

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

**Criminal Appeal No.: HAA 30 of 2020**

**BETWEEN:**           **FIJIAN COMPETITION AND CONSUMER COMMISSION**  
**(FCCC)**

**APPELLANT**

**AND:**                   **THE TRUSTEES FOR THE COLONY OF FIJI OF THE**  
**CHURCH OF ENGLAND**

**FIRST RESPONDENT**

**AND:**                   **ENERGY FIJI LIMITED**

**SECOND RESPONDENT**

**Counsel**                   :     Mr. K. Gauna and Ms. C. Choy for the Appellant.  
                                  :     Mr. E. Sailo for the First Respondent.  
                                  :     Mr. Koroi (on instructions) for the Second  
                                  :     Respondent.

**Date of Hearing**           :     24 August, 2020  
**Date of Judgment**       :     08 September, 2020

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**JUDGMENT**

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**BACKGROUND INFORMATION**

1. The appellant acting on the complaint of one Edward Rajendra Nagaiya proceeded to charge to first respondent with the following offence:

### ***Statement of Offence***

**UNCONSCIONABLE CONDUCT**: Contrary to section 76(1) (2) (d), 132 and 129 (1A) (2) and (4) of the Fijian Competition and Consumer Commission Act 2010.

### ***Particulars of Offence***

The Trustees for the Colony of Fiji of the Church of England being the landlord of the premises situated under St. Christopher's Anglican Church at 110 Kennedy Avenue Nadi in the Western Division did between the 22<sup>nd</sup> day of September 2019 and the 12<sup>th</sup> day of December 2019, engaged in a conduct that is, in all circumstances, unconscionable by disconnecting power supply to Edward Rajendra Nagaiya.

2. Before the charge could be determined by the Magistrate's Court at Nadi, the appellant on behalf of the complainant filed a Notice of Motion and supporting affidavit of Mosese Natakele sworn on 10<sup>th</sup> February, 2020 seeking the following orders pursuant to section 145 of the Fijian Competition and Consumer Commission Act 2010:
  - a). *Order for reconnection of Energy Fiji Limited meter no. 109606 and account no. 2034710110 of the residential premises leased by Edward Rajendra Nagaiya;*
  - b) *...;*
  - c) *Any other orders this court deems fit.*
  
3. All the parties filed their respective affidavits and written submissions. On 27<sup>th</sup> April, 2020 the Magistrate's Court at Nadi dismissed the application for injunction and ordered the complainant to pay \$250.00 each to both the respondents within 30 days.

4. The appellant aggrieved by the ruling of the Magistrate's Court filed a timely appeal in this court upon the following grounds:

#### GROUND ONE

*The learned Magistrate erred in law and in fact in not recognizing [the] powers of the Fijian Competition and Consumer Commission under Section 145 of the Fijian Competition and Consumer Commission Act 2010 and failed to grant orders.*

#### GROUND TWO

*The learned Magistrate erred in law and in fact in not considering the complainant as a tenant without the determination of the pending substantive matter.*

#### GROUND THREE

*The learned Magistrate erred in law and in fact in prematurely determining the disconnection of electricity as justified without hearing the substantive matter.*

#### GROUND FOUR

*The learned Magistrate erred in law and in fact in distinguishing the facts in the case of *Mereia Ravasiga v Fiji Electricity Authority*, Civil Action No. HBC 343 of 2015, without taking into account that electricity supply is a constitutional right.*

5. The following arguments were advanced by the appellant's counsel in respect of the above grounds of appeal filed.

## **GROUND ONE**

*The learned Magistrate erred in law and in fact in not recognizing [the] powers of the Fijian Competition and Consumer Commission under Section 145 of the Fijian Competition and Consumer Commission Act 2010 and failed to grant orders.*

6. The appellant's counsel argued that the learned Magistrate erred in not recognizing the powers of the Fijian Competition and Consumer Commission under section 145 of the FCCC Act to allow the injunction sought against the first respondent. By disconnecting the complainant's electricity after giving instructions to Energy Fiji Limited, the first respondent had engaged in a conduct of forcing the eviction of the complainant without the determination of the eviction proceedings.
7. In his ruling the learned Magistrate raised his concerns on the affidavit deposed by the investigating officer Mosese Natakele on behalf of the appellant hereinafter referred to as "FCCC" and not by the complainant Edward Nagaiya at paragraph 7 of his ruling as follows:

*With respect to the Applicant, it would have been better that the Complainant himself deposes the Affidavit rather than Mosese Natakele. The reason is very simple. Mr. Natakele is the investigation officer in the complaint against the First Respondent. Obviously, he will have information obtained from both parties in the course of his investigation that will be submitted to his superiors for a decision. For Mr. Natakele to depose an Affidavit in the same complaint he investigated in lieu of the Complainant, would bring into question the independence of his investigation and fairness to the First Respondent.*

8. I am not convinced that the affidavit of Mr. Natakele has made any detailed reference to the substantive charge pending against the first respondent which may prejudice the first respondent in defending the charge. However, it would have been appropriate for the complainant to depose an affidavit to explain some pertinent issues such as how the complainant had entered the property what was the arrangement between the complainant and the first respondent in respect of payment of rental etc. if indeed the complainant was a tenant of the first respondent.
9. Be that as it may, it is incorrect for the appellant's counsel to submit that the learned Magistrate did not recognize the powers of the FCCC under the FCCC Act in regards to seeking an injunction.
10. In recognition of the powers of FCCC the court had accepted the application seeking an injunction and after the relevant documents were filed had made a determination on the evidence presented.
11. The court after considering the materials put forward did not grant the orders sought does not mean that the court did not recognize the powers of the appellant provided under the law. The comment made by the learned Magistrate at paragraph 7 of his ruling about the filing of the affidavit by Mosese Natakele was only an observation which did not affect the appellant's case in respect of the issues raised in the injunction application.
12. Section 145 of the FCCC Act bestows a discretion upon the court to decide whether to grant an injunction or not. It is trite law that whilst granting an injunction the court has to act judicially on the evidence presented by the parties.
13. The appellant's counsel did not refer this court to any error made by the learned Magistrate in the exercise of his discretion not to grant the orders

sought. It is not good enough to say that because the court did not grant the orders sought, it did not recognize the power of the appellant under the law.

14. The learned Magistrate had dismissed the application for injunction on its merits after considering the evidence placed before it in accordance with section 145 of the FCCC Act.
15. Although not raised by counsel, this court has reviewed the evidence that was put before the Magistrate's Court at the time the application for injunction was argued. I am guided by the explanation of *Lord Diplock in Hadmor Production Ltd v Hamilton [1983] 1 A.C 191 at page 210* about the role of an appellate court in the context of the grant or refusal of interlocutory injunctive relief in the following words:

*The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of appeal, or upon the ground that there has become available by the time of appeal, or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it.*

16. In this case the appellant did not adduce any evidence to rebut what the first respondent had put before the court that the complainant was a trespasser into the premises and not a tenant and that he did not pay the electricity bill.

17. The learned Magistrate had no choice but to refuse the application when the appellant had not put before the court all the evidence in support of the injunction sought.
18. There is no error made by the learned Magistrate in the exercise of his discretion and this ground of appeal is dismissed due to lack of merits.

## **GROUND TWO**

*The learned Magistrate erred in law and in fact in not considering the complainant as a tenant without the determination of the pending substantive matter.*

19. The counsel for the appellant submitted that a tenant and landlord relationship had existed between the complainant and the first respondent. The complainant was occupying the bottom flat of the property since 13<sup>th</sup> October 2017.
20. At paragraph 4.6 of his written submissions, counsel stated that an implied landlord and tenant relationship was in existence by virtue of vestry meeting minutes which has been annexed to his submissions filed in this court. A perusal of the copy records does not show that this annexure was brought to the attention of the Magistrate's Court or was annexed to the affidavit of Mosese Natakele.
21. This court does not give any weight to the annexures attached to the written submission. It is highly improper for counsel to attach such extraneous material being fully aware that such evidence had not been put before the court of first instance.

22. The counsel further stated that the learned Magistrate had prematurely determined the allegation against the first respondent when he ruled that the complainant was not a tenant.
23. At paragraphs 13 and 14 of the ruling the learned Magistrate stated as follows:

Paragraph 13

*The investigation by Mr. Natakele reveals that the First Applicant is the landlord of the subject property described as Certificate of Title No. 13102, Lot 47 and 48 on DP 2678 known as Waqadra situated at 110 Kennedy Avenue, Nadi. A title copy is annexed as “MN 1” in the said Affidavit. According to Mr. Natakele, the Complainant Mr. Nagaiya “is the tenant of the 1<sup>st</sup> Defendant and is currently residing premises situated under St Christopher’s Anglican Church at 110 Kennedy Avenue, Nadi.” (Emphasis is the Court’s).*

Paragraph 14

*It is not known how Mr. Natakele was able to reach the conclusion and confirm with certainty that the Complainant “is the tenant of the 1<sup>st</sup> Defendant...” Mr. Natakele has not provided any documentary evidence to prove on a balance of probability that the Complainant Mr. Nagaiya “is the tenant” of the First Respondent. It matters not that the Complainant resides on the premises for his tenancy is the subject of eviction proceedings in the High Court. The only credible and admissible evidence to prove such tenancy is the tenancy agreement the Complainant should have signed as tenant with the First Respondent as Landlord and rental receipts for rent paid. In the Court’s view, without first establishing evidence of lawful tenancy and yet proceeding to grant the Orders sought would be a cart before the horse*



*approach analysis of this application resulting in injustice and unfairness to the First Respondent.*

24. To begin with, the injunction sought by the appellant required a determination of the *locus standi* of the complainant first and no doubt the learned Magistrate was correct when he stated that it was for the appellant to first establish there was lawful tenancy in existence between the complainant and the first respondent.
25. The nature of the application and the evidence before the court was such that the learned Magistrate had to make a finding about the locus of the complainant that is whether there was a lawful tenant and landlord relationship between the complainant and the first respondent.
26. Moreover, the substantive matter is a criminal charge which is made up of the elements of the offence that must be proven beyond reasonable doubt by FCCC to establish the charge of unconscionable conduct. The injunction was for restoration of electricity which had to be resolved with the question of whether there was a tenant and landlord relationship in existence between the parties on the evidence put before the court. The application was filed by the appellant hence there was no need for the court to wait for the outcome of the substantive charge before deciding on the issue of tenancy.
27. The appellant had failed to establish a tenant and landlord relationship and also failed to put before the court any evidence of payment of electricity to the second respondent which lead to the first respondent losing its electricity meter deposit due to non-payment of the electricity bill by the complainant.
28. This ground of appeal is also dismissed due to lack of merits.

### **GROUND THREE**

*The learned Magistrate erred in law and in fact in prematurely determining the disconnection of electricity as justified without hearing the substantive matter.*

29. The appellant's counsel argued that the learned Magistrate had decided that the disconnection of the electricity was justified without the determination of the substantive charge. Counsel also submits that in his ruling the learned Magistrate had pre-determined the issue of the alleged disconnection of electricity which was an issue pertinent to the substantive charge.
30. At paragraphs 22 and 23 of the ruling the learned Magistrate has stated:

#### Paragraph 22

*In respect of claims 2 months advance electricity payment, the Second Respondent refutes it saying that their record per Gentrack annexed as "MV 3" to their Affidavit shows the account was in arrears. The arrears was settled from the security deposit belonging to the Anglican Church. It is a fact in Fiji that electricity supply is disconnected by the Second Respondent due to unpaid bill pursuant to Regulation 64 of the Electricity Regulations.*

#### Paragraph 23

*In the Courts view, the evidence produced by the Second Defendant substantiates the position of the First Respondent in respect of the electricity account. It only raises the bar higher for the Applicant to prove that reconnection of electricity supply is justified in the facts he has laid before the Court.*

31. The injunctive relief sought was based on a balance of probabilities to provide an injunctive relief to the complainant the ruling of the Learned Magistrate has not touched on the elements of the substantive offence the first respondent is charged with.
32. A perusal of the ruling shows that the learned Magistrate had made specific reference to the evidence before the court in respect of the application for an injunction. In order to determine where the balance of convenience lay for the grant of an injunction the court had to direct its mind to whether the disconnection of the electricity was justified or not on balance of probabilities.
33. In respect of the substantive charge, the prosecution must prove all the elements of the offence charged beyond reasonable doubt based on the evidence adduced at that time which is different to the injunction application. There is no error made by the learned Magistrate.
34. This ground of appeal is also dismissed due to lack of merits.
35. Before I leave this ground of appeal, the counsel for the appellant in his written submissions submitted that this court should rule that the learned Magistrate not hear the substantive matter. It is not for this court to consider whether by refusing the injunction application the learned Magistrate should recuse himself from hearing the substantive charge.

#### **GROUND FOUR**

*The learned Magistrate erred in law and in fact in distinguishing the facts in the case of Mereia Ravasiga v Fiji Electricity Authority, Civil Action No. HBC 343 of 2015, without taking into account that electricity supply is a constitutional right.*

36. The counsel for the appellant submitted that the learned Magistrate had failed to acknowledge that electricity is an essential need for housing and sanitation and a Constitutional right. The counsel however, did accept that the facts of this case differed from the case in *Mereia Ravasiga v Fiji Electricity Authority, Civil Action no. HBC 343 of 2015*.
37. At paragraph 24(b) of the ruling, the learned Magistrate had explained the reasons why the case of *Mereia Ravasiga* was distinguished from the current case.
38. At paragraph 24(b) of the ruling the learned Magistrate stated:

*(b) The case before the court however is not about the complainant attempting to have electricity for the first time like Ravasiga. The Complainant claims to be a tenant of the First Respondent but failed to provide to Court evidence of lawful tenancy. (If there was evidence of lawful tenancy notwithstanding eviction proceedings in the High Court and the actions of the First Respondent is challenged in Court, then the issue of whether the First Defendant's action is unconscionable or not will have to be determined.) The First Respondent on the other hand does not accept that the Complainant is a tenant of theirs and have accordingly issued legal proceedings in the High Court for his eviction. The First Respondent has advised the Second Respondent to disconnect power supply to the subject dwelling on its property and the Second Respondent complied, in accordance with Regulation 65 of the Electricity Regulations 65 states:*

*Unless an agreement or contract made between the Company or licensed supplier and the consumer provides otherwise any consumer who desires the Company to cease supplying electricity to him or her must give to the Company or licensed supplier at least 7 days prior written notice to that effect.*

39. The learned Magistrate was correct when he ruled that *Ravasiga's* case was different to the current case.

40. The counsel also argues that the complainant has a right to electricity under the Constitution which the learned Magistrate had failed to consider.

41 Section 35(1) of the Constitution of Fiji states:

*“The State must take reasonable measures within its available resources to achieve the progressive realisation of the right of every person to accessible and adequate housing and sanitation.”*

42. In this case, the state has already made electricity available to the owners of the premises which is what section 35 of the Constitution is trying to achieve.

43. In my judgment, the right to electricity is not absolute but a derived right hence the complainant cannot rely on section 35 of the Constitution in this situation. The learned Magistrate was correct in not considering *Ravasiga's* case as relevant to the current situation and also that the Constitutional right to housing and sanitation was not breached considering the circumstances of this case.

44. The International Journal of Human Rights, 2020 - Volume 24, no. 26 at page 721 made a pertinent observation about right to electricity in the following words:

*We should therefore understand electricity is a derived right. A right to electricity is often necessary to protect our basic rights, for example, to life and to such material things as adequate housing, healthcare and education. Still, it is life, housing, healthcare and education that are essential, not*

*electricity. This distinction is important since the pursuit of basic human rights is a worthy goal. This pursuit should not wait for total electrification of all parts of the world if there are other energy forms available today.*

45. This ground of appeal is also dismissed due to lack of merits.

### **ORDERS**

1. The appeal against the ruling of the Magistrate's Court dated 27<sup>th</sup> April, 2020 is dismissed due to lack of merits.
2. The decision of the Magistrate's Court is affirmed.
3. 30 days to appeal to the Court of Appeal.



**Sunil Sharma**  
**Judge**

**At Lautoka**

08 September, 2020

### **Solicitors**

**Manager Legal, Fijian Competition and Consumer Commission for the Appellant.**

**Messrs K Law, Nadi for the First Respondent.**

**Manager Legal, Energy Fiji Limited, Suva for the Second Respondent.**