

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

HBC 42 of 2019

BETWEEN : **HAZRA KHATOON**

1ST PLAINTIFF

AND : **AHMED BEGG**

2ND PLAINTIFF

AND : **ABDUL AZIZ BEGG**

DEFENDANT

BEFORE : **M. Javed Mansoor, J**

COUNSEL : **Mr. S. Sharma & Mr. A Namua for the 1st and 2nd plaintiffs**

: **Mr. A. Kohli & Ms. S. Naidu for the defendant**

Date of Hearing : **15 August 2022 & 31 January 2023**

Date of Decision : **22 February 2023**

SENTENCE

CONTEMPT Disobedience of court order – Sections 15 & 16, Sentencing & Penalties Act 2009 – Sections 37 (1) & 153 (1) (b), Criminal Procedure Code –Order 52 of the High Court Rules 1988

The following case is referred to in this decision:

1. *State v Mereseini Rokovatu [2022] FJHC 755; HAC 360.2022 (5 December 2022)*

1. By decision dated 23 January 2023, the plaintiffs were found guilty of contempt of court by their failure to obey court orders pronounced according to terms of settlement entered between the parties. The plaintiffs were directed to be present in court on 31 January 2023 to take notice of the sentence and for submissions to be made in mitigation of their sentence.
2. On the day fixed for sentencing, the plaintiffs did not attend court. Their counsel, Mr. S. Sharma did not show up. Mr. Namua, who appeared on that day submitted that the proceedings having been filed under the civil rules of procedure, his clients were not required to be in court, and sought an adjournment. He submitted that Mr. Sharma was seriously ill. He did not have instructions concerning mitigation of sentence.
3. The court conveyed to Mr. Namua that his explanation for the absence of his clients was not acceptable, especially as the charge against them arose from the disobedience of a court order and contempt proceedings are penal in character. The plaintiffs were again directed to be present in court for sentencing on 6 February 2023. They were given an opportunity to file submissions before 12 pm on 3 February.
4. On 6 February, the first plaintiff was present in court. The second plaintiff did not attend court, but on this occasion submitted a medical certificate through his lawyers. The medical certificate states that he is ill, unfit to attend court and that he will not be fit for five days. The illness was not specified. Alongside the medical certificate was a doctor's note prescribing some medical tests.

Submissions for mitigation on behalf of the plaintiffs were filed late on the ground of adverse weather. Court accepts the late filing. Sentencing was adjourned to 22 February 2023. Plaintiffs were directed to be present to take notice of the sentence.

Submissions in mitigation

5. The plaintiffs submitted that they were unable to execute the orders made by this court on 12 March 2020 because of orders by Amaratunga, J extending a caveat filed by one Farina Bi and issuing injunctive orders in respect of the subject property. They said that they made efforts to remove the caveat and injunctive orders and that the first plaintiff filed an affidavit in opposition (as the first defendant in that proceeding). Along with their submissions the plaintiffs tendered the first plaintiff's affidavit sworn on 1 June 2022 in support of her notice of motion and filed in HBC 138 of 2002 and the High Court decision of Amaratunga J given on 19 August 2022 in Suva.
6. The plaintiffs submitted that Abdul Aziz Begg retired as a director of Waiqele Sawmills Limited on 20 November 2020 and appointed his son as a director. They submitted that the defendant as a director of the company made no attempt to obtain the mandatory consent of the Housing Authority to transfer the property to the estate of Nasib Begg aka Jaffar Begg as ordered by court. The plaintiffs submitted that the onus was on all parties to promptly transfer the property and that all directors of the company are equally liable for their neglect.
7. The plaintiffs submitted that they paid the defendant a sum of \$450,000.00 prior to the date of settlement even though the company did not execute the transfer documents and lodge the Housing Authority's consent. This refers to the payment to be made to the defendant by the estate of Nasib Begg at the time the subject property is to be transferred from Waiqele Sawmills Limited to the estate. The payment to the defendant was to be made by the estate of which the first plaintiff is the administratrix.
8. In regard to the non-payment of keyman insurance monies, the plaintiffs say that they did not personally benefit from the payout and that the money was still in

the company account. They say that the defendant agreed with the board's decision to keep the money in the company account, and that no attempt was made on his behalf to pay the sum.

9. The plaintiffs say that the first plaintiff is 82 years old, and that she is a cardiac patient. She is said to have continuously administered the estate since 1991. They say she is apologetic to court. She desires the property to be transferred to the estate. She has paid the defendant a sum of \$450,000.00 in anticipation of the transfer. They submit that when she tried to lodge the consent of the Housing Authority she found that her step daughter, Farina Bi, had lodged a caveat and obtained a restraining order in respect of the property.
10. They submitted that the second plaintiff is 61 years old and married with four children. He underwent open heart surgery five years ago. They say that he is remorseful and apologetic that court orders were not complied with. The plaintiffs say that the second plaintiff played a vital role in the making of the consent orders and that he requested his mother, the first plaintiff, to make a payment of \$450,000.00 to the defendant. They submitted that the second plaintiff is taking steps to transfer the property and comply with the orders of court. They ask court to impose a minimum fine on the basis that the defendant and his son are equally liable in the orders not being enforced. The plaintiffs also submitted that the court has the power to discharge them even though they have been found guilty of contempt.
11. Many of the factual matters stated in the plaintiffs' written submissions were not stated by their affidavits in opposing committal. The plaintiffs had the opportunity to explain their default. The court is unable to ascertain the veracity of matters stated in submissions. On matters of controversy, the defendant does not have the opportunity to respond at the stage of submissions in mitigation. The plaintiffs have relied on the action filed by Farina Bi in obtaining a caveat on the property ordered to be transferred by court. Amaratunga J issued injunctive orders on 25 April 2022. His Lordship says the first defendant (the first plaintiff in this case) did not appear in court until 2 June 2022 and had sufficient time to move for the dissolution of the injunctive orders issued *inter partes* by court. The

judge noted that this court's orders were made on 12 March 2020 and the first defendant (first plaintiff) did not comply with the orders for more than two years, and dissolved the injunction on 19 August 2022, a few days after the committal hearing before this court. The material before court shows that the caveat expired on 2 May 2022.

12. The payment of monies to the defendant were ordered by court after the parties agreed to those terms. The plaintiffs say that the defendant agreed to the board's decision to withhold the insurance payment in order to reinvest in the business. This position was never taken in the second plaintiff's affidavit in opposition to committal. There is also no board resolution in support of this claim. The court notes that the insurance pay out was to be made out of the company's account. The consent orders of 12 March 2020 state that the second plaintiff is a signatory to all bank accounts of Waiqele Sawmills Limited.
13. I am unable to accept the plaintiffs' contention that all directors of the company are liable. Liability in this case proceeds from the disobedience of court orders by the parties who undertook to comply with those orders. The court was not apprised of any of impediment to complying with the orders prior to the defendant's committal application. The plaintiffs have not satisfied court that they made an effort to comply with the orders made on 12 March 2020. The plaintiffs undertook to transfer the subject property from Waiqele Sawmills Limited to the estate of Nasib Begg. The court notes that the second plaintiff is a director of the company, Waiqele Sawmills Limited, while the first plaintiff is not a director. According to the plaintiffs' submissions, the defendant resigned from the board on 20 November 2020.

Sentence

14. The plaintiffs, having been found guilty of contempt, are liable to be punished by court. The Sentencing & Penalties Act 2009 makes provision for sentences. The range of sentences are set out in section 15 of the Act.
15. Section 15 of the Sentencing & Penalties Act states:

- (1) "If a court finds a person guilty of an offence, it may, subject to any specific provision relating to the offence and subject to the provisions of this Act—
- (a) *record a conviction and order that the offender serve a term of imprisonment;*
 - (b) *record a conviction and order that the offender serve a term of imprisonment partly in custody and partly in the community;*
 - (c) *record a conviction and make a drug treatment order in accordance with regulations made under section 30;*
 - (d) *record a conviction and order that the offender serve a term of imprisonment that is wholly or partly suspended;*
 - (e) *with or without recording a conviction, make an order for community work to be undertaken in accordance with the Community Work Act 1994 or for a probation order under the Probation of Offenders Act 1952;*
 - (f) *with or without recording a conviction, order the offender to pay a fine;*
 - (g) *record a conviction and order the release of the offender on the adjournment of the hearing, and subject to the offender complying with certain conditions determined by the court;*
 - (h) *record a conviction and order the discharge of the offender;*
 - (i) *without recording a conviction, order the release of the offender on the adjournment of the hearing and subject to the offender complying with certain conditions determined by the court;*
 - (j) *without recording a conviction, order the dismissal of the charge; or*
 - (k) *impose any other sentence or make any other order that is authorised under this Act or any other Act.*
- (2) All courts may impose the sentences stated in subsection (1) notwithstanding that a law may state that a penalty is to be imposed upon the conviction of an offender.
- (3) As a general principle of sentencing, a court may not impose a more serious sentence unless it is satisfied that a lesser or alternative sentence will not meet the objectives of sentencing stated in section 4, and sentences of imprisonment should be regarded as the sanction of last resort taking into account all matters stated in this Part.

- (4) Notwithstanding the provisions of the Community Work Act 1994 and the Probation of Offenders Act 1952, a court may impose a sentence under subsection (1)(e) upon finding an offender to be guilty of an offence but without recording a conviction.
 - (5) When sentencing or dealing with offenders who, by reason of their mental state have been found to be unfit to plead or have established a defence under law related to their mental impairment, the provisions of this Act may only be applied subject to any law which makes specific provision for dealing with such offenders”.
16. In terms of the Sentencing and Penalties Act, the court may impose a term of imprisonment or a fine. The court may exercise its discretion in deciding whether or not to convict prior to imposing a sentence. The court may also with or without recording a conviction, order the offender to pay a fine.
17. Section 16 of the Act sets out the manner in which the court’s discretion on whether or not to record a conviction should be exercised. The enactment states:
- (1) “In exercising its discretion whether or not to record a conviction, a court shall have regard to all the circumstances of the case, including—
 - (a) *the nature of the offence;*
 - (b) *the character and past history of the offender; and*
 - (c) *the impact of a conviction on the offender’s economic or social well-being, and on his or her employment prospects.*
 - (2) Except as provided by any law, a previous finding of guilt without recording a conviction in the exercise of a power under section 15 must not be taken into consideration for any purpose.
 - (3) A finding of guilt without recording a conviction in the exercise of a power under section 15 —
 - (a) *does not prevent a court from making any other lawful order that is authorised under any law as a consequence of the finding of guilt; and*
 - (b) *has the same effect as if a conviction had been recorded for the purpose of—*
 - i. *appeals against sentence;*
 - ii. *proceedings for variation or breach of a sentence; and*
 - iii. *proceedings against the offender for a subsequent offence”.*

18. The decision dated 23 January 2023 directed the plaintiffs to comply with paragraphs 2, 3 & 7 of the order made by consent on 12 March 2020 and sealed on 1 April 2020. Each plaintiff was ordered to pay \$1,500.00 to the defendant. The orders were to be complied within 21 days. In view of the directions made by court, a custodial order would not allow the plaintiffs to immediately comply with the orders. The first plaintiff is the administratrix of the estate of Nasib Begg aka Jaffar Begg. She has duties to perform as the estate’s administratrix and to comply with court orders. The second plaintiff is a director of Waiqele Sawmills Limited that owns the property that is to be transferred to the estate in terms of the consent order. He is a signatory of the company’s bank accounts. The court has taken note of the plaintiffs’ apologies and remorse, and their submission that they have not committed an offence previously. Their ages and their health conditions are noted. The plaintiffs have also submitted that they would comply with the orders of court.
19. Section 15 (1) (f) of the Sentencing and Penalties Act allows court to order an offender to pay a fine with or without recording a conviction. The operation of sections 15 & 16 of the Sentencing & Penalties Act and section 153 of the Criminal Procedure Code are dealt with in the judgment of Kulatunga, J in *State v Mereseini Rokovatu*.¹
20. In view of the submissions made in mitigation, the court imposes a fine on both plaintiffs in terms of section 15 (1) (f) of the Act instead of recording a conviction. The first plaintiff is fined a sum of \$10,000.00, and the second plaintiff is fined \$15,000.00. The aggregate fine is \$25,000.00.
21. Section 153 of the Criminal Procedure Code permits any part of the fine to be used in defraying the costs in the prosecution of the case or to compensate for any loss or injury caused by the offence. The section states:

(1) “Any court may order the whole or any part of any fine imposed or money found on or in the possession of a convicted person to be applied towards—

¹ [2022] FJHC 755; HAC 360.2022 (5 December 2022)

- (a) *the defraying of the costs or expenses properly incurred in the prosecution;*
- (b) *the payment to any person of compensation for any loss or injury caused by the offence pursuant to an order made under the Sentencing and Penalties Act 2009; or*
- (c) *the payment to any person for any loss sustained as a consequence of any order made under the provisions of this Part for the restitution or disposal of any property or thing.*

(2) If the fine is imposed in a case which is subject to appeal no such payment shall be made before the period allowed for presenting the appeal has elapsed, or if an appeal is filed, before the decision of the appeal”.

- 22. The court summarily assesses that it is apt to apply a part of the fine imposed on the plaintiffs to compensate the defendant for losses caused by the plaintiffs’ disobedience. A summarily assessed sum of 5,000.00 is to be applied out of the fine imposed on the first plaintiff, and \$7,500.00 out of the fine imposed on the second plaintiff, aggregating to \$12,500.00, to compensate the defendant for prejudice caused as a result of the plaintiffs’ failure to comply with the orders of court within a reasonable time.
- 23. Plaintiffs are to be imprisoned if they default in complying with the orders made by court. A prison term for default is made available by section 37 of the Criminal Procedure Code.

ORDER

- A. Fines are imposed on the plaintiff without recording a conviction.
- B. The first plaintiff is ordered to pay a fine of \$10,000.00. The second plaintiff is ordered to pay a fine of 15,000.00. The aggregate fine of \$25,000.00 must be paid within five weeks of this sentence.
- C. Out of the fine imposed, the first plaintiff is ordered to pay the defendant compensation in a sum of \$5,000.00, and the second plaintiff is ordered to pay the defendant compensation in a sum of \$7,500.00. The aggregate

compensation of \$12,500.00 must be paid to the defendant within five weeks of this sentence.

- D.* Each plaintiff is to sign a bond equivalent to the fine.
- E.* In default of the payment of fine, the plaintiffs are liable to be sentenced to prison.

Delivered by skype at **Suva** on this **22nd** day of **February, 2023**.



M. Javed Mansoor
Judge