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

CIVIL APPEAL NOs. ABU 079 of 2019
(Civil Action NO. HBC 472 of 2007)

BETWEEN : **GULF SEAFOOD (FJI) LIMITED**
Plaintiff/Appellant

AND : **I-TAUKEI LAND TRUST BOARD**
Defendant/Respondent

Coram : **Basnayake JA**
Lecamwasam JA
Dayaratne JA

Counsel : **Mr. S. Inoke and Mr. I. Maopa for the Appellant**
Mr. J. Cati for the Respondent

Date of Hearing : **2 November 2022**

Date of Judgment : **25 November 2022**

JUDGMENT

Basnayake JA

[1] This is an appeal filed by the Plaintiff/Appellant (hereinafter referred to as Plaintiff) to have the judgment of the learned High Court Judge dated 13 April 2016 set aside (pgs. 78-95 of the Record of the High Court (RHC). The Plaintiff filed eight grounds of appeal in his notice (pgs. 73-76 of the RHC). By this judgment the Plaintiff's statement of claim

was dismissed and struck out. The counter-claim of the Defendant/Respondent (hereinafter referred to as Defendant) for $103,530.22 was allowed with costs $3500.00.

[2] This action was filed with a writ of summons and a statement of claim on 3 October 2007. (The statement of claim is at pgs. 98-100). On 10 February 2012, the Plaintiff has filed an amended statement of claim (pgs. 231-238 Vol. II Tab 29). The Plaintiff states that on 2 May 2002 the Defendant issued an agreement for lease (AL) commencing from 1 April 2002, for a period of fifty years in favour of the Plaintiff over a land known as Culanuku (part of) in the Tikina of Batiwai Province of Serna, containing an area of 3.7511 hectare (subject to survey). The Plaintiff states that a sum of $6000.00 was paid to the Defendant for members of Mataqali Lawacolo. The Plaintiff spent approximately $820,000.00 in the preparation work. The Plaintiff states that the Plaintiff could not proceed with the business (prawn farming) due to an order issued by the High Court of Suva that the land in question was a reserved land. In paragraph 8 (pg. 98) the Plaintiff states that, *"due to the said court order the company had to cease its operation".* The Defendant in his statement of defence disputed this claim. The Defendant stated that there was no such order made by High Court of Suva. No such order was produced.

[3] The Plaintiff also states that the AL was issued by the Defendant to the Plaintiff without the consent of the native land owners and the defendant thus breached the Regulations of the Native Land Trust Act. In paragraph 12 of the statement of claim the Plaintiff states that, "due to the cancellation of the lease to the Company, it has suffered $18,326,300.00. Of this sum, $16,000.000.00 is computed at the rate of 20,000.00 per crop for 40 years with two crops per year. At the rate of two crops per year for a period of 40 years should be 80 crops at $20,000.00 totaling $1,600,000.00 and not $16,000,000.00 as claimed by the Plaintiff. The above amount was made as follows:

2 crops x 40 years at $20,000.00 per crop	16,000,000.00
Capitol loss	1,506,300.00
Funds invested	820,000.00
	18, 326,300.00

[4] The Defendant filed a statement of defence (pgs. 170-173) with a counter-claim on 16 October 2008. The Defendant in reply stated that the Defendant was not a party to the payment of $6000.00 referred to by the Plaintiff in paragraph 4 of the statement of claim. The Defendant also denied that the High Court or any court has issued an order declaring the land in question a native reserve land. The Defendant also denied the existence of a court order preventing the Plaintiff of continuing his prawn farm business. The Defendant stated that the Plaintiff had to cease operations when the Plaintiff wound up on 24 February 2006. The Plaintiff filed action on 3 October 2007 without disclosing the fact that the business has gone bankrupt. If the Plaintiff disclosed this fact the Plaintiff would not have been able to file the action as the Plaintiff was under liquidation. However this situation was avoided with a belated application to the Official Receiver and Provincial Liquidator (OR) for consent. The consent of the OR was granted on 12 August 2008 (pg. 151).

[5] The Defendant categorically denied to having cancelled the AL issued to the Plaintiff. The Defendant claims that the AL is much in existence and valid to date. The Defendant also claimed that the Plaintiff was obliged to pay $10,000.00 to the Defendant for the first 10 years and owed $16,704.10 by 13 September 2005 and $50,474.44 by 2 May 2008. The defendant states that the defendant has filed proof of debt with the OR for $50,474.44. By 16 October 2008 the amount increased to $58,303.77. The Defendant claims that the Plaintiff's claim is frivolous and vexatious. The Defendant moved that the AL be cancelled and arrears of rent amounting to $58,303.77 be recovered from the Plaintiff.

[6] The Plaintiff filed an amended claim on 10 February 2012. In that the Plaintiff reveals that in August and October 2007 some buildings including the residence of the chief Executive Officer of the Plaintiff were set on fire. The Plaintiff mentioned four reasons for vacating the land as follows:

a. The High Court Action No. 174 of 2006.

b. Burning of the premises on two occasions.

c. Inability of the Defendant to provide the Plaintiff with a valid lawful lease, and,

d. Plaintiff's occupation and development being illegal.

[7] The Plaintiff did not mention as a reason his declaring bankrupt and wounding up the company. The Plaintiff now claims $28,974,540.00 as follows:-

2 crops per year x 10 ponds (Plaintiff admittedly constructed only four ponds) x 40 years at $30,000.00 per crop	24,000,000.00
Capitol loss	1,806,300.00
Fund invested	984,000.00
Loss resulting from devaluation	2,184,240.00
	28,974,540.00

[8] The Plaintiff claims that the Plaintiff suffered loss and damage due to the Defendant issuing a lease without obtaining the consent of the Native Land Owners. There is no mention of the cancellation of the lease by the Defendant in the amended statement of claim. The Defendant has denied to ever cancelling the lease and maintains that the lease is valid. In the amended statement the Plaintiff seeks the court to declare the lease null and void and of no effect and that the defendant was negligent in issuing the lease.

[9] The Defendant in an amended statement of defence (pgs. 246-253 vol. II Tab 32 of RHC) stated that the Plaintiff had started the prawn farming business even prior to the issuance of the lease. The Plaintiff had entered into an agreement with the Land Owning Unit (LOU) without consulting the Defendant. The Plaintiff had made the lease application to the Defendant on 5 April 2002 and the Defendant had issued an offer to the Plaintiff on 12 April 2002 and a revised offer on 18 April 2002. The Defendant stated that the number of ponds to be built was not specified in the agreement. The Defendant stated that the written consent of the LOU was the responsibility of the Plaintiff to submit along with the application. This is what the Plaintiff did in this case.

[10] The Defendant stated that the Defendant received representation in 2002 from the LOU that they would be consenting to the de-reservation. The Defendant stated that the Plaintiff and the LOU were persistently requesting the Defendant to issue the lease immediately. However the Defendant had encouraged the Plaintiff to get the remainder of the LOU's consent as the consent already obtained from LOU was not sufficient. The Defendant had not known at the time the sour relationship that existed between the Plaintiff and the LOU. The Defendant categorically stated that no court has made an order prohibiting the Plaintiff from prawn farming.

[11] The Defendant stated that the Plaintiff has ceased its operations when it was wound up on 24 February 2006 by an order sealed on 28 February 2006 into receivership. This fact is proved by a letter issued by the Official Receiver & Provincial Liquidator of Gulf Sea Food (Fiji) Limited on 12 August 2008 granting consent to take legal proceedings in the name of the Company (In Liquidation) subject to conditions (pg. 151 RHC). This letter was apparently issued on a belated application made by the Plaintiff. The evidence of Isikeli Tubailagi too has confirmed the fact that trouble erupted when the villagers were told that the company has gone bankrupt (Pg. 85 paragraph 35 of the Judgment). The Defendant in the amended statement invites court to strike out the amended statement of claim and cancel the AL. The Defendant further moves that the Plaintiff be ordered to pay $103530.22 as rental arrears.

Minutes of the pre-trial conference

[12] The issues to decide at the trial have been numbered from 23 to 37 (pgs. 366-368). Of those I will reproduce Nos. 27 and 35 (pg. 366 & 367) as the most pertinent issues.

27. Whether the Plaintiff's failed business was due to the Defendant's issuance of the AL or was it due to its action or inaction to their agreement with the iTaukei landowners.

32. Whether the AL issued by the Defendant in favour of the Plaintiff…was a valid legal document which gave the Plaintiff the right to lawful occupation …and to carry out …prawn farming?

Judgment

[13] The learned Judge said that the Plaintiff has filed this action for issuing an agreement to lease (AL) over the property belonging to iTaukei reserve land without the consent of the landowners. The Plaintiff attributing this act as negligence on the part of the Defendant. Due to this negligence the Plaintiff claimed that it has suffered loss in a sum of $28,974,540.00. The Defendant whist denying this claim, in a counter claim, claimed a sum of $103,530.22 for rental arrears under the AL.

[14] The learned Judge in summarizing the evidence stated that the Plaintiff had a meeting with the landowners and a document marked D4 was signed setting out the requirements of the Landowners under the heading, "*conditions to attach to Lease Agreement*". The AL issued by the Defendant to the Plaintiff was produced and marked P1. According to the evidence, the former General Manager of the Defendant was employed by the Plaintiff as a consultant. The Plaintiff has apparently got the consent of 16 Mataqali members. Evidence reveals that it was the Plaintiff who was eager to commence the project and commenced clearing the site and began construction work even prior to the issuance of the AL.

[15] The learned Judge also considered the procedure adopted by the Defendant in issuing leases. Either the Plaintiff could make the application to the Defendant who will consult the Landowners and obtain their consent for leasing or the applicant could also approach the Landowners and obtain their consent and submit the application along with the consent. In this case it was the second method that was followed. Evidence also revealed that the Defendant had to first issue an AL as the Defendant did not receive the sufficient number of consent from members of Landowners and required the Plaintiff to obtain consent from more members. This was the reason for not issuing a lease at the first

instance and the Defendant was able to issue only an AL. This was also done after submitting two draft agreements.

[16] The learned Judge also considered the evidence of two witnesses, namely, Mr. Antiko Qasevakatini and Mr. Nata who gave evidence for the Defendant with regard to the legality of the AL. According to these two witnesses the AL was issued prior to de-reservation. In fact there was no de-reservation at all of the reserve land. The AL was issued for administration and commercial purposes prior to the issue of a lease. The learned Judge held that there is no provision in the Land Transfer Act to issue an AL, but this aspect is covered by Regulations issued under Section 33 of the Native Land Trust Act.

[17] The learned Judge also considered the evidence of witnesses who testified to the benefits the Plaintiff agreed upon but had not fulfilled. The most important one was with regards to 5% gross income. It is evident that the Plaintiff transported prawns harvested for weighing out of the farm to Suva without a representative from the Landowners. In paragraph 34 of the judgment (pg. 85) the learned Judge relating the evidence of Isikeli Tubailagi stated that, "*Isikeli was asked whether the villages had stopped Roger Black (Chief Executive Officer of the Plaintiff) or the company from operating, and he had stated that the villagers did not stop Roger Black or the company from operating the prawn farming until they were told that the company was bankrupt".*

[18] The Plaintiff filed the writ of summons on 3 October 2007 (pgs. 96-100). The Defendant in the statement of defence filed on 16 October 2008 revealed and sought an order from court to cancel the AL as the Plaintiff Company was wound up on 28 February 2006. The Plaintiff has obtained consent (pg. 151) from the Official Receiver & Provisional Liquidator on 12 August 2008 to have legal proceedings in the name of the company. However at the time of filing this action on 3 October 2006 the Plaintiff Company was wound up and not able to file action in the name of the Company.

[19] The learned Judge had seen the enthusiasm of the Landowners to have the Plaintiff engage in the business of prawn farming in the reserve land as it gave job opportunities to villagers and brought development to the village. There was no problem in not having a lease or de-reservation of reserve property. Although the project had begun by giving lot of hope to the Landowners, it was very disappointing when the project did not function to benefit the village. The promise to develop a playground not materialising, locating the prawn packing facility outside the village, failure to fence a burial ground, failure to pay FNPF and rental leasing and finally to disclose bankruptcy were some of the reasons for the disappointment which caused some villagers to burn down some buildings in 2006. Probably when the villagers demanded payments the Plaintiff's Chief Executive Officer would have told them that there is no money to pay and that they have gone bankrupt. Bankruptcy was declared in February 2006. According to the Plaintiff the burning of the buildings took place in August and October 2006. There was also evidence of some Landowners complaining to the Plaintiff's CEO, Mr. Black which went unheeded.

[20] The learned Judge said as per section 17 (1) of the LTA the Defendant may with the consent of native owners exclude any portion from any native reserve. However the Defendant's position is that the Plaintiff was given an AL due to the insufficient number of consent obtained from Landowners and the Defendant had informed the Plaintiff to get consent from more Landowners. Therefore the Defendant's failure to grant a lease could not be given as a cause for the Plaintiff's loss. The Plaintiff was able to operate the prawn business without an interruption with the Agreement to Lease.

[21] The learned Judge held that (paragraph 53) the Plaintiff's contention that there should be a de-reservation prior to AL was not supported by any statutory provision or any case law.

[22] In paragraph 59 (pg. 92) the learned Judge justified the Defendant in not issuing a formal lease at the 1st instance as follows, *"The agreement to lease in terms of the said regulation was different from the lease or licence, in terms of the Act. Hence pending a survey and determination of the exact area under an agreement to lease, some kind of exclusive*

possession was needed to commence the development. (60) After a survey and determination of the exact area it could be applied for de-reservation. In the interim an agreement to (sic: sale) lease was entered in terms of the Regulation 12 of the Regulations issued in terms of Section 33 of the Act (Native Land Trust Act) and in my judgment it was not an illegal document. (62) The de-reservation needed to be done after the survey and 'Agreement to Lease' in terms of the Regulation 12 of the Act, was issued 'subject to survey'. The said regulations were made to facilitate issue of agreement to lease for un-surveyed land till a proper survey was done. To de-reserve a survey needed to be done and specific area needed to be excluded. So de-reservation cannot be a prerequisite for an agreement to lease issued in terms of Regulation 12 of the Act, as it was 'subject to survey'. (65) "The breakdown of the trust and good relationship between the villagers and the Plaintiff had already started to appear not due to the conduct of the Defendant but due to the conduct of the Plaintiff. So the Defendant was not responsible for the loss to the Plaintiff".

[23] The learned Judge allowed the counter claim of $103,530.22 on the basis that it was not challenged.

Grounds of Appeal

[24] *1. The Learned trial Judge was wrong in law in finding (at paragraphs 53 and 54 of the judgment) that:*

> *53. The Plaintiff's contention that there should be a de-reservation prior to AL, was not supported by statutory provision or any case law. In contrary Section 15 the Act states that a lease for a native reserve in terms of Regulation 33 of the Act can be issued.*
>
> *54. The said provision states as follows:*
> *"Land in native reserve not to be alienated.*
>
> ***16**.-(1) Subject to the provisions of the Crown Acquisition of Lands Act, the Forest Act, the Petroleum (Exploration and Exploitation) Act, the Mining Act, and to the provisions of this section, no land in any native reserve shall be leased or otherwise disposed of.*

(2) Leases or licences may with the consent of the native owners be granted by the Board to native Fijians in accordance with regulations made under section 33 (emphasis is mine)"

because the Appellant contends that section 16(1) of the iTaukei Land Trust Act prohibits the leasing or otherwise disposing of land in any native reserve without first de-reserving such land pursuant to section 17 of the Act.

2. *The learned trial Judge was wrong in law in holding (at paragraphs 57, 58 and 60) of the judgment) that an agreement to lease could be issued under Regulation 12 made pursuant to section 33 of the iTaukei Lands Trust Act, Cap 134 and that such an agreement was "not an illegal document" because the Appellant contends that section 16(1) of the iTaukei Land Trust Act prohibits the leasing or otherwise disposing of land in any native reserve without first de-reserving such land pursuant to section 17 of the Act.*

3. *The learned trial Judge was wrong in law in not accepting (at paragraph 61 of the judgment) that "the requirements in section 17(1) was a pre-requisite for agreement to lease" because the Appellant contends that section 16(1) of the iTaukei Land Trust Act prohibits the leasing or otherwise disposing of land in any native reserve without first de-reserving such land pursuant to section 17 of the Act.*

4. *The learned trial Judge was wrong in law in holding (at paragraph 62 of the judgment) that "de-reservation cannot be a pre-requisite for an agreement to lease issued in terms of Regulation 12 of the Act, as it was subject to survey" because the Appellant contends that section 16(1) of the iTaukei Land Trust Act prohibits the leasing or otherwise disposing of land in any native reserve without first de-reserving such land pursuant to section 17 of the Act.*

5. *The learned trial Judge was wrong in law in concluding (paragraph 70 of the judgment) that "the agreement to lease entered (into) between the Plaintiff and the Defendant was not contrary to section 15 and 16 and Regulation 12 in terms of section 33 of the Act" because the Appellant contends that section 16(1) of the iTaukei Land Trust Act prohibits the leasing or otherwise disposing of land in any naïve reserve without first de-reserving such land pursuant to section 17 of the Act.*

6. *The learned trial Judge was wrong in law in assuming, holding or otherwise concluding that the landowners could enter into a valid and binding agreement with the Appellant over land in native reserve because the Appellant contends that the only legal entity that can enter into such an agreement is the iTaukei Land Trust Board by virtue of section 4(1) of the iTaukei Land Trust Act.*

7. *The learned trial Judge was wrong in law and in fact in concluding that "The Defendant was not negligent in the process of granting the (agreement of lease) to the Plaintiff" because such a conclusion is not supported by the law (sections 16(1) and 17 of the Act) and the facts.*

8. The learned trial Judge was wrong in law in finding that the Defendant was entitled to its counter claim because the Appellant contends that the agreement to lease on which such a claim is based is illegal and of no legal effect for the reasons given above and cannot support such a claim."

Legal Matrix

[25] This case was originally filed by the Plaintiff when the Plaintiff was not a legal personality for the reason that the Plaintiff Company was under liquidation. The Plaintiff Company was officially ordered to be liquidated on 24 February 2006. Although incapacitated, the Plaintiff Company filed this action. With the Defendant raising an objection, the Plaintiff rectified this position later by obtaining the consent of the Official Receiver.

[26] The Plaintiff filed this action to claim loss which had occurred due to the Defendant issuing an AL without obtaining the consent of the Landowners. The Plaintiff's claim was based on the illegality of the said AL. Contrary to the above ground, in the same claim the Plaintiff averred that it has suffered loss due to the cancellation of the AL. The Plaintiff also averred that the Plaintiff had to cease its operations of prawn farming due to an order issued by the High Court of Suva. When the Defendant denied the cancellation and claimed the validity of the AL and the nonexistence of a High Court order, the Plaintiff retreated. In an amended statement of claim filed on 10 February 2012 the Plaintiff discreetly dropped those averments.

[27] The Plaintiff's assert that the loss was due to the illegality of the AL. The learned Judge held that the AL was legal. The learned Judge has in paragraphs 59 and 60 (pg. 92) (reproduced in paragraph 22 above) having explained the procedure in issuing a lease found no illegality in issuing the AL. The Plaintiff did not adduce any evidence of anyone disputing the AL. The Plaintiff's cause of action is based on the illegality of the AL. Even assuming that the AL was illegal the question is how did the Plaintiff suffer loss due to this illegality? In paragraph 10 (pg. 233) of the Plaintiff's amended statement of claim the Plaintiff discloses the Defendant's reason for not issuing a lease. That is, due to not having the sufficient number of consent from the Mataqali members. Admittedly the number

received was only 16 and the Plaintiff was told by the defendant to get consent from more members. The lease could be issued only after a de-reservation. As the Defendant was not able to issue a lease due to this lacuna, the Defendant issued an Agreement to Lease. If there is no illegality with the AL the Plaintiff will have no cause of action.

[28] The Plaintiff admittedly has gone bankrupt. However the reason for the bankruptcy cannot be attributed to the issuing of the AL or the non-issuing of a lease. The AL was issued as the Defendant was unable to issue a lease due to not receiving sufficient number of consent from the members of Mataqali. It is only on receipt of the sufficient number of consent that would enable the Defendant to de-reserve a native reserve land. The law requires it to be surveyed and published in the Gazette and a public newspaper. However the fact of either issuing an AL or lease did not have any effect on the Plaintiff's business.

[29] It appears from the proceedings and the judgment of the learned Judge the reasons for the Plaintiff's failure. The villagers originally welcomed the business that the Plaintiff was going to introduce to the village. This was to uplift the welfare of the villagers and develop the village. This is the reason why the villagers were originally very keen in having this started. The villagers consented to the Plaintiff having its business started even before the issuance of the AL. The villagers or the Landowners never insisted on a lease being issued or for a de-reservation. It was the Plaintiff who brought the Landowners to the Defendant to get the business started. However everything has turned sour when the villagers realized that they were not benefitting. The villagers expected the Plaintiff to be honest. However this was not to be seen. As I have already described elsewhere, the reasons for the disappointment caused the failure and the loss. The villagers appear to have lost their dreams. Was the plaintiff transparent in his dealings with the villagers? The Plaintiff was taking the prawn catch out of the village and to weigh without a representative from the village. The Plaintiff promised to share the profit with the villagers. How disappointing it would have been to realize that they were getting cheated. Nonfulfillment of the various promises would have contributed to the disappointment. How disappointing it would have been to learn that the business has gone bankrupt. This has nothing to do with the AL or the de-reservation or the issuing of a lease.

[30] The arithmetic of the claim itself appear to be questionable. The Plaintiff claims in the statement of claim $18,326,300.00. Of this sum, $16,000,000.00 is for the loss of two crops per year for 40 years at the rate of $20,000.00 per crop. The correct amount for 40 years at $20,000.00 for one crop is $800,000.00. For two crops the amount would be $1,600,000.00. How did the Plaintiff come up with $16,000,000.00? In the amended claim the Plaintiff claims $28,974,540.00. Of this sum $24,000,000.00 is claimed at $30,000.00 per crop at 2 crops per year for 40 years for 10 ponds. The Plaintiff does not make a separate claim for ponds in the statement of claim. The defendant stated that the number of ponds is not in the AL. In the statement of claim in paragraph 6 the Plaintiff states that he completed four ponds and begun but not complete 6 more. If he has not completed six ponds one can presume that he did not breed prawns in the six ponds. Then how can the Plaintiff claim for 10 ponds? At $30,000.00 per crop at 2 crops for 40 years the amount would be $2,400,000.00. If the claim is for 4 ponds the amount would be $9,600,000.00. I am of the view that the Plaintiff has even bloated the claim with fanciful figures. I am of the view that the learned Judge was correct in concluding that the AL is legal. As I stated before the legality or the illegality of the AL does not have any bearing on the loss the Plaintiff claims.

[31] The Plaintiff admits not paying rentals until the issuing of a lease. No lease has been issued in this case. The rental payments became due as per the AL. The Plaintiff did not challenge the claim of arrears of rental. The AL was never cancelled and always remained valid. Therefore I am of the view that the learned Judge was right in awarding the Defendant with the claim in the amended statement of claim. I am of the view that the learned Judge was correct in declining the Plaintiff's writ of summons and striking out the writ.

[32] I am of the view that although several grounds have been urged, all grounds revolve around the issue, namely, the illegality of the AL. As I have already answered the question with regard to the legality of the AL, I answer the issues cumulatively in the negative. Hence I am of the view that the Plaintiff Appellant does not succeed. Hence the appeal of

the Plaintiff Appellant is dismissed with costs in a sum of $5000.00 to be payable to the Defendant Respondent within 21 days from the date of this judgment.

LecamwasamJA

[33] I agree with the reasons and judgment of Basnayake, JA.

Dayaratne JA

[34] I have read the judgment in draft of Basnayake, JA and agree with the reasons and the proposed orders.

Orders of Court are:

1. *The appeal is dismissed.*
2. *The Plaintiff/Appellant to pay costs $5000.00 to the Defendant/Respondent within 21 days from the date of this judgment*.

.....
Hon. Justice Eric Basnayake
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

.....
Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

.....
Hon. Justice V. Dayaratne
JUSTICE OF APPEAL