

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CIVIL JURISDICTION**

HBA 02 of 2019

**BETWEEN** : **SEOUL IMPORT & EXPORT LIMITED** a limited liability company  
having its registered office at Seoul Import & Exports, Sahu Khan  
Street in the Republic of Fiji Islands.

**APPELLANT/ORIGINAL 1<sup>ST</sup> PLAINTIFF**

**AND** : **STEPS INVESTMENT (FIJI) LIMITED** a limited liability company  
having its registered office at Koyas, Barristers & Solicitors, Nadi  
Town Council Arcade, Nadi.

**APPELLANT/ORIGINAL 2<sup>ND</sup> PLAINTIFF**

**AND** : **FIJI NATIONAL PROVIDENT FUND BOARD** a statutory body  
registered pursuant to the Fiji National Provident Fund Act Cap 219.

**RESPONDENT/DEFENDANT**

Appearances: Mr J. Prakashan for the Appellant  
Ms L. Bula for the Respondent

Date of Ruling: 30.08.19

## **RULING**

### **INTRODUCTION**

1. This is an appeal from a decision of the Magistrate Court which was handed down at the Nadi Magistrates Court on 06 December 2018.
2. The appellants were plaintiffs in the proceedings below.

3. The Learned Magistrate had dismissed the plaintiffs' claim on the ground that the claim was predicated upon a tenancy agreement which was illegal.
4. The finding of illegality was based on the fact that, the land demised in the said tenancy agreement, being state land, the Director of Lands had not consented to the agreement as required under section 13 of the State Lands Act.

### MAGISTRATES'S REASONING

5. The Learned Magistrate began by setting out section 13 of the State Lands Act.
6. He then states at paragraph 13 that:

*This section therefore, makes any alienation or dealing with such land or any part thereof whether by sale transfer of sublease or in any other manner whatsoever without the consent of the Director of Lands first had and obtained null and void and unlawful.*

7. At paragraphs 18, 19, 20 and 21, the Learned Magistrate observed that:

18. *The occupation of the property without the consent of the Director of Lands makes the tenancy agreement null and void. In Phalad v Sukh Raj 24 FLR 170, Henry JA says:*

*If before consent, acts are done pending the granting of consent, which come within the prohibited transactions, then the section has been breached and later consent cannot make lawful that which was earlier unlawful and null and void.*

19. *The maxim ex-turpi causa non oritur applies in this case. The claim of the plaintiff is predicated on an unlawful transaction and agreement and both plaintiff and defendants are in this case in pari delicto. Both parties cannot benefit from an illegal contract. I therefore find that the Plaintiff's application cannot succeed and must be dismissed.*
20. *It is not disputed that there was no consent from the Director of Lands prior to the execution of these agreements. In line with the above authorities, the Court finds that these agreements are unenforceable.*

## GROUND OF APPEAL

8. There are seven grounds of appeal. These are as follows:

- 1) *THAT the Learned Magistrate erred in law and in fact in dismissing the claim without considering that the Appellant/Original Plaintiff had incurred costs in bringing up the action seeking justice.*
- 2) *THAT the Learned Magistrate erred in law and in fact in dismissing the claim without considering the Appellant/Original Plaintiff when there was no consent under section 13 of the Crown Lands Act.*
- 3) *THAT the Learned Magistrate erred in law and in fact in dismissing the claim without awarding damages to the Appellant when there was a commercial lease agreement in place and the moneys were paid to the Respondent/Original Defendant under the commercial lease agreement dated 1<sup>st</sup> of September 2010.*
- 4) *That the Learned Magistrate erred in law and in fact in dismissing the claim without considering that the Appellants/Original Plaintiff claim was for refund of rental paid to the Respondents/Original Defendants for the periods the Appellants business was not operational because of the curfew and floods in Nadi Town during the 2009 flood, 2010 flood and 2013 flood.*
- 5) *THAT the Learned Magistrate erred in law and in fact in dismissing the claim without considering the merits of the case.*
- 6) *THAT the Learned Magistrate erred in law and in fact in dismissing the claim without considering that the Respondents/Original Defendant continued to receive moneys in the form of rental from the Appellants when the Respondents were fully aware that there was no consent of the Director of Lands to sublease the property to the Appellants/ Original Plaintiff.*
- 7) *THAT the Learned Magistrate erred in law and in fact in dismissing the claim without considering that it was the Respondents/Original Defendants responsibility to obtain the consent of the Directors of Lands for the sub lease of the property to the Appellant.*

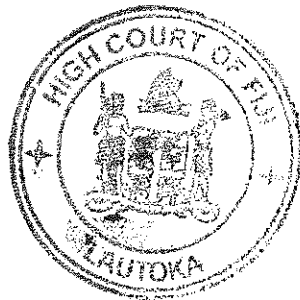
## COMMENTS

9. The Learned Magistrate was correct in starting with the general observation that the tenancy agreement, being illegal and void, neither of the parties can therefore derive any benefit or right out of it.

10. He then appeared to direct his mind to the question as to whether or not the parties were *in pari delicto*.
11. Generally, if the parties are *pari delicto* (equally blameworthy) in an illegal contract, the maxim *in pari delicto potior est conditione defendentis et possidentis* applies. This means that the law will leave the parties where it finds them and the courts will not intercede to resolve any dispute between them.
12. In effect, this means that neither of the parties will be able to recover from the other pursuant to their illegal arrangement (see **Kirri Cotton v Ranchhoddas Keshavji Dewani** [1960] 2 KB 482.).
13. However, if they were not in *pari delicto*, then the innocent party will be able to recover from the party that is to blame for the illegality. The basis of recovery however will be in equity rather than on the illegal arrangement.
14. In this case, the Learned Magistrate had held that the parties were *in parri delicto* and accordingly, the plaintiffs could not recover. He then dismissed the claim.
15. In my view, section 13 appears to place the burden on the lessee (i.e. the Respondent) to obtain consent of the Director of Lands. *Prima facie*, it would appear then that the parties were not *in pari delicto*. Must the appellant's appeal then be allowed which would then entitle him to recover the monies spent as rent during the period of time in question?
16. It appears to me that the appellants are seeking to recover monies it had paid to the respondent in rental for the period of time when they could not operate their business in the demised premises during certain periods of flooding in 2009, 2010, and 2013.
17. The statement of claim filed in the Magistrates Court did not set out clearly that this was the basis of the claim of \$16,000.00. However, as the Learned Magistrate correctly observed, the claim was based on the purported tenancy agreement in question, which he rightfully found was null and void.
18. If, assuming for one moment, that the purported tenancy agreement had been consented to by the Director of Lands and was valid and enforceable, the

appellants, in any event, could not possibly have succeeded under to recover the rental monies spent.

19. I say this because there was no provision in the tenancy agreement in question that rent would be abated, in the event of a *force majeure* or *act of god*. Neither did the tenancy agreement contain any provision that would have allowed the appellant tenant to withhold rent or suspend paying rent, or be entitled to a refund of rent, in such an event.
20. In my view, in the circumstances of this case, had the tenancy agreement in question contained such provisions which confer those entitlements on the appellant as I refer to above in paragraph 19, so that the only basis for refusing the appellant those entitlements was the illegality of the agreement, then it would have been sufficient ground to grant the appeal and allow the appellant to recover monies spent as rent during the periods of time in question (see ground of appeal no. 4 above).
21. To answer the question I have posed in paragraphs 14 and 15 above, in my view, even if the parties were not in *pari delicto*, it would still be wrong in principle to allow the appellants appeal in this case to enable them to recover the monies they have spent in rent. Had the tenancy agreement been validly consented to by the Director of Lands, the plaintiff would not have been able to recover under it any way, for reasons I have set out above. Equity would only step in to allow recovery, if, but/for the illegality in the tenancy agreement, the agreement would have allowed recovery.
22. This appeal has no merit. I dismiss it and Order costs in favour of the Fiji National Provident Fund which I summarily assess at \$1,000 (one thousand dollars) only.



.....  
Anare Tuilevuka  
**JUDGE**  
Lautoka