

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

CIVIL APPEAL ABU 106 of 2016  
ABU 77 of 2016  
(High Court HBC 86 of 2012)

BETWEEN : iTAUKEI LAND TRUST BOARD  
*Appellant*

AND : SALESHNI GEETA RAM  
*Respondent*

AND

BETWEEN : ASHOK BALGOVIND  
*Appellant*

AND : SALESHNI GEETA RAM  
iTAUKEI LAND TRUST BOARD  
*Respondents*

Coram : Calanchini P  
Wati JA  
Seneviratne JA

Counsel : Ms L Komatai for the Appellant/Second Respondent (TLTB)  
Mr M Yunus for the Respondent/First Respondent (Ram)  
Mr K Singh with Mr P Nawaikula for the Appellant  
(Balgovind)

Date of Hearing : 26 June 2018

Date of Judgment : 13 July 2018

## JUDGMENT

### **Calanchini P**

- [1] These are two appeals arising out of a judgment of the High Court at Lautoka pronounced on 16 June 2016. The Court ordered that the iTaukei Land Trust Board (the Board) specifically perform the contracts for a residential lease and for an agricultural lease. The Board was ordered to pay to Saileshni Geeta Ram (Ram) the sum of \$8,000.00 as exemplary and punitive damages. The Court declined to award general damages. An award for post judgment interest was unnecessarily included in the orders and the sum of \$2,000.00 was awarded as costs to Ram to be paid by the Board. There were no orders made for or against Balgovind.
- [2] The statement of agreed facts in the pre-trial conference minutes provides sufficient background material for the purposes of the present appeals. The following outline of the agreed facts is based on the material set out on pages four and five of the High Court Judgment. In November 2011 the Board offered Ram a residential lease over land known as Lomolomo Lot 1 DP 1418 in the Tikina of Nailaga in the Province of Ba with an area of 0.5893 hectares (the residential lease land) for a period of 99 years commencing from 1 January 2012. The offer was accepted by Ram on the same day as the offer was made, i.e. 16 November 2011 (residential lease agreement).
- [3] Pursuant to the residential lease agreement Ram paid on 16 November 2011 an amount of \$8283.58 in respect of premium, rent and duties. On the same day Ram also executed a residential lease over the property prepared by the Board and delivered the executed lease to the Board for its execution, stamping and registration.
- [4] At about the same time the Board also offered an agricultural lease to Ram over land known as Lomolomo Lot 1 DP415 Tikina of Nailaga, Province of Ba with an area of 4.2795 hectares for 99 years commencing from 1 January 2012 (agricultural lease land). This offer was accepted by Ram on the same day (16 November 2011) (agricultural lease

agreement). Pursuant to the agricultural lease agreement Ram paid an amount of \$500.00 to the Board to enable the Board to attend to stamping and registration for the lease.

- [5] It was agreed that payment of the balance of the premium, rental for one year, lease administration fees and part of lease processing fee was to come from cane proceeds after Ram was issued with the agricultural lease. On the same day (16 November 2011) Ram executed an agricultural lease over the agricultural lease land prepared by the Board and delivered the lease to the Board for its execution, stamping and registration.
- [6] Ram had at all times material performed her part of the agreements but the Board, despite several requests from Ram had refused or neglected to perform its part by failing to execute, stamp and register both the leases.
- [7] The issues to be determined at the trial included whether Ram had induced the Board to enter into the arrangements (i.e. make the offers and enter into the agreements) as a result of misrepresentations by Ram. It is not necessary to list the particulars of misrepresentations that were pleaded.
- [8] The learned trial Judge did not accept any of the defences raised by the Board. The Judge concluded that the Board had failed to satisfy the Court on the balance of probabilities that the Residential lease and the agreement for agricultural lease were induced by Ram through acts of misrepresentation of facts. As a result he concluded that the Board had wrongfully refused failed or neglected to perform its part of both agreements. Ram was entitled to orders for specific performances of both agreements.
- [9] Being dissatisfied with the orders of the High Court the Board filed a notice of appeal seeking an order that the orders of the High Court made on 16 June 2016 be set aside on six grounds of appeal that rely on alleged errors of fact and law on the part of the learned High Court Judge.

[10] About 1 month after the pronouncement of the High Court judgment Ashok Balgovind (Balgovind) filed a notice of appeal on 18 July 2016 seeking an order that the judgment of the High Court delivered on 16 June 2016 be wholly set aside on the following grounds:

- "a) That the learned Judge erred in law and in fact by refusing the (Balgovind) to file its statement of defence;*
- b) That the learned Judge erred in law and in fact in continuing with the hearing despite the fact that the Amended Statement of Claim was served on (Balgovind) sometimes in May 2016.*
- c) That the learned Judge erred in law and in fact in not directing the parties to engage in another pre-trial conference Minutes including (Balgovind).*
- d) That the learned Judge erred in law and in fact in not allowing the (Balgovind) to give evidence or call its witnesses."*

[11] For reasons that will become apparent in the course on this judgment it is not necessary to consider the grounds of appeal raised by the Board in appeal No. ABU 106 of 2016. The appeal by Balgovind in appeal No. ABU 77 of 2016 can be readily determined by reference to the appeal record filed by the legal practitioners for Balgovind.

[12] I propose to consider the Board's appeal first. The Board had filed an initial notice of appeal on about 26 July 2016. I say about 26 July 2016 because there is no filing stamp on the back sheet of the notice. The notice is dated 26 July 2016 and there is a stamp indicating that stamp duty was paid in the High Court Registry on the same date. It would also appear that the notice of appeal was served on the same date. Consequently both filing and service had been effected within the 42 days prescribed by Rule 16 of the Court of Appeal Rules (the Rules). A summons to fix security for costs had also been filed within the time prescribed by Rule 17(1) of the Court of Appeal Rules. The summons was returnable on 9 August 2016. On that date the application was adjourned to 23 August 2016. On that date there was no appearance by or on behalf of the Board. Consequently the summons was struck out by the Registrar of the Court.

- [13] On 25 August 2016 the Board purported to file a second summons to fix security for costs. However that summons was a futile attempt to redress a situation that could not be remedied for two reasons. First, by failing to attend on the return date of the summons to fix security for costs the Board was in breach of Rule 17(1) and with immediate effect the appeal was deemed to have been abandoned. Secondly, the filing of a second summons on 25 August 2016 was out of time being more than the 7 days from the date of service of the notice of appeal required under Rule 17(1).
- [14] As a result of its first appeal being deemed abandoned with effect from 23 August 2016 the Board filed and served a second notice of appeal pursuant to Rule 17(2) of the Rules which provides that:
- “If paragraph (1) is not complied, the appeal is deemed to be abandoned, but a fresh notice of appeal may be filed before the expiration of [42 days] calculated from the date the appeal is deemed to be abandoned.”*
- [15] The effect of this Rule is that the Board was given a second chance to revive its appeal by filing a fresh notice of appeal within 42 days from 23 August 2016. The second notice of appeal was filed on 6 October 2016 which was late by 2 days since 42 days from 23 August meant that filing was required by 4 October 2016.
- [16] Rule 17(3) of the Rules provides that except with the leave of the Court of Appeal no appeal may be filed after the expiration of time specified in sub rule (2) of Rule 17. There is therefore no appeal before the Court filed within the time prescribed under Rule 17(2) and there is no application before the Court for leave to appeal under Rule 17(3). I would strike out the notice of appeal filed on 6 October 2016.
- [17] As for the appeal by Balgovind, it must be noted that Balgovind was represented by Counsel at the hearing of the action in the High Court. Although there were no orders made against Balgovind in the judgment of the High Court, that alone would not necessarily preclude Balgovind from pursuing an appeal against the orders made in the

High Court. Any person who was a party in the hearing in the High Court may appeal to the Court of Appeal. However in this case the grounds of appeal do not indicate that Balgovind has any particular interest in the judgment or would be affected by the outcome of the appeal. The grounds of appeal appear to relate to what amounts to a denial of natural justice in the form of procedural fairness.

- [18] From the record it would appear that an amended writ of summons was issued out of the Registry of the High Court at Lautoka on 27 April 2016 pursuant to an order made by the learned trial Judge on 12 April 2016. It is not clear whether Balgovind filed an acknowledgment of service.
- [19] The record does not indicate that Counsel appearing for Balgovind had sought leave to file a defence. The record does not indicate that Counsel for Balgovind had sought time to prepare for the trial due to the relatively short period of time that had elapsed between service of the amended writ and the continuation of the trial. The appeal record does not indicate that Counsel for Balgovind had sought an adjournment or postponement of trial to enable all Counsel to reconvene a Order 34 pre-trial conference. The record does not indicate that Counsel for Balgovind had sought leave to call Balgovind or other witnesses to give evidence. The record does not support any of the claims raised by Balgovind's grounds of appeal. Counsel for Balgovind conceded as much.
- [20] Furthermore it is not the function of the trial judge in the context of an adversarial trial to assist a party to overcome the problems consequent to the position taken by that party in the trial. Whilst the trial judge is concerned with finding out the truth he is restricted to the material presented by the parties in the production of which he plays no part and which he cannot supplement or argument (Patrick Devlin: the Judge – Oxford University Press 1981 at page 61). There is no merit in any of the grounds of appeal raised by Balgovind and the appeal should be dismissed.
- [21] In respect of both appeals Counsel for Ram sought costs. I would refuse both applications. In the case of the appeal by the Board it was open to Ram to apply at a very

early date to have the appeal struck out on the basis that the appeal was not properly before the Court as leave under Rule 17(3) had neither been sought nor granted. In the case of the appeal by Balgovind it was apparent from the record that none of the grounds raised by the appellant could be supported by the record.

**Wati JA**

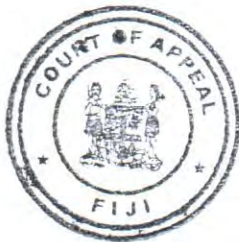
[22] I agree with the judgment of Calanchini P.

**Seneviratne JA**

[23] I agree with the reasons and findings of Calanchini P.

Orders:

1. *Appeal by iTaukei Land Trust Board in ABU 106 of 2016 is struck out.*
2. *Appeal by Balgovind in ABU 77 of 2016 is dismissed.*
3. *All parties are to pay their own costs.*



*W. Calanchini*  
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**Hon. Justice W D Calanchini**  
**PRESIDENT, COURT OF APPEAL**

*A Wati*  
.....  
**Hon. Justice A Wati**  
**JUSTICE OF APPEAL**

*L Seneviratne*  
.....  
**Hon. Justice L Seneviratne**  
**JUSTICE OF APPEAL**