

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

Labasa Civil Action No. HBA 03 of 2021

BETWEEN: **ASHIKA MALA DEVI** Trading as **NIKHILS EZY BUY** Wailevu, Labasa in the Republic of Fiji Islands, Businesswoman.

APPELLANT/DEFENDANT

AND: **BASHIR KHAN** of 15 Jaduram Street, Labasa in the Republic of Fiji Islands, Landlord.

RESPONDENT/PLAINTIFF

BEFORE: **Hon. Mr. Justice Vishwa Datt Sharma**

COUNSEL: **Mr. Sharma S** with **Ms. Nabiar A.** - for the Appellant/Defendant
Mr. Raramasi S - for the Defendant/Applicant

DATE OF DECISION: **21st February, 2024**

DECISION

[Appeal against Judgment/orders delivered on 01st November 2021].

A. Introduction

1. The Appellant/Defendant, Ashika Mala Devi, aggrieved by the Judgment of the presiding Resident Magistrate delivered on 01st November 2021, filed an appeal against the Judgment on the following grounds:
 - (1) The Learned trial Magistrate erred in law and in facts in not considering the principal developed in the case of *Khan v Puma Olymipans, ex pate Kumar [2004] FJHC 438 HNJ0001.2004L the Court at Paragraph 12 of Singh* whereby, the respondent did not exhaust the arbitration process stated at clause 12 (a) with Reference to Arbitrations.
 - (2) The Learned trial Magistrate erred in Law and in fact in not analyzing the evidence that the appellant made application for the issuances of the Business Licenses for the Year 2020 and the Business license was not granted by the Labasa Town Council.
 - (3) The Learned trial Magistrate erred in Law and in fact in not considering that the subletting agreement dated on 20th day June 2018 was frustrated by Labasa Town Council in not issuing the Business Licenses for the Year 2020.
 - (4) The Learned trial Magistrate erred in Law and in fact in misinterpreting the section 14 of the Business Licenses Act. When they was sufficient evidence by the appellant that she made application for Business license in 2020 with Labasa Town Council.
 - (5) The Learned trial Magistrate erred in Law and in fact in not considering that the rented premises constructed by the Respondent was unlawful and illegal in absences of approved plan and specification of the Building from Labasa Town Council.
 - (6) That the appellant reserve the right to add or alter or amend the grounds of appeal upon the receipt of the court record.
2. Both parties to this proceedings furnished Court with their written submissions and argued the appeal orally.
3. The Grounds of Appeal can be condensed, consolidated and determined in the following context:

Ground 1

Consideration towards the principle of Arbitration Process.

Ground 2 and 3

Frustration of the Agreement

Grounds 4 and 5

Disapproval of Business license to Appellant Ashika Mala Devi

B. Ground 1

4. At clause 12 of the letting agreement dated 03rd June 2019 deals with References to Arbitration. It reads:

"All disputes or differences that are between the lessor and lessee and the lease about the **provisions or the operation or construction of this lease or the rights or liability** of either party under this lease shall be referred to the Arbitration."

5. Therefore, the Respondent did not explore or exhaust that particular remedy and/or avenue to resolve the dispute before institution and commencement of this action.
6. However, the Respondents Contention is that the case deals with the '**Rental Agreement**' between the Respondent and the Appellant of 3rd June 2019. It was a Contractual Agreement between them.
7. The Appellant had breached the terms of the Rental Agreement in defaulting payment of the Rental and was served with the Notice to quit on 04th May 2020.

C. Grounds 2 and 3

8. The Appellants Contention is that the purpose of business was that the Appellant was operating a clothing shop and **this is not disputed by the Respondent**.
9. The Appellant failed to obtain and be **issued with the business licence from Labasa Town Council**. Therefore, the **letting Agreement was frustrated**.
10. The Appellant was renting the Respondent's premises from 2018. In 2018, the Appellant was renting at Bashir Khan Mall and in 2019, the Respondent offered a **newly built shop** in front of the building for the **Appellant to continue the operations of her business**.
11. The letting Agreement executed on 03rd June 2019 was for the premises to be used by the Appellant to operate a clothing shop. The shop space in question was not approved by the Labasa Town Council and any operations of business will tantamount to it being illegal.
12. However, the Respondent's contention was that the Court in its Judgment said '*that there is no clause in the Agreement which stipulates the requirement of the licence should be issued prior to leasing of the premises as provided for in paragraph 5.8 of her Judgment.*'

13. The Appellant failed to apply for a Temporary transfer of premises and approval of the Town Council was required pursuant to section 14(1) of the Business Licence Act but the Appellant's continued with the operation of her business on the premises under the previous licence.
14. The subletting Agreement dated 20th June 2018 was not an issue before the Court.

D. Grounds 4 and 5

15. The Appellants Contention is that the Learned Magistrate did not consider the Appellants application in obtaining a business licence; the Appellant made no application for a business licence.
16. In terms of Section 5 of the Business licence Act, the Defendant/Appellant made every possible application to have her licence approved.
17. Section 14 of the Business Licence Act is not applicable here since Appellant made a fresh application for issuance of a business licence which was refused by the Town Council. Section 14 was misinterpreted.
18. However, the Respondent's case is that the Magistrate had properly interpreted Section 14 of the Business Licence Act. The Appellant failed to provide evidence that she had applied for temporary approval of transfer and the Court found that the Appellant was at fault in not complying with the Business Licence Act.

E. Determination

19. It cannot be disputed by the parties to this Appeal proceedings that:
 - (1) Respondent, Bashir Khan and Appellant, Ashika Mala Devi entered into a Letting Agreement on 03rd June 2019 commencing on 3rd June 2019 and ending on 07th July 2020 [1 year 1 month period].
 - (2) There is no existence of any clause which specifies the purpose for which the Letting Agreement has been entered into with the Exception that the Lessee will occupy part of state land in Macuata on which land is erected a triple storey building. The Agreement does not specifically say that it was for business use to operate a clothing shop.
20. What was the dispute all about that prompted the Lessor/Respondent, Bashir Khan to file and commence Civil Proceedings against the Lessee/Appellant, Ashika Mala Devi and claiming Rental arrears of \$11,000?
21. As it can be ascertained from the Court Records that the Disputes was that:

- The Appellant/Defendant failed to pay the total Rental sum of \$9,900 from 08th December 2019 to 08th May 2020 and was in breach of the Letting Agreement executed on 03rd June 2019. The Appellant/Respondent further damaged the property costing the Respondent/Plaintiff a sum of \$1,100 for Repair of the same.
 - That the Appellant/ Defendant was offered a newly built shop in front of Bashir Khan Mall in 2019 for her to continue the operations of her business.
 - That the Appellant/Defendant's business licence expired in December 2019 and there is no evidence that she had applied for the issuance of a business licence.
 - Letter from Labasa Town Council of 15th January 2020 written to Appellant/Defendant stated "...The shop space in question has not been approved by Council.... The Council will not be in a position to issue you with a business licence for the year 2020 for the said space...."
 - The decision not to issue Business Licence frustrated the Letting Agreement.
 - If there were any dispute or differences that arose between the Lessor and Lessee (Appellant/Respondent) about the provisions or the operations or construction of this lease or the rights or liability of either party under this lease shall be referred to an Arbitration. The Respondent failed to explore and exhaust this avenue to resolve the dispute via mediation.
22. The Letting Agreement executed on 03rd June 2019 was for a different building owned by Bashir Khan [Respondent] on part of the state land where the Labasa Town in Macuata is currently in and on which land is erected a triple storey building.
23. The Letting Agreement dated 03rd June 2019 came to an end after the Appellant was offered in 2020 by the Respondent to move out and occupy the New shop opposite the current shop that she was occupying at Vanualevu Hardware Limited and located on part of the building known as Max Value, allegedly construction without any proper plans and specifications and approval of the Labasa Town Council and Director of Town and Country Planning.
24. However, the Rental arrears claimed for by the Respondent/Plaintiff is for the period 08th December 2019 to 08th May 2020 inclusive.
25. It is evident that in December 2019 the Appellant's Business license had expired and subsequently on 03rd February 2020 (According to DW5 Evidence (Appellant) that she was in occupation of the New shop, apposite the old rented premises. However, according to the Appellant's submission, she made an application to Labasa Town Council for issuance of

the business licence and received a letter from the Labasa Town Council on 15th February 2020 that **'the shop space in question has not been approved by the Council.'** Therefore, the Council will not be in a position to issue Appellant with a Business Licence for the year 2020 for the said premises.

26. Section 14 of the Business Licence Act stipulates **'that a temporary transfer of premises requires an approval from the Town Council on the Licence.'** She continued with her operation of the business from the new premises and there is no evidence to establish that she merely applied for a temporary approval. It was only after her business licence was not approved due to the fact that the new office space had not been approved by the Council that she decided to close her business.
27. The inability and failure of the Appellant/Defendant to successfully seek renewal of her business license after expiry of the current licence in December 2019 was not the fault of the Respondent/Plaintiff. It was the Appellant who failed to secure her licence in order to operate her business.
28. The sole cause of the Appellants Business licence was not renewed was that the shop space was not approved by the Labasa Town Council. The agreement was not at all frustrated since the non-issuance of licence to the Appellant was impossible to operate her business from that very premises.
29. However, the Respondent/Plaintiff, Bashir Khan was aware and had prior knowledge that he failed to inform the Appellant/Defendant about non-compliance and approval of the building /shop space, rather told Appellant to move/occupy the new space and/or the shop.
30. There is no clause in the 'Letting Agreement' pertaining to the Business and/or Business Licence. However, it pertains to leasing of premises, its default and period of Tenancy and either facts akin to the leasing arrangement.
31. She Appellant/ Defendant had been operating on her previous Business license on the new shop to run her business until 01st January 2019 when she decided to seek for approval of her business licence. She operated her business from June 2019 to December 2019. She has tendered a letter from the Labasa Town Council which stated 'that the shop space was not approved and hence on this particular ground her business licence was not approved by the Labasa Town Council.

F. Grounds 1 and Ground 2.

32. I reiterate that the Substantive Issue of the Appellant/Defendant, Ashika Mala Devi was regarding her non issuance and/or renewal of her business licence. The Reason given by the Labasa Town Council was 'that the subject property/premises was constructed without proper plan and specifications and without the approval of the Labasa Town Council and Director of Town and Country Planning.'

33. The Plaintiff/Respondent failed and did not disclose this very important information to the Appellant/Defendant at any time before she was told by Bashir Khan to occupy this New Building/ shop and operate her business from there.
34. Clause 12 of the Letting Agreement deals with Arbitration. It refers to all disputes or differences that arise between the Lessor and Lessee about the provisions, operation or construction of this Letting Lease or rights or liabilities to be referred to an Arbitration. This clause does not deal about and/or pertain to business licence of Lessee since it was upon the Appellant/Defendant to get approval and issuance of her Business Licence accordingly.
35. Therefore, I do not hold that there was any need for the current dispute for the Lessor to be referred to the Arbitration. The Arbitration clause factors in (Trivial) nature of the current dispute that arises between the Lessee and Lessor to be referred for Arbitration. Rather, only those disputes and differences that arise between the Lessee and Lessor about the provisions, construction liability and rights are to be referred for Arbitration. There was nothing pertaining in the Agreement that deals with the Lessee's (Appellant's) business licence. In fact the Letting Agreement was not frustrated when the Labasa Town Council refused to issue the business licence to the Appellant/Defendant, Ashika Mala Devi.
36. Accordingly, Ground 1 of the Appellants' appeal fails which deals with the Arbitration clause of the Letting Agreement.
37. I find that the Labasa Town Council chose not to issue the business licence to the Appellant/ Defendant on the basis that the premises/shop space, currently occupied by the Appellant/ Defendant was not approved by the Labasa Town Council and therefore the Appellant/ Defendant could no longer operate her business. This factor of non-issuance of business licence to the Appellant had not in any way frustrated the Letting Agreement. The Labasa Town Council's decision was made within the ambits of the law and the Business Licence Act accordingly.
38. Accordingly, Ground 2 and 3 fails to succeed on the issue of frustration of the Letting Agreement.

G. Ground 4 and 5

39. The Business Licence for year 2020 was refused to be issued to the Appellant/Defendant since the shop space she had moved into and began operations of her business was not approved by the Labasa Town Council. She had not even applied for temporary transfer of her current business licence. The Appellant/ Defendant current business licence expired on December 2019. She should have secured her business licence. It was the Appellant/Defendant's duty to carry out a search with Labasa Town Council whether the shop space that she moved into to operate her business was approved by the Labasa Town

Council and will not have any hiccups in future operations of her current business. If the shop space or the Building she moved in was already approved by the Labasa Town Council, then Labasa Town Council, would have issued or renewed her business licence without any hesitation.

40. Since the Appellant failed to secure her business licence for the reasons hereinabove, I have no alternatives but proceed to dismiss grounds 4 and 5 of the Appellants Appeal accordingly.

H. Costs

41. Each party to the proceedings to bear their own costs of proceedings at the discretion of this Honorable Court.

I. In Conclusion

42. Grounds of Appeal Nos. 1, 2, 3, 4 and 5 fails and accordingly are dismissed.

J. Orders

- (i) The Appeal stands dismissed on all five (5) Grounds.
(ii) Each party to bear their own costs of the proceedings.
(iii) File Closed.

Dated at Suva this 21st Day of February, 2024.



cc: Sushil Sharma Law, Labasa.
Raramasi Law, Labasa