. *The Learned Trial Judge erred in law and in fact in holding that the Respondent was entitled to be paid the sum of $89, 0876.15 in equal proportion.*

2. *The Learned Trial Judge erred in law and in fact in failing to properly and/or adequately evaluate all the evidence as to the Appellants liability when the 2nd Respondents are only a minority of the tokatokas and that no application has been made to the Court to exclude those that did not intend to be part of the proceedings.*
3. *The Learned Trial Judge erred in law and in fact in failing to recognise that the 1st Respondents are only a minority of the tokatokas and that no application has been made to the Court to exclude those that did not intend to be part of the proceedings.*
4. *The Learned Trial Judge erred in law and in fact in holding that the Appellant has no discretion or option as to what it may do with the monies after deduction under Section 1491) of the I-Taukei Land Trust Act.*

Discussion of the grounds of appeal

The Law - (a) the primary legislation-The Taukei Land Trust No.12 of 1940

[21] The substantial matter for determination is the interpretation of section 14(3) (e) of the Act, and the Regulations made thereunder.

[22] Before embarking on an analysis, it is helpful to examine the statutory definitions of some of the provisions of the Act which assist in the matter that requires determination.

> "*iTaukei land" means land which is neither Crown land nor the subject of a Crown or native grant but includes land granted to a mataqali under section 18;*
> *"iTaukei owners" means the mataqali or other division or subdivision of the natives having the customary right to occupy and use any native land;*

[23] The itaukei Land Trust Board was created under the iTaukei Land Trust Act 1940. The constitution of the Board is provided for in section 3. It provides as follows: -

> 3(*1) There is hereby established a board of trustees called the Native Land Trust Board which shall consist of— the President of the Republic of the Fiji Islands as President, the Minister a Chairman, five Fijian members appointed by the Great Council of Chiefs, three Fijian members appointed by the Fijian Affairs Board from a list of nominees submitted by provincial councils to the Fijian Affairs Board, and not more than two members of any race, appointed by the President.*

[24] The control of iTaukei land is vested in the Board, and section 4 provides as follows:

> *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 or for the benefit of the Native Fijians.'*

[25] The distribution of rents and purchase monies is set out in section 14. It provides as follows:

> 14.*—(1) 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.*
>
> *(2) Subject to the other provisions of this section, the purchase money received in respect of a sale or other disposition of native land, shall, after deduction therefrom of any expenses incurred by the Board in respect of such sale or other disposition, be either distributed in the manner prescribed or invested and the proceeds so distributed as the Board may decide.*

[26] The provision that requires determination in this appeal, is subsection (3) (e) of section 14. It provides as follows:

> *(3) Before any balance shall be distributed pursuant to the provisions of subsections (1) and (2) the Board shall discharge out of the moneys received—*
>
> *(a) any statutory obligation in relation to the land, which by reason of any order of a Court the Fijian owners have been adjudged liable to discharge and have failed to discharge;*
>
> *(b) any payment which the Fijian owners, in consequence of such an order as aforesaid have become liable to make in respect of the land, whether by way of payment for works carried out by any statutory body or other competent authority, or otherwise;*
>
> *(c) any amount due and unpaid in respect of any drainage rates payable under the provisions of the Drainage Act on the land or on any other native land belonging to the same native owners;*
>
> *(d) Any amount due and unpaid in respect of any land rates payable by or under the provisions of the Fijian Affairs Act on the land or on any other native land belonging to the same Fijian owners.*
>
> *(e) with the consent of the Fijian owners whether given before or after 4 December 1970 which consent shall operate as an assignment of rents irrevocable until the total amount is paid, any amount due and unpaid in connection with any scheme approved by the Minister for the benefit of the Fijian owners.*

The requirement of consent of the iTaukei land owners

[27] It is clear that a condition precedent to the distribution of monies to the members of the land owning units, is the requirement that the Board first complies with the statutory payment obligations described in subsections (a), (b), (c) and (d) of subsection (3). It is only after fulfilling the obligations arising thereunder, that the balance is available for distribution.

[28] Section 14(3) requires the Board to obtain the consent of the majority of the members. These reflects the principle of communal ownership underlying the provisions of the Act, as expressly provided for in the definition of "*iTaukei owners*", which encapsulates a division or subdivision of persons registered for that purpose, in contrast to individual members.

[29] Regulation 2 of 1940 provides as follows:

Form of consent of native owners

> ***"2****. The consent of the itaukei owners to any matter or thing in respect of which such consent is required to be given under the Act or any regulations made thereunder shall be given in such manner and evidenced in such form as the Board may consider appropriate and such consent shall be deemed to have been given if a majority of the adult native owners shall have signified their consent."*

[30] There was no dispute that Regulation 2 was in operation at the relevant time. Thus, the concept of majority consent was indeed a basis on which the Appellant was empowered to act. Accordingly, the finding of the learned Judge in paragraph 16 of the judgement in which he says that even the unanimous decision of all the members could not have prevailed, is contrary to law.

[31] In view of the wide powers given to the Appellant, it was open to the Appellant to formulate a scheme to signify majority approval. This, it did by approving the creation of the instrument of a Trust to enable the distribution of monies to take place. As I have already found, this was an approved scheme.

[32] In the oral and written submissions, learned Counsel for the Appellant submitted that in the past, distribution used to be done 'manually', by the Appellant visiting the villages and distributing the monies directly. In practical terms, what had happened was that if there were absentee owners at the time the Appellant visited the villages, the absentee owner would later visit the Appellant's office in Suva either personally or through an authorized representative, in order to collect his or her share of the money. The submission was that '*the process was strict in terms of actual distribution, but there was also flexibility in making some allowance to accommodate situations'* such as this.

[33] The learned Counsel for the Appellant submitted (this was also reflected in paragraph 14 of the Appellant's written submissions), that when the Equal Distribution Regulation 2010 came into effect on 1 January 2011, there were several challenges the Appellant faced in terms of implementation. During the period of transition from manual distribution to '*individual bank deposit distribution*', and until an effective and secure system was put in place, the Appellant permitted the creation of a Mataqali Trust Deed whereby the appellant would assign the monies for distribution through the nominated Mataqali Trust Account. This resulted in the monies being available to the Land Owning Units for onward distribution in equal shares. In order for it to be satisfied of the authenticity of the signatures and the element of consent, and to also ensure regularity, the Appellant required the Minutes of the Meeting appointing the Trustees, and the signatures of the membership signifying consent and authorizing the Appellant to deposit the monies into the nominated Bank account of the Trust. The Appellant then had these signatures verified by the iTaukei Lands and Fisheries Commission which maintained the VKB. I find this to be in accordance with the language, as well as the spirit of the Act.

[34] In this particular instance, the documents signifying such majority consent were annexed to the affidavit of Josaia Waqairatu on behalf of the Appellant. These are contained in pages 65 and 69 of the RHC. The letter accompanying these documents in the RHC was in the iTaukei language. At the Hearing of this appeal, this court requested the Registrar to have the letters translated into English. This was promptly done and made available. The forms signifying consent specifically authorized the Appellant to pay to the Trust account the sums due to the individual members of the Land Owning Units. It was undisputed that the consent forms in this case reflected that the Appellant had the consent of the majority of the members in respect of both lands. One form signified 63%, and the other form signified 61%. There was thus, no doubt that there was sufficient material before the Appellant to enable it to be satisfied that the statutory requirement of majority consent had been duly obtained and met. Accordingly, the Appellant was correct when it deposited the monies into the Trust Account, and had acted in total compliance with the Act and the Regulations.

The law - (b) the Regulations issued under the enabling Act

The Former Distribution scheme

[35] The former Distribution scheme was implemented in terms of Regulation 11 of the iTaukei Lands Trust (Leases and Licenses) Regulation **1984,** according to which distribution used to be in the following proportions:

: To the Proprietary Unit- 70%

: To the Turaga ni Mataqali- 15%

: To the Turaga ni Yavusa-10%

: To the Turaga I Taukei- 5%

The "New" Distribution Scheme - 2010

[36] Regulation 11 was amended in **2010**, and the amendment came into effect on 1 January 2011. The amended Regulation now provides as follows:

11(i) After deduction of any sums in accordance with section 14 of the Act, the balance of any monies received by the Board by way of rents and premiums in respect of iTaukei land, including any monies received by the Board but not yet distributed at date of commencement of the iTaukei Land Trust (Leases and Licenses) (Amendment) Regulations 2010, shall be distributed by the Board to all living members of the proprietary unit, registered in the Register of iTaukei Landowners known as Vola ni Kawa Bula, in equal proportion. (Emphasis added).

[37] Section 14(1) provides for distribution of rents and premiums received in respect of *leases or licenses* of itaukei lands, to be first subject to a deduction of an amount which the Board may from time to time decide. This is to cover the expenses in respect of collection and administration. This sum payable to the Board cannot however be more than 25% of the sum received. It is the remaining balance that "*shall be distributed in the manner prescribed.*"

[38] Section 14 (1) commences by providing that it is subject to the other provisions of section 14 itself. Section 14 (2) is in respect of purchase money received in respect of *sales or any other disposition* of iTaukei land. In this case, too, after the expenses incurred by the Board are deducted, there are two options open to the Board. The Board may distribute the monies in the manner prescribed, or it may invest the proceeds and the proceeds may then be "*so distributed as the Board may decide".*

[39] Sub-section (3) of section 14, provides that before any balance is distributed pursuant to the provisions of subsections (1) and (2), the Board is required to comply with a further list of statutory requirements. Subsections (a) to (e) of subsection (3) of section 14, must first be satisfied before the proceeds received under subsection (1) and (2) of section 14 are distributed.

[40] Subsection (3) of section 14 is the matter that requires consideration in this appeal. What is provided for is for the Board to distribute the funds in accordance with a scheme approved by the Minister for the benefit of the iTaukei owners.

Equal proportion or individual distribution?

[41] In my view the amendment of Regulation 11 in 2010 (which became effective from 1 January 2011), relates to the *proportion* of distribution, and not the mode by which the monies are to be distributed. It is obvious that the amended Regulations intended to bring about a change in the proportion of distribution of monies. That is why the Regulation provides for equal distribution, and not individual distribution. Equal proportion is not synonymous with individual distribution. In other words, even the amended Regulation did not require the Appellant to distribute monies individually. What was intended to be changed, was the proportions that each person was entitled to, not the mode of distribution. This is clear from a comparison of the 1984 Regulations with the 2010 Regulations.

[42] In any event, delegated legislation must yield to the principal legislation. The enabling Act was framed to protect the interests of the iTaukei land owners, which is premised on communal rights and not individual rights. The Board holds iTaukei lands in trust for the landowners. The Board is in a supervisory and controlling position, and is empowered to set in place a scheme which does not offend the principal policy or purposes on which the Act is based. It does not appear to me that the payment of money into a trust account, in any way offends or contravenes either section 14 of the Act or the Regulations of 2010.

[43] In the result, I hold that on the evidence before the court, the finding of the learned Judge that the Appellant is required to pay the members of Tokatokas 931 and 936, the balance of the monies in equal proportion individually and directly, is without legal basis. Although I have noted the lack of credibility on the part of the matters deposed to by the 1st Respondent in her affidavit both in regard to the factual material relating to the

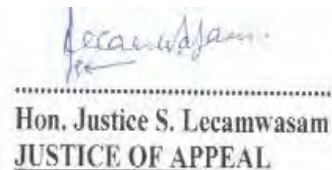
signatures, as well as the sums said to have been distributed, in view of my findings on the law, I do not consider it necessary to elaborate on these matters. However, I think that in fairness to the Appellant and the Trustees, it is a matter that goes to my order in respect of costs.

[44] Accordingly, I set aside the judgement of the High Court, and award costs against the 1st Respondent in favour of the Appellant, in this court in a sum of $3500.00, and in a sum of $1500.00 in the court below.

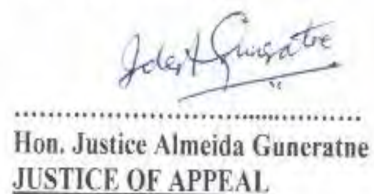
<u>The Orders of the Court are:</u>

1. *The Appeal is allowed, the Judgment of the High Court dated 25 April 2019 is set aside, and the Respondent's claim in the High Court is dismissed.*

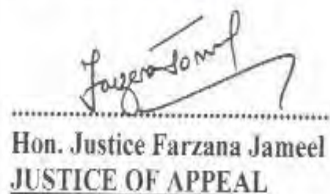
2. *The 1st Respondent(s) will pay to the Appellant jointly and severally a sum of $3500.00 (Three Thousand Five Hundred) as the costs of this appeal, and as $1500.00 (One Thousand Five Hundred) as costs in the court below, within four weeks from the date of this judgment.*



Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL



Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL



Hon. Justice Farzana Jameel
JUSTICE OF APPEAL