IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No: HBC 136 of 2018
IN THE MATTER of an application under section 169 of the Land Transfer Act (Cap 131)

BETWEEN : **AIR TERMINAL SERVICES (FIJI) LIMITED** a registered company having its registered office at Nadi Airport, Nadi.

Plaintiff

AND : **FEDERATED AIRLINE STAFF ASSOCIATION** a trade union registered under the Employment Relations Act.

Defendant

Before : Master U.L. Mohamed Azhar

Counsels : Ms. Rakai for the plaintiff
Mr. K. Tunidau for the Defendant

Date of Judgment : 17th June 2019

JUDGMENT

01. The plaintiff, Air Terminal Services (Fiji) Limited (**ATS**), is a ground handling company based at the Nadi International Airport which has the capacity to provide total ground handling to all types of aircrafts arriving at or departing the airport. It is jointly owned by the Government of Fiji having 51% of the shares and the Air Terminal Services Employees Trust (**ATSET**) which holds the balance 49% of the shares. **ATSET** was registered in 1980 with the purpose of equity and employee participation in the workplace. The defendant association, Federated Airline Staff Association (**FASA**) is the union representative for employees in ATS that nominates staff to sit in Joint Committees. The role of **FASA** is to protect the welfare and rights of the employees through collective bargaining regarding the terms and conditions of the employment as provided in the Memorandum of Understanding signed on 22.01.1998 by and between **ATS** and **FASA**, which is known as **"Master Agreement"**.

02. **ATS** filed the summons pursuant to section 169 of the Land Transfer Act (Cap 131), seeking an order on **FASA** to deliver vacant possession of office space in **ATS**'s Administration and Facilities Building situated at Cruikshank Road, Nadi comprised in Crown Lease No. 3469 being Lots 1 ND 4820 and Lease Agreement No 718361 to **ATS**.

The summons is supported by an affidavit sworn by Maftoa Kafmanu Pane – the Manager Technical Services of **ATS**. The affidavit contains the annexures marked as **"MKP 1"** to **"MKP 7"**.

03. **FASA**, upon service of the above summons, appeared through its solicitor and filed the affidavit in opposition sworn by Manasa Ratuvili – the National Secretary of **FASA** together with seventeen documents marked as **"MR 1"** to **"MR 17"**. The most of the documents attached with that affidavit are correspondences between **ATS** and **FASA** in relation to tenancy agreement and the rental amount between them. **ATS** thereafter filed the affidavit in reply sworn by the same person, annexing another set of the documents marked as **"MKP 8"** to **"MKP 17"**. The matter was then fixed for hearing.

04. Two days before the date fixed for hearing of the intant summons, **ATSET** filed an ex-parte summons pursuant to Order 15 rule 4 of the High Court seeking an order to join it as the **interested - defendant** in this proceeding. The said summons was however listed on the hearing day, as there was no other date available since it came on the last moment. The counsel for **ATSET** supported the said summons and it was vehemently objected by the counsel who was present in court for the hearing the summons for ejectment. Having heard both the counsel this court dismissed the summons filed by **ATSET** without cost. When the summons for ejectment was taken up for hearing, both counsels made the oral submission and the counsel for **ATS** filed her written submission too. The counsel for **FASA** moved to file his written submission and the court allowed him with the liberty to the counsel for **ATS** to file a reply submission (if any). Thereafter both counsels filed the submission and reply submission respectively.

05. There are several authorities from the High Courts and the Appellate Courts which have settled the law and procedure on the summary procedure available for a registered proprietor under the Land Transfer Act (Cap 131) and it does not need much deliberations. However a brief note on the law and procedure is necessary for the purpose of this judgment. It is a procedure 'to provide a quick and relatively inexpensive summary method of finding out whether a person who is in possession had any legal right to be there' (*per: Stuart J* in **Vivek Prasad v. Ram Sundar Lautoka** C.A. 788/76 (unreported)). The rationale of this speedy procedure is the principle that the registration is everything and in absence of fraud, the registered proprietor shall have an indefeasible title. This is the well-known Torrens System of Registration generally applied in certain countries in Pacific and on which Land Transfer Act (Cap 131) is founded. When explaining this system of registration in **Breskvar v. Wall** (1971-72) 126 CLR 376 Barwick C.J stated at page 385 that:

> *The Torrens system of registered title of which the Act is a form* ***is not a system of registration of title but a system of title by registration****. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor.* (Emphasis added).

06. In that same case Windeyer J. concurring with the Chief Justice stated at pages 399 and 400 that:

I cannot usefully add anything to the reasons that he and my brothers McTiernan and Walsh have given for dismissing this appeal. I would only observe that the Chief Justice's aphorism, ***that the Torrens system is not a system of registration of title but a system of title by registration****, accords with the way in which Torrens himself stated the basic idea of his scheme as it became law in South Australia in 1857. In 1862 he, as Registrar-General, published his booklet, A Handy book on the real Property Act of South Australia. It contains the statement, repeated from the South Australian Handbook, that:*

"…… ***any system to be effective for the reform of the law of real property must commence by removing the past accumulations, and then establish a method under which future dealings will not induce fresh accumulations****.*

This is effectuated in South Australia by substituting 'Title by Registration' for 'Title by Deed*'..."*

Later, using language which has become familiar, he spoke of "indefeasibility of title". He noted, as an important benefit of the new system, ***"cutting off the retrospective or derivative character of the title upon each transfer or transmission, so as that each freeholder is in the same position as a grantee direct from the Crown". This is an assertion that the title of each registered proprietor comes from the fact of registration, that it is made the source of the title, rather than a retrospective approbation of it as a derivative right****.* (Emphasis added).

07. The above aphorisms make it clear that, the registration is everything and it is the registration that grants the title to a person so registered. ***It is the title by registration and not registration of title***. Such title obtained through registration is indefeasible or unimpeachable except in case of fraud. Since the Land Transfer Act (Cap 131) is based on the same concept, it provides for a speedy procedure for obtaining possession where the occupier can show no cause why an order should not be made: (**Mishra JA in Jamnadas v Honson Ltd [1985] 31 FLR 62 at page 65)**.

08. The procedure is set out in the following provisions of the Land Transfer Act Cap 131:

169*. The following persons may summon any person in possession of land to appear before a judge in chambers to show cause why the person summoned should not give up possession to the applicant:-*

(a) the last registered proprietor of the land;

(b) a lessor with power to re-enter where the lessee or tenant is in arrear for such period as may be provided in the lease and, in the absence of any such provision therein, when the lessee or tenant is in arrear for one month, whether there be or be not sufficient distress found on the premises to countervail such rent and whether or not any previous demand has been made for the rent;

(c) a lessor against a lessee or tenant where a legal notice to quit has been given or the term of the lease has expired.

Particulars to be stated in summons

170. *The summons shall contain a description of the land and shall require the person summoned to appear at the court on a day not earlier than sixteen days after the service of the summons.*

Order for possession

171. *On the day appointed for the hearing of the summons, if the person summoned does not appear, then upon proof to the satisfaction of the judge of the due service of such summons and upon proof of the title by the proprietor or lessor and, if any consent is necessary, by the production and proof of such consent, the judge may order immediate possession to be given to the plaintiff, which order shall have the effect of and may be enforced as a judgment in ejectment.*

Dismissal of summons

172. *If the person summoned appears he may show cause why he refuses to give possession of such land and, if he proves to the satisfaction of the judge a right to the possession of the land, the judge shall dismiss the summons with costs against the proprietor, mortgagee or lessor or he may make any order and impose any terms he may think fit;*

Provided that the dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceedings against the person summoned to which he may be otherwise entitled:

Provided also that in the case of a lessor against a lessee, if the lessee, before the hearing, pay or tender all rent due and all costs incurred by the lessor, the judge shall dismiss the summons.

09. The clear and unambiguous language in sections 169 and 170 sets out the requirements for the applicant or the plaintiff and the requirements of the application respectively. The *locus standi* of the person who seeks order for eviction is set out in section 169 and it provides for the three categories of the persons who are entitled to invoke the jurisdiction of this court under that section. The requirements of an application, namely the description of land and the time period to be given to the person so summoned, are mentioned in section 170. The other two sections namely 171 and 172 provide for the powers that the court may exercise in the applications under the section 169. The burden to satisfy the court on the fulfillment of the requirements under section 169 and 170 is on the plaintiff and once this burden is discharged, it then shifts to the defendant to show his or her right to possess the land. The exercise of court's power, either to grant the possession to the plaintiff or to dismiss the summons, depends on how the said burden is discharged by respective party to the proceedings. However, dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceedings, against the

person summoned, to which he or she may be otherwise entitled. Likewise, in the case of a lessor against a lessee, if the lessee, before the hearing, pay or tender all rent due and all costs incurred by the lessor, the summons shall be dismissed by the court.

10. The plaintiff invoked the jurisdiction of this court under the section 169 (a) and (c) of the Land Transfer Act. The plaintiff is the registered sub-lessee of all that land and the owner of the building as described in the summons. The plaintiff annexed the copy of the Crown Lease marked as **"MKP 1"** and the Lease marked as **"MKP 2"** certified by the Registrar of Title. Both are considered as the instruments of title as per the definition of section 2 of the Land Transfer Act. In addition, the section 18 of the Land Transfer Act provides that, the duly authenticated Instrument of title to be conclusive proof of the particulars contained in or endorsed upon such instrument unless the contrary is proved. The said section is as follows:

Instrument of title to be evidence of proprietorship

> *18. Every duplicate instrument of title duly authenticated under the hand and seal of the Registrar shall be received in all courts as evidence of the particulars contained in or endorsed upon such instrument and of such particulars being entered in the register and shall, unless the contrary be proved by the production of the register or a certified copy thereof, be conclusive evidence that the person named in such instrument or in any entry thereon as seised of or as taking an estate or interest in the land described in such instrument is seised or possessed of such land for the estate or interest so specified as from the date of such certificate or as from the date from which such estate or interest is expressed to take effect.*

11. Accordingly, **ATS** is the registered proprietor of the Crown Lease and the owner of the building as described in the summons for ejectment, for the purpose of section 169 (a) of the Land Transfer Act. In fact, **FASA** does not dispute the proprietorship of **ATS**. **ATS** also relies on the third category under section 169 (c) of the Land Transfer Act, and that is a lessor, who has given a legal notice to lessee or tenant or the term of the lease has expired. The said subsection is reproduced for convenience:

> *(c) a lessor against a lessee or tenant where a legal notice to quit has been given or the term of the lease has expired.*

12. For a plaintiff to pass the threshold under that subsection there should have been lease or tenancy between such plaintiff and the defendant, and the legal notice to vacate should have been given or the term of lease should have expired. The supporting affidavit specifically states that, **FASA** had been renting the office space mentioned in the summons since 1981 to 2013 on a nominal rental amount of $ 150.00 per month. The affidavit further states that, on 01.10.2013 **FASA** entered into a Tenancy Agreement for the period of 12 months for the office occupied by it and the said agreement expired in October 2014. A copy of the said Tenancy Agreement marked as **"MKP 3"** is attached with supporting affidavit. The said agreement provided for increased monthly rental of $ 1,534.53 VIP per month together with the separate and fixed charges for electricity,

maintenance of air-conditioners, lighting and removal of garbage. Though **ATS** claimed that **FASA** entered into the said agreement, it has not actually been executed by them.

13. Conversely, **FASA** in paragraph 21 of its affidavit sworn by it national secretary specifically admits that, there was an oral agreement between **FASA** and **ATS** 36 years ago in 1981 which resulted in **FASA** occupying the office space in dispute. **FASA** further admitted in paragraph 23 of its affidavit that, it had been paying a sum of $ 150 per month from 1998 till 2013. However, it is stated that was a 'monthly fee' paid to **ATS**. For avoidance of doubt, it should be stated here that, "rent" includes yearly or other rent, toll, duty, royalty, or other reservation by measurement or otherwise as per the interpretation in section 2 of the Property Law Act (Cap 130). Thus, the payment of $ 150 per month is the rent and there had been landlord and tenant relationship between **ATS** and **FASA** in relation to the office space occupied by the latter, apart from those other rights and obligations arise out the said 'Master Agreement'.

14. In addition, most of the documents marked and tendered by **FASA** in its opposing affidavit (**"MR 3"** to **"MR 18"**) are clear evident that there had been tenancy between **ATS** and **FASA** and they further show that the tussle between them in relation to the said office space started when the former wrote to the latter on 10.09.2013 to formalize the lease of the said office space. There was no agreement between the parties for nearly 3 years from September 2013 to June 2017 in the relation to the terms and conditions of the formal agreement of lease, which resulted in **ATS** sending several notices to **FASA** to vacate the said office space. Some those notices are marked as **"MKP 4"**, **"MKP 4 (i)"** and **"MKP 4 (ii)"** and attached with the supporting affidavit filed on behalf of **ATS**. **FASA** does not deny receipt of those notices, but admits same and had taken further step by obtaining ex-parte injunctions against **ATS** in Civil Actions 41 of 2017 and 236 of 2017 restraining latter from evicting it from the said office. It follows that, not only the averments in the affidavit of **ATS**, but also clear admission by **FASA** and it's later action of obtaining the injunctions show that, the legal notice to quit the office space had duly been given to the **FASA**. This shows that, **ATS** has proved to the satisfaction of this court that, it has locus standi under the section 169 (c) of the Land Transfer Act (Cap 131).

15. The section 170 provides for the two requirements of the application, namely the description of land and the time period to be given to the person so summoned. In facts, these are the technical requirements. The next question therefore is whether **ATS** complied with these procedural requirements when it invoked the jurisdiction of this court. The fact that, the application for ejectment involves with the property right of a citizen and the order for possession deprives him from his right, which has more effect on his social and economic wellbeing, the courts in all jurisdictions had a tendency to be strict on the applicant, especially in relation to compliance and the technicalities of the respective statute. This resulted in the judgement of **Atunaisa Tavuto v Sumeshwar Singh** HBC 332/97L which held that, in application such as under section 169 of Land Transfer Act, the technicalities are strictly construed, because of the drastic consequences that follow for one of the parties upon the relief sought being granted. That was a case where an application for vacant possession was sought, however, the applicant failed to give the particulars such as Crown Lease number, lot number and the situation of land, though the Housing Authority Lease number was correctly mentioned. The court dismissed the summons stating that, it behooved the plaintiff and his counsel to have exercised more diligence in that regard.

16. The above decision, however, was distinguished by Prakash J, in **Wati v Vinod** [2000] 1 FLR 263 (20 October 2000) and it was held that:

> *"The Court has not been provided nor able to locate any authorities to suggest that "a description" as per section 170 means a full description of the land. The Act itself does not specify what a. description of the land entails. What is adequate or full description? What is a sufficient description? The purpose is clearly for the parties to be informed as to what land the application relates to. This is clear from the supporting affidavit. In this regard I cannot concur with the sentiments of my brother Justice Madraiwiwi in* ***Atunaisa Tavuto v Sumeshwar Singh*** *(Civil Action No. HBC0332 of 1997L) submitted by the Defence Counsel in support of his argument on s.170. It is not clear what Justice Madraiwiwi had meant in stating that "The Summons is defective in not properly describing the subject property" (emphasis added). It is not clear whether "a description means full or proper description. Further, the Supreme Court in the case of* ***Ponsami v Dharam Lingam Reddy*** *(Appeal No. 1 of 1996) was dealing with the need for compliance with the Supreme Court Rules not a statutory provision such as Section 170. The statute does not clearly specify what "a description" requires. In* ***Vallabh Das Premiji v. Vinod Lal, Nanki and Koki*** *(Civil Appeal 70 of 1974) the Court of Appeal had accepted a description as in the present summons as sufficient".*

17. It appears that, the view of Prakash J is based on the plain and unambiguous meaning of the statute which does not specify what description of land entails and what is adequate or full description of the land. It is not the duty of the court to impose more conditions and restrict the interpretation of a statute when the wording is clear and unambiguous. What is actually required by the statute is whether the person, so summoned to appear, had the full knowledge, without any misunderstanding, of the land and premises from which he or she ought to be evicted. If there is any misunderstanding of premises which is the subject matter of the proceeding, it should be brought by the person who is so summoned to show cause, and in the absence of any such misunderstanding or any objection on that basis, the description given by any applicant seems to be sufficient and adequate under the section 170 of the Land Transfer Act. This view is supported by the Court of Appeal in **Premji v Lal** [1975] FJCA 8; Civil Appeal No 70 of 1974 (17 March 1975).

18. It is incumbent on the court to consider the property right of the person so summoned under this application. However, the more emphasis should not be given to such property rights, at the expense of a registered proprietor of a land, who has indefeasible title against the entire world by *Torrens system* of land registration. Accordingly, the reasoning of Prakash J in **Wati v Vinod** (supra) seems to be more rational than the view of Madraiwiwi J in **Atunaisa Tavuto v Sumeshwar Singh** (supra). These two judgments are from the Honourable Judges and are equally binding on this court. Therefore, for better reasoning I prefer the view of Prakash J over the other. Accordingly, if an applicant can give the description of a land or premises which can give clear understanding for the persons so summoned under this section, the former is deemed to have discharged his duty under this section. As far as the time period of 16 days that

should be provided to such person is concerned, it should be interpreted strictly as the section is mandatory, because the defendant should be given sufficient time to prepare his or her defence.

19. In this case, **ATS** seeks the vacant possession of the office space occupied by **FASA** from 1998 till to date. On the other hand, **FASA** has stated in paragraph 46 (g), (h) and (i) of the opposing affidavit as follows:

> *(g) The area of approximately 915 square feet referred to in the letter of 10 September, 2013 (annexure MR-3) was not the total area of the office space occupied by both FASA and ATSET.*
>
> *(h) ATS in its letter dated 10 September, 2013 and its subsequent correspondences had deliberately omitted ATSET as the other occupier of the same office space and this is a material nondisclosure.*
>
> *(i) ATS deliberately omitted to disclose how much of the office space area is occupied by ATSET in order to assess the true office area occupied by FASA when putting FASA to a rent hike in the tenancy agreement by its letter of 10 September, 2013.*

20. It appears from the above averment that **FASA** dispute the description contained in the summons of the said office space. It is an undisputed fact that, **FASA** has been occupying the same office space since 1998 to date. It is **FASA** that negotiated the rent payable for that demised office space with **ATS** from 2013 till final notice was given by **ATS** for purpose of this proceeding. It is the same **FASA** that obtained the ex-parte injunction against **ATS** in relation to the same office space occupied by it in Civil Action No 41 of 2017 and also filed another action 236 of 2017 by way of writ seeking permeant injunctions and damages against **ATS**. Though FASA was unsuccessful in both matters, its concern was to remain in possession of the said office space mentioned in the summons. Indubitably, **FASA** and its members have full knowledge of the demised premises from which it is asked to vacate. In the circumstances the description of office space given in the summons is sufficient and adequate for the purpose section 170. Thus, the claim of **FASA** in relation to the description of office space as mentioned above is not only meritless, but also frivolous. Furthermore, **FASA** had been given time more than what has been prescribed by the Land Transfer Act. Accordingly, **ATS** has passed the thresholds under both sections 169 and 170 of the Land Transfer Act (Cap 131).

21. The next is the section 171 of the Land Transfer Act (Cap 131) which empowers the court to make order for possession. However, the said section 171 provides that the court should be satisfied with the consent if any such consent is necessary. The obvious reason for this provision is the requirement of consent to deal with both iTaukei and State land as provided in both legislations dealing with both types of land. **FASA** too took up an objection in paragraph 46 (k) of its affidavit in relation to consent of director of lands and stated that, **ATS** has not obtained the consent of the Director of Lands to bring court proceedings against **FASA** in this case. The question therefore, is whether any consent

from the Director of land or any other authority is necessary for an application under 169 of the Land Transfer Act. This matter has been settled by the Former Chief Justice His Lordship Anthony Gates (as His Lordship then was) in **Prasad v Chand** [2001] FJLawRp 31; [2001] 1 FLR 164 (30 April 2001). His Lordship held that:

> *"At first sight, both sections would seem to suggest that an Applicant should first obtain the Director's written consent prior to the commencement of section 169 proceedings and exhibit it to his affidavit in support. However I favour Lyons J.'s approach in* ***Parvati Narayan v Suresh Prasad*** *(unreported) Lautoka High Court Civil Action No. HBC0275 of 1996L 15th August 1997 at p 4 insofar as his Lordship found that consent was not needed at all since the:*
>
> > *"section 169 application (which is the ridding off the land of a trespasser) is not a dealing of such a nature as requires the Director's consent."*
>
> *This must be correct for the Director's sanction is concerned with who is to be allowed a State lease or powers over it, and not with the riddance of those who have never applied for his consent. With respect I was unable to adopt the second limb of Lyons J's conclusion a few lines further on where his lordship stated that the order could be made conditional upon the Director's consent. For if the court's order of ejectment was not "a dealing" then such order would not require the Director's consent and the court would not be subject to section 13. The court is not concerned with the grant of or refusal of, consent by the Director, provided such consent is given lawfully. Consent is solely a matter for the Director. The statutory regime appears to acknowledge that the Director's interest in protecting State leases is supported by the court's order of ejectment against those unable to show cause for their occupation of the land which is subject to the lease. The court is asked to make an order of ejectment against a person in whose favour the Director either, has never considered granting a lease, or has never granted a lease. The ejectment of an occupier who holds no lease is therefore not a dealing with a lease. Such occupier has no title. There is no lease to him to be dealt with. The order is for his ejectment from the land. There is no need for a duplicating function, a further scrutiny by the Director, of the Plaintiff's application for ejectment either before or after the judge gives his order".*

22. The section reads as *'...if any consent is necessary...'* and the above authority clearly states that, the consent of the Director for the application under 169 is not necessary. Thus, the question of consent does not arise in applications under section 169. The summary of above examination on law and procedure is that, if any of those three persons who may avail themselves of the procedure under the section 169, satisfy the court the above requirements or pass the threshold as discussed above, the onus of shifts on the defendant or the person, who opposes the summons, to show his or her right to possess the land or the property. In this case **ATS** has passed the threshold as discussed above and therefore, the burden now shifts to **FASA** to satisfy this court the right to possess the said office space situated at the Facilities Building owned by **ATS**.

23. The section 172 provides that, if the person so summoned (the defendant) proves to the satisfaction of the judge a right to the possession of the land, the judge shall dismiss the summons with costs against the proprietor, mortgagee or lessor or he may make any order and impose any terms he may think fit. The Supreme Court in **Morris Hedstrom Limited –v- Liaquat Ali** CA No: 153/87 explained the nature of duty casted upon a defendant under section 172 and held that:

> *"Under Section 172 the person summonsed may show cause why he refused to give possession of the land if he proves to the satisfaction of the Judge a right to possession or can establish an arguable defence the application will be dismissed with costs in his favour. The Defendants must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under Section 169 procedure. That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What is required is that some tangible evidence establishing a right or supporting an arguable case for such a right must be adduced."* (Emphasis added)

24. According to the above decision, the duty on **FASA** in this case is, not to produce any final or incontestable proof of its right to remain in the property, but to adduce some tangible evidence establishing a right or supporting an arguable case for its right to remain in possession of the office space described in the summons. If this burden is discharged by **FASA** this court should dismiss the summons for ejection with cost against **ATS**. Furthermore, if the court finds that, an open court hearing is required it shall also dismiss the summons. This was held by the Fiji Court of Appeal in **Ali v Jalil** [1982] FJLawRp 9; [1982] 28 FLR 31 (2 April 1982) where the court explained the nature of the orders a court may make in terms of the phrase used in section 172 of the Land Transfer Act, which says "*he (judge) may make any order and impose any terms he may think fit*". The Court held that:

> *"..but the section continues that if the person summoned does show cause the judge shall dismiss the summons; but then are added the very wide words "or he may make any order and impose any terms he may think fit". These words must apply, though the person appearing has failed to satisfy the judge, and indeed are often applied when the judge decides that an open court hearing is required*". (Emphasis added).

25. **FASA** through the affidavit sworn by its secretary totally relies on the Master Agreement it signed with **ATS** and on the purported relationship between **ATS** and **ATSET** for its defence to possess the disputed office space in this case. The following are the relevant averments in paragraph 46 of the affidavit filed on behalf of FASA by its secretary:

> *(a) ATS has failed and has not made any sincere attempt to settle the grievance made by 203 ATS workers contained in letter dated 18 July, 2018 under Article 25 of the Master Agreement.*
>
> *(b) Eviction is an arbitrary course for ATS to take given the unique relationship of ATS with its employees who are represented as*

beneficiaries under ATSET and union members under FASA. These workers made up the core of the majority of the workforce of ATS.

c) *In letter of 10th September, 2013 (annexure MR-3) ATS clearly expressed the wish to "continue with the cordial relationship" it had with FASA for many years.*

d) *FASA and ATS did not have a written tenancy agreement between 1981 and 10 September, 2013, a period of 32 years. I verily believe that what had endured for 32 years before 2013 was their cordial relationship.*

e) *It was only a letter dated 10 September, 2013 that ATS decided to have a written tenancy agreement in order* ***"to protect the interests of both parties."***

f) *That the interests of both parties are contained in the Master Agreement under Article 1A and 1D. Article 1D says:*

"Not withstanding any other provision of this agreement, the parties hereto recognize the desirability of implementing the practices of industrial democracy or employee participation in decision, at all levels of the company's operations and therefore undertake to work closely together towards the foregoing purpose..."

26. The question is whether the said Master Agreement which is marked as **"MR 2"** and attached with the opposing affidavit gives any right to **FASA** to possess the office space in dispute. The scope of the said Master Agreement is mentioned in Article 1. The subsection ***A*** of that Article clearly states that, **FASA** has been recognized as the sole representative for the purpose of collective bargaining and industrial matters of the employees of **ATS**. It is a clear fact that **FASA**'s role is to protect the welfare of and rights of employees, through collective bargaining regarding terms and conditions of employment, and to make sure that the decisions made are just and fair taking into consideration both the employees and **ATS**'s position. Thus the scope of the Master Agreement is limited to industrial matters and developing process of industrial democracy. This is further strengthened by subsection ***D*** of that Article. Though the full paragraph in subsection ***D*** clearly limits the scope of the said Master Agreement to industrial democracy, the opposing affidavit sworn by the secretary of **FASA** conveniently omitted the relevant part when mentioning the same in paragraph 46. The underlined part of the said subsection ***D*** is evident for its limitation. It reads as follows:

Notwithstanding any other provision of this Agreement, the parties hereto recognize the desirability of implementing the practices of industrial democracy, or employee participation in decision- making, at all levels of the Company's operations and therefore undertake to work closely together towards the foregoing purpose. It is further recognized that the provisions of this Agreement specifically relating to rules and procedures

as distinct from benefits and rates of pay may require reviewing from time to time, as a result of the developing process of industrial democracy and it is therefore agreed that amendments as necessary will be implemented during the currency of this Agreement. (Emphasis added)

26. Furthermore, there is no provision in the said Master Agreement which provides that, **ATS** should provide an office space to **FASA** for the purpose and implementation of the said agreement. **ATS** and **FASA** recognized the desirability of implementing the practices of industrial democracy or employee participation in decision making at all levels of **ATS**'s operations. Therefore, they undertook to work closely together towards the purpose for which they entered into the said Master Agreement. It does not necessary mean or should not be taken to mean that, **FASA** should have been given an office space at the building of **ATS** in the absence of any direct or implied provision to that effect in the said Master Agreement. Thus, neither **ATS** is obliged to provide such office space, nor **FASA** has any right to seek such an office space under the said Master Agreement. **FASA** had been paying a nominal rent based on the oral agreement entered in 1981 as admitted in paragraph 21 of the affidavit filed on its behalf. Had there been any implied or direct provision or undertaking in the said Master Agreement which obliges or warrant **ATS** to provide such an office space to **FASA**, they would not have entered into another oral agreement in 1981 to occupy the present office at a nominal amount of rent, and the necessity would not have arisen for the parties to have such separate and oral agreement of tenancy in addition to the said Master Agreement.

27. The desirability of implementing the practices of industrial democracy or employee participation in decision making at all levels of **ATS**'s operations – the principles on which the Master Agreement is founded - might only help **FASA** to get a reduced rental amount for an office space at the building of **ATS** only if **ATS** wishes to rent or demise such office to **FASA**. However, those principles will not give any substantive right to **FASA** to demand an office space or to establish any right to possess an existing office space. **FASA**, which entered the disputed office space pursuant an oral agreement of tenancy separate and independent from the Master Agreement, cannot use the said Master Agreement to retain the said office space. It follows that, the Master Agreement does not give any right for **FASA**, which has been paying rent on an oral agreement, to remain in possession of the said office space. Furthermore, evicting **FASA** from the rented office space will not, in any event, affect the principles of the Master Agreement which are desirability of implementing the practices of industrial democracy and employee participation in decision making at all levels of **ATS**'s operations, because **FASA** will continue to be recognized as sole representative of employees for the purpose of collective bargaining and industrial matters of the employees.

28. The counsel for **FASA** in written submission raised another issue and submitted that, **ATS** has not any iota of evidence that Board of Directors, which include **ATSET** trustee/director had resolved, decided and directed in any duly called Board meeting for eviction of **FASA** from its premises by virtue of the powers vested on **ATS** directors pursuant to Article 96 of **ATS**'s Article of Association. The counsel went further and stated that, CEO of **ATS** and Maftoa Pene who has sworn the supporting affidavit for these proceedings have acted ultra-virus. Though, the counsel for **FASA** just mentioned the Article 96 of **ATS** in his submission, he did not make that Article available for the court to peruse the same. In any event, few facts to be considered in relation to the above

argument. Firstly the Companies Act 2015 provides in section 54 to make some assumptions in relation the conducts of its directors or other person acting on behalf of the company. The said section reads;

Entitlement to make assumptions

54.—(1) A person is entitled to make the following assumptions in relation to dealings with a Company —

(a) a person may assume that the Company's Articles of Association and any provisions of this Act that apply to the Company , have been complied with;

(b) a person may assume that any person who appears, from information provided by the Company that is available to the public from the Registrar, to be a Director or a company secretary of the Company —

(i) has been duly appointed; and

(ii) has authority to exercise the powers and perform the duties customarily exercised or performed by a Director or company secretary of a similar Company ;

(c) a person may assume that any person who is held out by the Company to be an Officer or agent of the Company —

(i) has been duly appointed; and

(ii) has authority to exercise the powers and perform the duties customarily exercised or performed by that kind of Officer or agent of a similar Company ;

(d) a person may assume that the Officers and agents of the Company properly perform their duties to the Company ;

(e) a person may assume that a document has been duly executed by the Company if the document has been signed in accordance with section 53;

(f) for the purposes of making the assumption, a person may also assume that any person who states next to their signature that they are the sole Director and sole Company secretary of the Company occupies both offices; and

(g) a person may assume that an Officer or agent of the Company who has authority to issue a document or a certified copy of a document on its behalf also has authority to warrant that the document is genuine or is a true copy.

(2)The Company is not entitled to assert in proceedings in relation to the dealings that any of the assumptions is incorrect.

(3)A person is entitled to make the assumptions in subsection (1) in relation to dealings with another person who has, or purports to have, directly or indirectly acquired title to Property from a Company.

(4)The Company and the other person are not entitled to assert in proceedings in relation to the dealings that any of the assumptions is incorrect.
(5)The assumptions may be made even if an Officer or agent of the Company acts fraudulently, or forges a document, in connection with the dealings.
(6)A person is not entitled to make an assumption in subsection (1) if at the time of the dealings they knew or suspected that the assumption was incorrect.
(7)Without limiting the generality of this section, the assumptions that may be made under this section apply for the purposes of this section.
(8)Except, for a change registered under this Act, a person is not taken to have information about a Company merely because the information is available to the public from the Registrar.

27. The analogy that follows from the examination of the above section is that, if the assumptions are to be made as per the requirement of above section in relation to the contracts and/or the agreements which require the sanction of the company, why the court cannot assume that a director or a responsible person of a company, who swears an affidavit on behalf it, has proper authority to do so, when there is a clear and written authority?

28. Secondly Justice Tuilevuka (as he then was) in **Total (Fiji) Ltd v Khan** [2010] FJHC 206; HBC023.2008 (11 June 2010) concluded in paragraph 12 of his ruling as follows in relation to similar argument in that case:

> *Both Leung and Sanyal depose that they are duly authorized to swear their respective affidavits on TOTAL's behalf. These gentlemen both hold positions of high authority in TOTAL (see paragraph 9 above). It is hard not to believe that they are duly authorized by TOTAL in this case. Their affidavits obviously are crucial to TOTAL's case. As an artificial legal entity, TOTAL obviously must of necessity, give evidence through the medium of its human officers or agents in this case. In this case, it is clear that TOTAL has been trying for quite some time to get vacant possession of Lot 3. That, and the fact that Leung and Sanyal both hold relatively very senior management positions in TOTAL, which are yet undisputed, lead me to the conclusion that both are duly authorized to swear their respective affidavits on behalf of TOTAL.*

29. Thirdly, the attempt by **ATS** to get the vacant possession of office space from **FASA** is not the one which has just started overnight, but it has started in June 2017 when **ATS** first sent the notice to vacate the premises. Fourthly, it is **FASA** which took this matter first to the court by seeking injunctions against **ATS** from eviction in the abovementioned two cases. There were several affidavits filed in those cases as well both by **ATS** and **FASA**. Therefore, the Board of Directors of **ATS** (including trustees of **ATSET**) should have been well aware of this long struggle between **ATS** and **FASA** and or could not have been unaware of the same. Hence, it is hard to believe that the Board of **ATS** would

not have given authority to bring this action for eviction. Thus, there is no sufficient evidence before the court to rebut the assumption provided in section 54 of the Companies Act 2015. As a result I am unable to concur with the argument of the counsel for **FASA**.

30. The above discussion conveniently comes to the conclusion that, **ATS** being the registered sub-lessee of all that land and owner of the buildings comprised of Crown Lease Crown Lease No. 3469 being Lots 1 ND 4820 situated at Cruikshank Road, Nadi, brought this action against **FASA** and passed all the thresholds under the section 169 (a) and (c), 170 and 171, by discharging the burden on it. However, **FASA** failed to adduce any tangible evidence establishing the right to possess the disputed office space. Though **FASA** relies on the Master Agreement between **ATS** and **FASA**, the said Master Agreement neither gives any substantive right to **FASA** to remain in possession of demised office premises, nor it raises any arguable case. It follows that, **FASA** must be ordered to immediately deliver the vacant possession of the said office space to **ATS**. In addition, **ATS** should be entitled for reasonable cost for bringing this application to evict **FASA** the overstaying tenant despite several notices to vacate.

31. Accordingly, I make following final orders:

a. The defendant (**FASA**) is ordered to immediately hand over the vacant possession of office space mentioned in the summons to the plaintiff (**ATS**), and

b. The defendant (**FASA**) is further ordered to pay a summarily assessed cost of $1,000.00 to the plaintiff (**ATS**) within 14 days from today.

HIGH COURT OF FIJI
LAUTOKA

U.L.Mohamed Azhar
Master of the High Court

At Lautoka
17.06.2019