

IN THE FIJI COURT OF APPEAL

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Civil Jurisdiction

CIVIL APPEAL NO. 24 OF 1990  
(Lautoka Civil Action 342 of 1989)

BETWEEN

FIJI NATIONAL PROVIDENT FUND

Appellant

and

FIJI MOCAMBO LIMITED

Respondent

Mr M. Raza for the Appellant  
Mr C.B. Young for the Respondent

Date of Hearing: 25th June, 1992  
Date of Judgment: 1st July, 1992

JUDGMENT OF THE COURT

In November, 1989 the Fiji Mocambo Hotel (the Respondent) proceeded against the Appellant (Fiji National Provident Fund) by way of originating summons asking -

- "1. For a declaration that the Plaintiff's contract with the Mocambo Quartet from July 1984 to September 1988 was one for service and the Plaintiff thereof was not liable to pay the Defendant Fiji National Provident Fund contributions under the Fiji National Provident Fund Act Cap 219.

2. *FOR a further order that the Defendant refund to the Plaintiff the sum of \$16,809.38 (Sixteen thousand eight hundred nine dollars thirty eight cents) being Fiji National Provident Fund contributions paid by the Plaintiff to the Defendant with interest thereon at the rate of \$13.50 per centum per annum from the 8th day of November, 1988 to the date of judgment under Section 3 of Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap 27."*

The Respondent succeeded in its action and the trial Court (Saunders J.) entered judgment for the Plaintiff in the sum claimed plus interest thereon with costs.

The trial Judge held that 'there was no contract of service and no member of the Band was an employee of the Plaintiff company within the definition of the National Provident Fund Act.'

From this judgment the Appellant has appealed to this Court on the following grounds:-

1. That the Learned Trial Judge erred in Law and in fact in holding that there was a Contract for Services.
2. That the Learned Trial Judge took into account irrelevant factors in coming to his decision.
3. That the Learned Trial Judge misdirected himself and or did not properly direct himself as to matters to be taken into account in coming to his decision.

The sum in question was paid by the Respondent to the Appellant under protest on 8.11.88 after being threatened with prosecution.

The issue for the trial Judge was whether the members of the Band were employees as defined in the National Provident Fund Act. The definition of "employee" in the Act so far as relevant to our purpose is - "employed in Fiji under a contract of service."

The Respondent submitted that the members of the Band worked under a "Contract for Service" and as such they were not employees of the Hotel whereas the Appellant argued that they

were employed under 'Contract of Service' and as such were employees of the Hotel.

It is not disputed that if the members of Band came within the definition of "employee" the Hotel would be liable in law to make the contribution in question.

It is also not in dispute that the Band were not contracted under the Hotel's normal standard letter of employment.

The contract or agreement under which they worked was exhibited as Annexure 'B' to the supporting affidavit of Mr Radike Qereqeretabuá, the manager of the Hotel (see pages 14, 18 of the Record). We note that the agreement was entered into with the Hotel by the Band's managing agent Joseph Heritage, i.e. members of the Band did not individually sign the agreement.

Whether or not in any given case, the relationship of employer and employed exists is a question of fact, although the construction of the contract or agreement is a matter of law.

In our view it is the nature of contract or agreement that must primarily be looked at to determine the status of the members of the Band. This the trial Judge did by comprehensively analysing terms of the agreement 'B' in his Judgment (see pages 70-71).

In the Court below the Appellant laid much emphasis on the element of control of the Bandsmen. The Learned Judge dealt with this submission in this way -

*"Fiji National Provident Fund claimed these terms showed control by the hotel over the band members such as to constitute the relationship of master and servant. The Court does not agree. These are terms and conditions which should properly be inserted in any contract with a group of musicians in Fiji, who are to play in a high class hotel for a weekly payment."*

He then referred to the other pieces of evidence which supported his construction. For instance, at p.72 of the Record he said as follows:-

'Mr Raza also referred to the deduction of 15% provisional tax. But that supports the claim by the hotel that the members of the band were not employees. The Income Tax (Collection of Provisional Tax) Regulations requires that "there shall be deducted from any payment made under any contract for services but not being a contract of employment....., a sum equal to 15% of such payment". This contract was treated by both the hotel and the band as "not being a contract of employment" within the provisions of those regulations, and reflected such intention by providing for the deduction of 15% tax. '

We are satisfied that the trial Judge could not be faulted on his construction of the agreement nor on the inferences he drew from uncontested facts. In the circumstances we uphold his decision and dismiss the appeal with costs.

*Michael Helsham*

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Justice Michael Helsham  
President, Fiji Court of Appeal

*Sir Moti Tikaram*

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Sir Moti Tikaram  
Resident Judge of Appeal

*Sir Mari Kapi*

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Sir Mari Kapi  
Judge of Appeal