IN THE FIJI COURT OF APPEAL

SUVA, FIJI ISLANDS

[Misc. Action No. MISC 0013 OF 2008]
(On Appeal from the Lautoka High Court in Civil Action No. HBC 230 of 2000)

BETWEEN : **SHANTI LAL**

APPLICANT **(Original Plaintiff)**

AND : **NATIVE LAND TRUST BOARD**

1ST RESPONDENT (Original 1st Defendant)

AND : **APISAI and BANSI**

2ND RESPONDENTS (Original 2nd Defendants)

BEFORE THE HONOURABLE JUSTICE OF APPEAL : **Mr. JUSTICE JOHN E. BYRNE**

COUNSEL : **Ms P. KENILOREA (For the Appellant)**

: **Ms A. VAKATALE (For the 1st Respondent)**

Date of Hearings and Submissions : **12th, 19th January; 17, 24th February 2009**

Date of Ruling : **13th August 2009 at 9.15 am**

RULING ON APPLICATION FOR LEAVE TO APPEAL OUT OF TIME

[1] This ruling concerns only the Applicant and the First Respondent. Judgment was given in the High Court at Lautoka on the 11th of July 2008 against the 2nd Respondents who have not taken any part in this application.

[2] The applicant sued the Respondents in the High Court for damages and compensation for breach of contract, breach of statutory duty, trespass and unlawful conversion and detention of goods.

[3] The Applicant claimed against the First respondent that he was lessee of approximately 13 acres of native land known as NLTB No. 4/10/3877 SOLOVI in the tikina of NAWAKA (the land), which was covered by cane contract no. 2286 for twenty (20) years from 1st January 1981. He claimed that he had purchased the remaining period and interest in the lease from Subhaga Devi with the consent of the First Respondent which was granted on 22nd August 1985. He claimed that he was entitled to a twenty year extension from the expiry of twenty years from 1st January 2001 under the Agriculture and Landlord Tenant Act Cap. 270(ALTA).

[4] The Applicant claimed that after having been evicted from the land on at least two occasions he was able to resume possession of the land with the assistance of the 1st respondent (herein-after called the NLTB). Thereafter he alleged that the NLTB had not upheld his entitlement in breach of its contractual and statutory obligations as landlord and, despite knowing of his occupation of 13 acres sought to maintain that his lease and entitlement was only in respect of 3 acres of land. He claimed that the NLTB wrongfully and in breach of his entitlement and rights tried to terminate his tenancy by Notice dated 30th June 2000 which also demanded compensation from him in the sum of $35,000.00. He alleged that the NLTB refused to give him his full entitlement under ALTA and was in breach of the provisions of ALTA.

[5] The Applicant claimed that he paid $47,000 for the lease of 13 acres which he purchased in 1986 and subsequently renovated and extended a large four-bedroom house on the property. He alleged that there were 2 well-built and equipped labourer's quarters on the property and he built a bulk store as well. He claimed that the improvements cost $111,194.00 and that he expended $10,410.00 for an internal laundry and storage facility.

[6] He alleged that as a result of the NLTB refusing to recognize his rights and lease over 13 acres the second respondents occupied and trespassed onto his lease, premises, property and chattels. He claimed that as a result of the actions of the NLTB, he lost the cultivation of a sugarcane crop for three years and particularized his losses at $40 per tonne by 450 tonnes for 3 years totaling $54,000.00. He claimed other farm losses from fruit bearing and seasonal fruit trees, vegetable plants and flower gardens at $19,800.00 per annum. He also claimed that he lost his farming implements which he valued at $7,361.00.

[7] He alleged that the actions of the NLTB constituted a trespass, a detention and/or conversion of his goods. He obtained an injunction restraining the NLTB from interfering with his possession of the property. He also claimed that the NLTB had refused or neglected to obey the order.

[8] As I said at the beginning the Learned Judge dismissed the Plaintiff's claim against the NLTB but ordered the 2nd respondents to pay the applicant the sum of $20,000 inclusive of interest plus costs of $2,000.00.

THE NLTB'S AMENDED STATEMENT OF DEFENCE

[9] The NLTB denied that the applicant was the lessee of approximately 13 acres of native land. It stated that only 3 acres of land known as SOLOVI C/N 2286 had been leased to the applicant. The NLTB alleged that it was the applicant's duty as purchaser to check the title of

the land before buying it. The NLTB also alleged that the applicant's predecessor in title SUBHAGA DEVI was issued with a tenancy at will by the NLTB over an area of 3 acres on 6th January 1977 with effect from 1st January 1971 at a rental of $75 per annum which was re-assessed on 26th August 1980. A condition of the tenancy was that it was not transferrable and that no building whatsoever was to be erected on the land.

[10] The NLTB stated that the tenancy at will expired on 1st January 1981 and was extended for a further term of 20 years under ALTA on 17th September 1982 with effect from 1st January 1981 and that the conditions of the tenancy at will remained in force. The rent was re-assessed and increased to $126.00 in 1986. The NLTB stated that in 1986 the land was bought by the Plaintiff. The NLTB claimed that on 2nd April 1986 it mistakenly consented to 13 acres instead of 3 acres of land sold to the applicant. The rent was re-assessed and increased to $240.00 in 1991 and $355.00 in 1995. Further that the tenancy expired on 31st December 2000 and consequently the applicant had no leasehold interest in the land. The claim that the applicant purchased 13 acres from Subhaga, Devi was denied on the ground that Ms Devi leased only 3 acres of land from the NLTB. The consent to 13 acres was pleaded as a mistake in that the NLTB could not have consented to lease land that it "did not have", given that Ms Devi's tenancy at will was only in respect of 3 acres and not 13 acres.

[11] The alleged improvements claimed by the Applicant were denied on the ground that they were illegal and in breach of the tenancy at will dated 6th January 1977 and the provisions of ALTA because the applicant did not obtain the prior written consent in writing of the NLTB before making the said improvements.

THE APPLICANT'S REPLY TO THE NLTB DEFENCE

[12] The applicant asserted that the NLTB was estopped from pleading mistake due to its conduct that it knew through its surveyors that these were Colonial Sugar Refinery reverted leases, that it was creating a new tenancy in CSR reverted leases and was aware that these tenancies would fall under the provisions of ALTA and having consented to the transfer of 13 acres of land on 30th April 1986 by accepting a Certificate of Assignment dated 6th August 1986 in

respect of 13 acres signed by the Applicant as purchaser and the vendor. The applicant also maintained that the NLTB having inspected the land with a surveyor named D. Prasad was aware of and had confirmed that the whole area of 13 acres was native land on or about 19th May 1988.

BREACH OF CONTRACT CLAIM AGAINST THE FIRST RESPONDENT

[13] The applicant claimed that in failing to uphold his entitlement to 13 acres of land, the NLTB breached its contractual obligations as landlord. Further, that the landlord and tenant relationship was breached because the applicant had not been compensated for his house and property in accordance with ALTA. It was also alleged that the applicant was not accorded the full period of the lease that he was entitled to.

THE JUDGMENT OF PHILLIPS, J

[14] In a very comprehensive judgment, Phillips, J rejected the applicant's claims. She held that the contracted tenancy was subject to the provisions of ALTA, being in respect of Agricultural land which did not fall within the exceptions contained in Section 3 of the Act. The Learned Judge did not mention these but it is desirable that I do so. They are :

(a) Agricultural Holdings having an area of less than 1 hectare;

(b) Tenancies held by members of a registered co-operative society of agricultural land, where the society is the landlord;

(c) all native land situated within a native reserve.

[15] The judge said in paragraph 23 of her judgment :

"Ms Devi was never granted a registrable lease. She was never granted any other instrument of title over the subject land. She was never granted any lease or tenancy over 13 acres of land in the subject area. Her rights to occupy and use the subject land were confined to the terms her contract of tenancy evidenced by Instrument of Tenancy

which was issued in her favour over 3 acres only. Pursuant to Section 6(a) of ALTA any contract of tenancy created after the commencement of the Act but before the commencement of the ALTA (Amendment) Act 1976 shall be deemed to be a contract of tenancy for a term of not less than ten years".

[16] The essence of the judge's findings is contained in paragraph 25 of her judgment which reads:

"Under Section 13(1) of ALTA a tenant holding under a contract of tenancy shall be entitled to be granted a single extension of the contract of tenancy for a period of twenty years. Ms Devi was accorded the statutory extension in respect of the 3 acres of land she held pursuant to her contract of tenancy in Solovi on land bearing NLTB reference no. 4/10/3877. She was notified that the conditions and restrictions contained in the contact of tenancy evidenced by the Instrument dated 6th January 1977 remained in force in so far as they were applicable. She could only have conveyed and/or assigned to the plaintiff her legal entitlements/interest in the land assigned. At the time she purported to assign 13 acres of land to the plaintiff, she held a contract of tenancy over only 3 acres of land and not 13 acres of land. She could only have disposed of the interest in the land that she held, and no more than that. She only held an interest of 3 acres, with a remaining balance term of fourteen years to run at the time of the purported assignment."

[17] In paragraph 26 of her judgment Phillips, J stated that it was apparent from the documentary evidence produced that the NLTB's records concerning the subject land refer to the acreage as being both 3 acres and 13 acres. In paragraph 26 she gives 21 examples of documents showing 3 acres and in paragraph 27 she gives 7 examples of documents referring to 13 acres.

[18] It would appear that the Learned Judge was greatly assisted by these examples in coming to the conclusion that the applicant's rights were only over 3 acres. I shall return to this aspect shortly but I must now decide whether it would be reasonable to grant the applicant the extension of time he seeks.

[19] The applicant supports his application by an affidavit sworn on the 13 October 2008, in which he states that he was unwell and in Australia at the time when judgment was delivered on the 11th of July 2008. I consider this is a reasonable explanation. I do not consider that the respondent has suffered any prejudice by the applicant being out of time by at the most two days.

[20] The Order perfecting judgment was sealed on 18th August 2008. Therefore the time for appealing expired on 29th of September 2008.

[21] The applicant attempted to file a Motion of Appeal on or about 1st October 2008 which was only two days out of time. The Respondent says that it has been prejudiced by this delay but no details of prejudice have been shown and I cannot believe that the respondent suffered any. This then leads to the question of whether the applicant has shown any arguable grounds of appeal and whether it is desirable that leave to appeal should be granted.

THE PROPOSED GROUNDS OF APPEAL

[22] In my opinion the applicant has shown a number of arguable grounds of appeal which deserve a judgment of the Full Court. These are :

(a) whether the judge erred in holding for the 1st respondent on its defence of mistake in light of the first respondent's conduct towards the applicant;
(b) whether the judge erred in holding that the first respondent was not estopped by its conduct from denying the applicant's entitlement to 13 acres;
(c) whether the court erred in holding that the applicant was not entitled to the agricultural tenancy;
(d) whether the court erred in holding that the applicant was not entitled to compensation under Section 40 of the Agricultural Landlord and Tenant Act; and
(e) whether the court erred in holding that there was insufficient proof of sugarcane production to award damages therefor.

[23] I said earlier that it appeared one of the factors influencing the trial judge was the 22 of the documents produced by the 1st respondent refer to 3 acres and only 7 refer to 13 acres. In my view it is arguable that in so finding the Learned Judge failed to appreciate that what is important is what the 1st Respondent consented to at the time of transfer. There is evidence that the applicant had through his Solicitors obtained the consent of the 1st Respondent to assign 13 acres of native land to himself for which he paid a consideration of $50.00

He went into occupation and began to cultivate the land after obtaining this consent. He paid rent for 13 acres and the 1st Respondent accepted this.

[24] If this be correct then arguably the applicant's occupation was legal and he was entitled to damages for trespass and breach of contract.

[25] In paragraph 44 of her Judgment Phillips, J held that the applicant failed to get the consent of the First Respondent for improvements on the land. I consider there is substance in the submission by the applicant that there is nothing requiring consent to renovation of and re-building existing structures especially when there is destruction by a hurricane, evidence of which it is said is contained in the Record.

[26] In my opinion this is an important point for argument because otherwise all tenants will run the risk of being adversely affected when they improve their structures even after such a disaster as Fiji experienced in January this year with devastating floods.

[27] I am of the opinion that the proposed grounds of appeal raise questions of some importance under the Agricultural Landlord and Tenant Act and the applicant should be given leave to appeal out of time. I make this Order and I also direct that costs be in the cause.

Dated this 13th day of August 2009.

JOHN E. BYRNE

JUDGE OF APPEAL