

IN THE EMPLOYMENT RELATIONS COURT OF FIJI
AT LAUTOKA

ERCC 02 of 2020

BETWEEN : FIJI SUGAR CORPORATION

APPLICANT

AND : POASA TURAGANISOLEVU RAQIO

RESPONDENT

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. N. Tofinga for the applicant
Mr. K. Maisamoa for the respondent

Date of Hearing : 1 July 2020

Date of Decision : 9 September 2022

DECISION

EMPLOYMENT LAW Compliance – Order to vacate from employer’s quarters – Subsisting application under section 169 of the Land Transfer Act – Failure to place penal notice on tribunal’s order – Whether plaintiff company in violation of requirement to act through a solicitor – Employment Relations Act 2007, Sections 211 (1) (e), (h) & (k), 221 (1) & (6), 229 (1) (b) & 238 (2) – High Court Rules 1988, Orders 5 rule 6 (2), 45 rule 6 (4) (a) & 113

The following cases are referred to in this decision:

- a. *Shalini aka Salini Sangeeta Devi v Basanti and another* [2003] FJHC 63; HPP 0036].1999S (27 August 2003)
- b. *Penilope Postulka v George Postulka* [1988] FJHC 7; [1988] 34 FLR 82 (3 May 1988)
- c. *Prasad and Chand Investment Ltd v Ali* [2011] FJHC 56; HBC 216.2010 (9 February 2011)
- d. *Iberian Trust Limited v Founders Trust and Investment Company Limited* [1932] 2 K.B 87

1. The respondent was dismissed from employment on 20 September 2018 following complaints of alleged misconduct. The worker filed a grievance, which was referred to the tribunal for adjudication. The tribunal by its decision dated 18 October 2019 dismissed the grievance. The tribunal also issued a supplementary decision on 7 February 2020 concerning the respondent’s occupation of staff quarters. The applicant has filed an application for enlargement of time to appeal the decision and the supplementary decision of the tribunal.

2. After the supplementary decision was made on 7 February 2020, the applicant filed a notice of motion on 18 March 2020 and sought *inter alia* the following orders:

- a) “That the Respondent comply with the Orders of 7 February 2020 arising out of the Decision of the Employment Relations Tribunal dated 18 October 2019 in EG No: 10 of 2019 as stated below:

On 7 of February 2020 –

1. The Griever pay the Employer the sum of \$4000.00 as a result of his election to remain in the Employers premises, following his dismissal in employment.

2. Payments be made 21 days hereof

And again on 7 February 2020 in another order –

1. The Griever Poasa Turaganisolevu Raqio vacate the Employers quarters at Penang FSC Compound (House Number PMSH1222), within 14 days.
 2. Costs be summarily assessed against the Grievor, in the amount of \$1,000.00 and paid to the Employer within 21 day”.
- b) That the Grievor show cause as to why should he not be made to pay a penalty in a sum not exceeding \$10,000.00 or why he should not be sentenced to imprisonment for a term not exceeding 3 months.
- c) That this mater be joined with ERCA I of 2020 scheduled for hearing on 17 April, 2020”.
3. The application for enlargement of time to file the appeal (ERCA 1 of 2020) and this notice of motion were taken up for hearing together. The application for enlargement of time mainly concerned the tribunal’s order delivered on 18 October 2019, but received by the applicant on 11 December 2019. By its supplementary decision of 7 February 2020, the tribunal directed the dismissed worker to vacate the employer’s quarters. He was also asked to pay the plaintiff \$4,000.00 for use of the quarters from June 2019 to February 2020 and \$1,000.00 as costs. The orders sought for compliance are in respect of the orders in the supplementary decision.
4. At the hearing on 1 July 2020, the respondent resisted the application for compliance orders on several grounds. The respondent submitted that the resident magistrate overstepped his jurisdiction in issuing an eviction order, and, therefore, the orders should not be enforced. The respondent submitted that there were only two modes by which it was possible to institute eviction proceedings. These were through section 169 of the Land Transfer Act and by Order 113 rule 1 of the High Court Rules.
5. It was submitted that the applicant had filed an application under section 169 of the Land Transfer Act to evict the respondent from the premises in which he resided, and that the case – HBC 43 of 2019 – was coming up for hearing on 15

September 2019. As such the respondent submitted, the resident magistrate should not have made the impugned orders on 7 February 2020.

6. Section 169 (a) of the Land Transfer Act states that the last registered proprietor of the land may summon any person in possession of the land to appear before a judge to show cause why the person summoned should not give up possession to the applicant. Paragraphs (b) and (c) of the provision concern a lessor - lessee relationship, which has not been urged by either party.
7. Order 113 rule 1 states that where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, proceedings may be brought by originating summons in accordance with that rule.
8. I accept the respondent's submission that section 169 of the Land Transfer Act and Order 113 of the High Court Rules are the usual methods in which ownership or possessory rights are asserted in respect of land. The respondent submitted that section 169 action was instituted by the applicant and pending in the High Court. Since that action was pending, he submitted, the resident magistrate erred in ordering the respondent to vacate quarters. This issue can be answered by reference to the statutory provisions concerning the jurisdiction of the tribunal.
9. Section 211 (1) (k) of the Act confers the tribunal with jurisdiction to adjudicate on matters referred to it by Mediation Services or any party to the mediation. There is no dispute that proceedings were properly brought before the tribunal. In terms of section 211 (1) (e), the tribunal has the jurisdiction to adjudicate on all actions involving entitlements and related matters for which provision is made by the Act. Section 211 (1) (m) gives the tribunal jurisdiction to adjudicate on a question connected with the construction of an employment contract, where that question arises in the course of proceedings properly brought before the tribunal.
10. When an employer provides accommodation to a worker, it is a benefit incidental to the worker's employment. The rights and limits of such a benefit

will ordinarily be governed by the contract of employment. When the employment contract is terminated, the benefit is likely to cease unless there are terms agreed upon to different effect between the worker and the employer. In this case, the worker's employment was terminated on 20 September 2018. While the respondent was in employment, accommodation in his quarters was possibly a matter of entitlement under his contract of employment. The tribunal has jurisdiction to inquire into and adjudicate an action involving an entitlement. The respondent submitted that the tribunal went beyond its limits as no action was filed in respect of the worker's entitlement to accommodation in the employer's quarters.

11. In my view, the respondent's position is not correct. The tribunal has jurisdiction to adjudicate on matters referred to it by mediation services or any party to the mediation. The resident magistrate has considered the matter of handing over vacant possession of the employer's quarters as a matter connected with the termination of the respondent's employment. This is understandable as the applicant has to provide accommodation to a new worker taken in place of the dismissed respondent. The resident magistrate was entitled to adjudicate the matter concerning the respondent's occupation of quarters after the termination of his employment. This was not adjudicated in the order of 18 October 2019. The order to vacate was given on 7 February 2020. The High Court, that was hearing the action to evict the respondent, did not restrain the resident magistrate from hearing or making orders in respect of the quarters occupied by the respondent; it is not even clear that court was apprised of proceedings before the tribunal. The pending application under section 169 of the Land Transfer Act did not fetter the tribunal's jurisdiction, although it must be said that the order concerning the employer's quarters should have been made in the decision given on 18 October 2019, and not by way of a supplementary decision.
12. Mr. Maisamoa raised two other matters in objecting to proceedings brought by the applicant's notice of motion. He submitted that orders of the resident magistrate that were served on the respondent did not contain a penal notice. He did not point out which of the Magistrate Court Rules were not complied with by the applicant. A copy of the order that was served on the respondent has not been placed before court. He said that although sealing of orders and placement

of the penal notice were not specified under the Employment Relations Act, section 238 (2) of the Act made the rules of the High Court applicable to proceedings before the tribunal. As a result, he submitted, Order 45 rule 6 (4) (a) of the High Court Rules requires a notice to be placed on an order served on a person informing him that he is liable to process of execution to compel him to obey the order if he neglects, abstains or disobeys the order.

13. Section 238 (1) of the Employment Relations Act states the chief justice may from time to time make rules for the purpose of regulating practice and procedure of the tribunal or court. Section 238 (2) of the Act states:

In the absence of such rules, or where no provision is made for a particular circumstance —

- a) the Magistrates Court Rules 1945 apply to the proceedings before the tribunal; and
- b) the High Court Rules 1988 apply to the proceedings before the Employment Relations Court.

14. Order 45 rule 6 of the High Court Rules states:

- (1) In this rule references to an order shall be construed as including references to a judgment.
- (2) Subject to Order 24, rule 16(3), Order 26, rule 6(3), and paragraphs (6) and (7) of this rule, an order shall not be enforced under rule 4 unless-
 - (a) a copy of the order has been served personally on the person required to do or abstain from doing the act in question, and
 - (b) in the case of an order requiring a person to do an act, the copy has been so served before the expiration of the time within which he was required to do the act.
- (3) Subject as aforesaid, an order requiring a body corporate to do or abstain from doing an act shall not be enforced as mentioned in rule 4(1)(ii) or (iii) unless-
 - (a) a copy of the order has also been served personally on the officer against whose property leave is sought to issue a writ of sequestration or against whom an order of committal is sought, and

(b) in the case of an order requiring the body corporate to do an act, the copy has been so served before the expiration of the time within which the body was required to do the act.

(4) There must be indorsed on the copy of an order served under this rule a notice informing the person on whom the copy is served-

(a) in the case of service under paragraph (2), that if he neglects to obey the order within the time specified therein, or, if the order is to abstain from doing an act, that if he disobeys the order, he is liable to process of execution to compel him to obey it, and

(b) in the case of service under paragraph (3), that if the body corporate neglects to obey the order within the time so specified or, if the order is to abstain from doing an act, that if the body corporate disobeys the order, he is liable to process of execution to compel the body to obey it.

15. In saying that the applicant failed to comply with Order 45 rule 6 (4) of the High Court Rules, the respondent relied on the decisions in *Shalini aka Salini Sangeeta Devi v Basanti and another*¹ and *Penilope Postulka v George Postulka*². Both decisions were made by the High Court, and concerned committal proceedings under Order 52 of the rules. The proceedings in those cases were penal in nature. In *Shalini v Basanti*, the court quoted a passage from the judgment in *Iberian Trust Limited v Founders Trust and Investment Company Limited* which is reproduced below³.

“The object of the indorsement is plain – namely, to call to the attention of the person ordered to do the act that the result of disobedience will be to subject him to penal consequences”.

16. The penal notice could be framed in this way: “If you neglect to obey the order within the time specified herein, or, if the order is to abstain from doing an act, that if you disobey the order, you are liable to process of execution to compel you to obey it”⁴. “Pathik, J in *Shalini v Basanti* stated that the proceedings in that case were penal,

¹ [2003] FJHC 63; HPP 0036J.1999S (27 August 2003)

² [1988] 34 FLR 82

³ [1932] 2 KB 87 at 97

⁴ *Shalini v Basanti*

and that the rules in regard to contempt proceedings were not fully and strictly complied with by the applicant. In those circumstances, the court ruled that service of the order was clearly irregular as the order did not contain the penal notice.

17. In *Postulka*, an application was made for committal as the respondent failed to pay interim maintenance as ordered by the High Court. Both parties were absent when the order was made, but the order was served on the respondent. The penal notice was not endorsed on the order. Fatiaki, J said that the proceedings were penal in nature. As the liberty of the respondent was at stake, this led him to the conclusion that the rules ought to be strictly complied with. The court also noted that there were alternate enforcement provisions available in the Matrimonial Causes Act. The application for committal was refused.
18. *Shalini v Basanti* and *Postulka v Postulka* suggest that the effect of Order 45 rule 6 (4) is particularly important when an application is proposed to be made for committal or for sequestration of property. In view of the orders that court proposes to make, it is not necessary to consider in this instance whether the absence of a penal notice renders the tribunal's decision incapable of enforcement. This must be considered by construing Order 3 rule 8 of the Magistrates Court Rules and Order 45 rule 6 (4) of the High Court Rules. The matter has to be considered after fuller submissions are heard by court.
19. The resident magistrate gave separate decisions on 18 October 2019 and 7 February 2020. The first decision made no mention of the quarters provided by the employer. In that decision, the tribunal evaluated the evidence against the respondent and concluded that termination was justifiable. The second decision – called a supplementary decision – went into detail on the matter and referred to matters that transpired during proceedings. The supplementary decision states that the worker, though terminated from employment on 20 September 2018, was unwilling to vacate the company premises until the tribunal determined the substantive matter i.e: whether the worker was unjustifiably dismissed and, if so, whether reinstatement was to be ordered. The tribunal held against the worker on 18 October 2019. The worker continued to occupy the quarters. Then followed the decision of 7 February 2020. Both parties were

represented on that day. Parties are deemed to have notice of a decision or judgment, if pronounced at the hearing, in terms of Order XXX11 rule 3 of the Magistrate Court Rules. A separate order on the employer's quarters was not good practice by the tribunal. The resident magistrate has justified it on the basis that there was a slip. In the application for enlargement of time, I have allowed both orders to be appealed.

20. Another matter raised by the respondent concerns the representation of the applicant in court. The respondent submitted that the applicant was in breach of Order 5 rule 6 (2) of the rules.

21. Order 5 rule 6 of the High Court Rules states:

(1) Subject to paragraph (2) and to Order 80, rule 2, any person (whether or not he sues as a trustee or personal representative or in any other representative capacity) may begin and carry on proceedings in the High Court by a barrister and solicitor or in person.

(2) Except as expressly provided by or under any enactment, a body corporate may not begin or carry on any such proceedings otherwise than by a barrister and solicitor.

22. The respondent's objection is based on rule 6 (2) of Order 5. In raising this objection, the decision in *Prasad and Chand Investment Ltd v Ali* was cited⁵. In response, Mr. Tofinga submitted that he was entitled to represent the applicant in terms of section 229 of the Act.

23. Section 229 of the Employment Relations Act states:

A party to a proceeding before the tribunal or court may—

- a) appear personally;
- b) be represented by a representative whom the tribunal or the court is satisfied has authority to act in proceedings; or
- c) be represented by a legal practitioner,

and may produce before the tribunal or the court witnesses, documents, books and other evidence as the party thinks fit.

⁵ [2011] FJHC 56; HBC 216.2010 (9 February 2011)

24. Section 229 (1) (b) of the Act permits a party before a tribunal or court to be represented by a representative whom the tribunal or the court is satisfied has authority to act in proceedings. The respondent submitted that the applicant's representative has not satisfied court that he has authority to act in these proceedings. Mr. Maisamoa did not say whether the objection concerning representation was raised before the resident magistrate. This is a matter the court is not able to check without the record of proceedings. No opposition was taken to the company's representation when the notice of motion was filed on 18 March 2020. The objection seems to have been raised for the first time by counsel for the worker at the hearing of this application and the appeal hearing (the objection was in respect of both cases). If this is the case, Mr. Tofinga's authority to represent the applicant was not an issue in proceedings before the tribunal. Unfortunately, the applicant has not filed an authorisation to represent it in these proceedings. Had this been done, the controversy could have been avoided. In the absence of any objection to the applicant's representation in proceedings before the resident magistrate, there is no reason to doubt that Mr. Tofinga has the authority to represent the company. The court is satisfied that the applicant's representative has the authority to act in these proceedings under section 229 (1) (b).
25. If a person has not complied with a provision of an employment contract, the tribunal is empowered by section 212 (1) to require a party to a proceeding to do a specified thing, for the purpose of preventing further non-compliance with the thing. In this case, the tribunal's direction to the employer was to vacate the employer's quarters as he was terminated from employment in September 2018. Section 212 (6) provides for an application to be made to the court if there is a failure to comply with a compliance order made by the tribunal. Section 221 (6) makes provision for the imposition of a penalty not exceeding \$10,000.00, imprisonment for a period not exceeding three months and for sequestration of property. The authority vested in court to order compliance is fairly wide. Where there is non-compliance with the Act or an order, determination, direction, or requirement made or given under this Act by the court, the court may order a person to do a specified thing or to cease a specified thing.

26. The applicant's application is for compliance of the order made on 7 February 2020. The orders to be issued are under section 221 (1) & (6) of the Employment Relations Act. The court is of the view that the penal orders asked by the applicant's notice of motion are not appropriate in the circumstances. The Act requires a party to comply with orders made by the tribunal and the court. The respondent is directed to comply with the orders specified below. In the event of non-compliance there is provision for enforcement of the orders in terms of Order 45 of the High Court Rules as well as the provisions of the Employment Relations Act.

ORDER

- A. The Respondent is ordered to comply with the orders made by the Employment Relations Tribunal on 7 February 2020 arising out of the decision dated 18 October 2019, except for the order relating to costs in a sum of 1,000.00, within the time specified below:
- a. The respondent must vacate the employer's quarters described in the notice of motion within 14 days of this decision.
 - b. The sum of \$4,000.00 shall be paid by the respondent to the applicant within 14 days of this decision.
- B. The parties will bear their own costs

Delivered at Suva this 9th day of September, 2022



M. Javed Mansoor
Judge