

**IN THE HIGH COURT OF FIJI**

**(WESTERN DIVISION) AT LAUTOKA**

**Civil Action No. HBC 208 of 2014**

**BETWEEN** : **MOHINI CHANDRA** of 5539 Laguna Park Drive, Elk Grove, California 95758, USA, as Widow and Administratrix in the Estate of Ramesh Chandra.

**PLAINTIFF**

**A N D** : **THE FIJI NATIONAL PROVIDENT FUND**, a body corporate established under the Fiji National Provident Fund Act.

**DEFENDANT**

**A N D** : **BANK OF SOUTH PACIFIC** having its registered office at Level 12, BSP Suva Central Building, Corner of Pratt Street and Renwick Road, Suva.

**NOMINAL DEFENDANT**

**Appearances** : Mr Roopesh Singh for plaintiff

Ms Ana Rogovakalali for defendant

**Date of Hearing** : 27 June 2016

**Date of Judgment** : 07 March 2017

**J U D G M E N T**

**INTRODUCTION**

[01] The plaintiff has brought this action against the FIJI NATIONAL PROVIDENT FUND (*the defendant*) on her late husband Ramesh Chandra's FNPF account. She seeks an order that the defendant release the monies kept to the credit of her husband's FNPF account at the time of his death with interest.

- [02] The Plaintiff is the widow of late Ramesh Chandra (*the 'deceased'*). They were married on 4 June 1977. The deceased died on 6 July 2000 in the United States of America. The deceased and the Plaintiff had one child.
- [03] The deceased had an FNPF account with the defendant. His FNPF number is EE297. At the time of his migration, the deceased did not withdraw his funds kept with the defendant.
- [04] The plaintiff after the death of her husband made an enquiry with the Defendant about her husband's FNPF account and the outstanding balance. The defendant did not provide any particulars of the account. Whenever the plaintiff asked for the particulars, the defendant was claiming that the file could not be located.
- [05] Eventually, she was informed that the account had been paid out, but the Defendant refused to divulge any further information as to who had withdrawn the monies. However, by letter dated 16 September 2014 the defendant informed the plaintiff that the money was paid into the account of the deceased's bank account in 2008.
- [06] The plaintiff supplied the Death Certificate of the deceased to the defendant. Then the defendant maintaining its position that the money was released to the deceased's bank account in 2008, advised the plaintiff to liaise with the Bank.

## **DISCOVERY**

[07] Now, it has been discovered under the order of the court that:

- 7.1 The deceased had a membership with the Defendant being membership number EE 297.
- 7.2 The deceased died on the 6<sup>th</sup> of July 2000 in the United States of America.
- 7.3 The funds standing to the credit of the deceased was paid out in 2008 into an account in Bank of South Pacific.

7.4 The deceased or the Plaintiff was not paid the monies.

7.5 The defendant has paid another in place of the deceased.

## **AGREED FACTS**

[08] At the Pre-Trial Conference ('PTC'), the following facts were agreed to by the parties:

1. *THAT the Plaintiff is the widow and Administratrix in the Estate of Ramesh Chandra, her later husband. (Hereinafter referred to as the said deceased).*

2. *THAT the Defendant is a body corporate established under the Fiji National Provident Fund Decree and its amendments.*

3. *THAT all material times the deceased was a member of the Defendant with a membership number EE 297.*

4. *THAT all material times the deceased had monies to his credit with the Defendant.*

5. *THAT the said deceased passed away in the USA on the 7<sup>th</sup> June 2000.*

6. *THAT the Defendant until the time of his death did not withdraw any monies kept to his credit with the Defendant.*

7. *THAT on an application for withdrawal of funds was executed on 25<sup>th</sup> of September, 2008 the Defendant had released the monies kept to the credit of the deceased to another person pursuant to the said withdrawal made by the said person.*

8. *THAT the deceased did not withdraw his monies kept with the Defendant as per paragraph 7 above.*

9. *THAT at the time of withdrawal the sum of \$37,253.63 (Thirty-Seven Thousand Two Hundred Fifty-Three Dollars and Sixty-Three Cents) was kept by the Defendant in the deceased account.*

## **ISSUES**

[09] At the trial, the plaintiff's counsel advised that as far as the plaintiff was concerned, the issue could be narrowed down as follows:

[i] Whether the defendant when releasing the monies exercised reasonable care in processing and approving the application for the withdrawal by a person other than the deceased.

## **EVIDENCE**

[10] Before the commencement of the hearing, counsel for the plaintiff raised a preliminary issue with regards to the beginning of the case. It is that the defendant ought to begin the case first as they have admitted the sum was owing to the deceased. As a result of it, the defendant agreed to begin the case first as the burden of establishing payment was on them.

[11] The defendant called two witnesses namely Saleshni Narayan, Customer Services Officer ('DW1') and Roselyn Rekha Nair, Team Leader Customer Services ('DW2').

[12] DW1 states in her evidence that:

- a) She received Ramesh Chandra's retirement application through the mail, checked if everything tallies, verified his signature and recommended the payment.
- b) In respect of Chandra's identification, she said he did not have photograph identification.
- c) She did not know that Chandra had passed away at the time she approved the payment. She was not notified of his death.
- d) She marked and produced the following documents:

- i. Form 9A (D/E 1).
- ii. Registration of Employee Form (D/E 2).
- iii. Indemnity Letter (D/E 3).
- iv. Deposit Slip (\$50) (D/E 4).
- v. Ramesh Chandra's Birth Certificate (D/E 5).
- vi. Duplicate Membership Card (D/E 6)
- vii. Advice of Death with Death Certificate (D/E7).

[13] Under cross-examination DW1 states that:

- a) She confirmed that a withdrawal application (F9A) must include Pension Option Form, request letter, Birth Certificate and member's identity card.
- b) She cannot recall receiving Chandra's original identity Card.
- c) When suggested that she failed to compare the Birth Certificate that was submitted at the time of application and the one submitted at the time of withdrawal, she said, admitting that she did not clarify, the name 'aka' is not important.
- d) She processed the withdrawal application the same day that she got it. She admitted that she got it by mail.
- e) She admitted that she saw the original documents.
- f) It was put to her that she should have verified little things like the name of the member's father, nomination and thumbprint.

[14] DW2 in her evidence stated that:

- a) Application for withdrawal may be made by post, in person or even by a third party.

- b) She cannot recall handling the application of Ramesh Chandra on 30 September 2008, because she processes and approves a lot of application. However, she maintained that everything was perfect, and she approved payment.

[15] In cross-examination DW2 stated that:

- a) She could not answer when it was put to her that she did not check the date of birth stated on the Withdrawal Form.
- b) She said, 'Yes' to the question that there was no thumbprint tally.
- c) She admitted the higher degree of care is needed to process this (Chandra's) application as it was received by via post.

[16] The plaintiff did not call any witness. However, she marked and produced the following documents during the cross-examination:

- a) Letter dated 27 September 2008 (PE 1).
- b) FNPf Pension Form (PE2).
- c) FNPf Nomination Form (PE3).
- d) Email communication -9 pages (PE4).
- e) Correspondences between plaintiff's solicitor and the defendant (PE5).

[17] At the conclusion of the trial, both parties opted to file closing submissions. The court accordingly granted 21 days to both parties to file and serve their respective written submissions simultaneously. After filing their closing submission, both parties wished to file replying submissions and the court granted further 21 days to file their replying submissions.

## **DISCUSSION**

- [18] The only issue to be decided by the court is whether the defendant exercised reasonable care when releasing the monies standing to the credit of the member Ramesh Chandra's FNNPF account No. EE297.
- [19] Ramesh Chandra died on 7 June 2000 in the USA (see: DE 7).
- [20] It was not in dispute that the sum of \$37,253.63 was accrued to the credit of Chandra's FNNPF account at the time of his death.
- [21] The defendant admitted that on 25 September 2008 all the monies kept to the credit of Chandra's FNNPF account was released to another person on an application received via post after his death.
- [22] It will be noted that the monies kept in the deceased's account were released to the imposter some 8 years after the deceased death and that it was so released on the same day the defendant received the application for withdrawal through the post.
- [23] It is plain that the defendant processed the withdrawal application hurriedly and without any clarification as to the correct details of the deceased.

## **Indemnity**

- [24] The defendant seems to rely on the so-called indemnity executed by the person receiving the monies and received along with the application. The indemnity is dated 30 September 2008, a date after the death of the deceased. The purported indemnity runs thus:

*"I, Mr Ramesh Chandra FNNPF EE 297 hereby declare that I fully understand the FNNPF Pension Scheme and its calculations as explained to me by the FNNPF Pension Officer.*

*I hereby indemnify the FNNPF Board from any liability whatsoever including any loss of benefit that may arise as a result of acceding to and approving my application for partial withdrawal of funds at this stage."*

[25] The purported indemnity is executed after the death of the deceased. The deceased could not have signed this. Therefore, on the facts of the case, the defendant is not entitled to rely on this document and to seek indemnity against payment done in relation to the deceased FNPF account.

### **Reasonable care and breach of duty of care**

[26] The defendant seeks recourse to section 10 (4) of the Fiji National Provident Fund Decree 2011 to immune any liability arising out of their action. Section 10 (4) provides:

***“(4) No proceedings, civil or criminal shall lie against the Board for anything they it may do or fail to do in the course of the exercise or intended exercise of its functions, unless it is shown that it did not act in good faith or with reasonable care.”***

[27] The real question is that whether the above section will protect the defendant against an action, especially where the defendant has admitted its mistake that the monies in a member’s account had been released to a person other than the member or the nominee nominated by the member.

[28] The immunity provided to the defendant by section 10 (4) is not applicable if it is shown that **it did not act in good faith or with reasonable care.**

[29] It may well be that in the light of the available evidence and admissions made by the defendant; the plaintiff has confined her claim to that of failing to act with reasonable care when releasing the monies kept to the credit of the deceased.

[30] It goes without saying that the defendant was under a legal duty pursuant to section 10 (4) to exercise reasonable care when it or its employee carries out its functions under the Decree.



[31] Once a legal duty of care is owed, the authority needs to ensure that there is no breach of that duty.

[32] The defendant had admitted that it simply paid out the monies kept to the credit of the deceased's account to an unknown person. I, therefore, find that the defendant had failed to exercise reasonable care and as a result, the defendant wrongfully and illegally released the deceased's FNPF fund to the unknown person. My finding is not only based on the defendant's admission, but also based on the following additional reasons:

- a) Strangely, the application was processed hastily on the same day the application was received.
- b) The officer who processed the application for withdrawal had inserted the dates in the application. This was improper on the part of the officer of the defendant.
- c) The application was processed and approved without original photo identity. Photocopy of the photo identity was accepted. The officer who recommended the payment (DW1) should have insisted on and enquired about the photo identity as the withdrawal was for lump sum over \$37,000.00.
- d) A different Birth Certificate was accepted when releasing the monies. The name of the deceased's father according to the Birth Certificate tendered at the time of the application for membership (PE3) is "*Ram Deo/Churkut*" His father's name is highlighted in BLACK and BOLD letters. The Birth Certificate submitted at the time of withdrawal states the deceased's father's name as "Ram Deo" only. It appears that the fund has been released in the absence of the relevant file. The defendant could have easily found out the discrepancies if they had compared the documents tendered at the time opening an FNPF account and the documents submitted at the time of the withdrawal. The

defendant's employees failed to compare the documents submitted for the purpose of withdrawal with that of the documents on their file.

- e) The withdrawal application was processed and approved in the absence of even the membership card. The basic document needed for withdrawal.
- f) DW1 stated that there is no system to compare the thumbprint. However, she told the court that signature and thumbprint tally. DW1 could not explain how she compared and came to that conclusion.
- g) The deceased's account was dormant since 1998. This should have given the alarm to the defendant. However, the defendant failed to pay extra attention when making full withdrawal application.
- h) The Full Withdrawal Form itself is defective. The form was received and processed on 30 September 2008. The solicitor has verified and attested the thumbprint on 25 September 2008, which 5 days before the application was received. The solicitor who attested the thumbprint was not called by the defendant to confirm the same.
- i) In the Application Form, the date against the deceased's name states as "**28 July 2008**" whereas the deceased's date of birth is "**28 July 1952**". The application was processed ignoring the basic things like the date of birth.
- j) The fact that the defendant was not notified of the death of the member (deceased) is no excuse for the defendant to pay to the imposter.

- k) The defendant could not even produce the deposit slip, if they had deposited the monies into the deceased's bank account.

[33] There is sufficient evidence before the court to conclude that the defendant has wrongfully and illegally released the funds kept to the credit of the deceased member to an unknown person who was not entitled to those funds and by doing so, the defendant has acted in breach of its duty and obligation to properly maintain and keep the funds, account for the same and pay the funds to the proper person.

[34] The statutory duty to act with reasonable care cast on the defendant in maintaining, keeping the members' account and releasing the fund extends not only to the member but also to the nominee nominated by the member and to the person or persons entitled to claim as beneficiary or beneficiaries in the case of unallocated funds.

#### **Locus issue**

[35] In regards to the locus to initiate legal proceedings on behalf of the deceased, the defendant, in its written submissions, for the first time has raised two questions, namely:

- i. Does the Plaintiff have the right to institute legal proceedings on behalf of the deceased's estate?
- ii. Is she the lawful Administratrix/Executrix of Ramesh Chandra's estate? If so, has she disclosed any evidence to show that she has been granted probate or letters of administration before she filed these proceedings?

[36] It is an admitted fact that the Plaintiff is the widow and Administratrix in the Estate of Ramesh Chandra, her later husband. The defendant is,

therefore, not entitled to raise that issue after the conclusion of the trial at closing submission. As the widow of the deceased, the plaintiff is entitled to legal claim on the estate of the deceased. She is entitled to bring legal action on behalf of the deceased estate.

### **Nomination Issue**

[37] That the issue whether the Plaintiff is a valid nominee is irrelevant in these proceedings. The defendant has no right to release the funds to an unknown person in the absence of any nomination. At the time when the deceased died, there were funds to the credit of the deceased FNPF account. She is entitled to those funds as the widow of the deceased. If there were no nomination, the defendant ought to have deposited that funds into the High Court for distribution on the basis of unallocated amount pursuant to section 57 (3) (b) of the FNPF Decree, which provides:

*“(3)If -*

*(a) a nomination by an FNPF member does not cover all of the amount payable in respect of the member on his or her death; or*

*(b) because of subsection (1), **the Board cannot pay some or all of the amount payable in respect of an FNPF member on his or her death;***

*(the amount not covered, or that cannot be paid, is the "unallocated amount"), **the Board must pay the unallocated amount into the High Court for disposition according to law.*** (Emphasis added)

### **CONCLUSION**

[38] The plaintiff, as the widow of the deceased member, Ramesh Chandra, is entitled to bring the action on behalf of the deceased's estate. The defendant has a legal duty of care towards the deceased member, his

nominee and the person or persons entitled to claim beneficial interest under his FNPF account. The defendant was wrong in releasing the fund kept to the credit of the deceased member to the unknown person. As a result, the defendant had failed to exercise reasonable care in handling the full withdrawal application. If the defendant had exercised reasonable care, it would not have resulted in the payment of the deceased's FNPF fund to the imposter. The defendant should have deposited all the monies standing to the credit of the deceased's account as unallocated amount pursuant to section 57 (3) (b) of the Fiji National Provident Fund Decree. The defendant had failed to do so. I, therefore, order the defendant to deposit into the High Court all the monies kept to the credit of the member Ramesh Chandra's account at the time of his death with interest. The defendant must do so within 30 days of the date of this judgment.

### **Costs**

[39] As a successful party, the plaintiff is entitled to costs of the proceedings. The plaintiff seeks indemnity costs. The plaintiff submits that she has already incurred the costs in the sum of \$30,000.00. She also submits that she has been running after her entitlement for a long time and that the defendant was at all times aware that the monies were paid to the wrong person. The defendant had unsuccessfully attempted to defend their wrongful act. The chain of correspondences between the plaintiff and the defendant shows that the plaintiff had pleaded for the funds to be released. The defendant's action was deplorable. They refused to provide any information regarding her husband's account. Eventually, on 4 June 2014 the defendant in writing confirmed that the funds were withdrawn and for the plaintiff to take legal advice and warned her not to forward false evidence and by the letter of 16 September 2014 the defendant informed the plaintiff the FNPF will not provide any further information. The defendant, through the letter of 3 October 2014 sent

by the plaintiff's solicitor, was put on notice that the indemnity costs will be sought if the plaintiff was compelled to bring any legal proceedings to assert the plaintiff's entitlement under the deceased account. Under these circumstances, I would grant the plaintiff indemnity costs to be assessed before the Master.

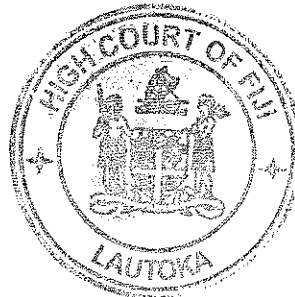
### **The Outcome**

- 1) There will be judgment in favour of the plaintiff.
- 2) The defendant within 30 days of the date of this judgment will deposit into the High Court all of the amount payable in respect of the FNPF member Ramesh Chandra's account (EE 297) on his death with interest.
- 3) The plaintiff is entitled to indemnity costs, which is to be assessed before the Master of the High Court.

*M H Mohamed Ajmeer*  
7/3/17

**M H Mohamed Ajmeer**

**JUDGE**



**At Lautoka**

**7 March 2017**