

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

Civil Action No. HBC 117 of 2024

**BETWEEN:**

**SABIR HUSSAIN**  
**PLAINTIFF**

**AND:**

**FIJI NATIONAL PROVIDENT FUND**  
**DEFENDANT**

**BEFORE:**

Acting Master L. K. Wickramasekara

**COUNSELS:**

Sunil Kumar Esquire for the Plaintiff  
FNPF Legal Services Department for the Defendant

**Date of Hearing:**

06 September 2024

**Date of Ruling:**

05 November 2024

**JUDGMENT**

01. The Plaintiff in this matter, by way of an Originating Summons has moved for the following orders from the Court,

- 1) **A Declaration** that the Defendant wrongly exercised its powers under Section 104 of the Fiji National Provident Fund Act 2011 in maintaining Departure Prohibition Order dated the 4<sup>th</sup> day of October 2018.
  - 2) **A Declaration** that the Departure Prohibition Order dated the 4<sup>th</sup> day of October 2018 is limited by Section 108 of the Fiji National Provident Fund Act 2011 in instituting proceedings for recovery of civil debt within due time.
  - 3) **A Declaration** that the Defendants action and/or assertion and/or claim against the Plaintiff for outstanding contributions (in-protest) leading to the imposition of the Departure Prohibition Order dated the 4<sup>th</sup> day of October 2018 is caught by latches.
  - 4) **An Order** for the Departure Prohibition Order dated the 4<sup>th</sup> day of October 2018 to be removed, revoked and/or uplifted with immediate effect.
  - 5) **That** irregularity arising therefore be cured by Order 2 of the High Court Rules 1988.
  - 6) **That** the time for service of this Originating Summons be abridged.
  - 7) **That** such further or other relief as seems just and equitable by this Honorable Court.
  - 8) **That** costs of this action be costs in cause.
02. The summons is supported with an Affidavit of Aitul Bi Hussain, the lawful sister and Power of Attorney Holder of the Plaintiff. She has stated that the facts averred in the Supporting Affidavit are information from the Plaintiff, his current solicitors and as of her knowledge.
  03. It is submitted that the Plaintiff has discovered the Departure Prohibition Order dated 04<sup>th</sup> day of October 2018 along with a letter dated 27<sup>th</sup> day of December 2017 issued by the Defendant, with the belongings of his late father, Khalil Hussain. The said letter was directed to ‘Sabir Builders’. The said letter was with reference to unpaid FNPF contributions to one Krishneel Rao and one Mohammed Shariff.
  04. It is alleged that ‘Sabir Builders’ was solely operated by the Plaintiffs late father, Khalil Hussain and hence the delay in responding to the letter of the Defendant. Furthermore, it is alleged that the Plaintiff had no communication over the hiring of staff of ‘Sabir Builders’.
  05. It is further alleged that the letter of the Defendant (dated 27/12/2017) had annexed pay slips to support the claim for unpaid contributions, however, the said pay slips do not reflect that they have been issued by ‘Sabir Builders’ and any information of the alleged workers employment with ‘Sabir Builders’. As such it is stated that the Plaintiff is disputing the same.
  06. It is further averred that the Defendants claim is for unpaid contributions from 2011 to 2017. It is therefore averred that the claim is out of time, since the 06-year period for

claiming the said contributions have passed and the Defendants failed to file necessary applications.

07. Moreover, it is averred that the pay slips as depended upon by the Defendant are scribbled upon and cannot be regarded as pay slips and hence the Defendant had issued the Departure Prohibition Order (dated 4/10/2018) *'in absence of clarity of the documents.'*
08. It is also averred that since the Defendant was aware that it had no clear and/or strong case, it had purposely delayed and/or did not file a civil case for recovery of funds.
09. It is further averred that the Plaintiffs solicitors upon a discussion with an officer of the Defendant had made an offer to pay \$ 2000.00 per employee (without admission of liability) in exchange of the Departure Prohibition Order to be uplifted. However, even upon a Demand Notice being issued by the Plaintiffs solicitors to this effect, the Defendant had failed to respond to the same.
10. As a result, it is averred that the Plaintiff is unable to freely move in and out from his home country. Furthermore, it is averred that the Plaintiff has various matters to attend to in Fiji and as such there's an urgency in uplifting the said Departure Prohibition Order.
11. It is also alleged in the Supporting Affidavit that,  
*"...based on the reasons hereinabove, the said Departure Prohibition Order is now nullified and/or moot and the Defendant's act in maintaining the same is therefore unlawful, unfair and unjustified and is thus in breach of the Plaintiff's right to personal liberty as enshrined by the Constitution of Fiji."*
12. The Defendant, having filed its Acknowledgment of Service of the Summons on 24/04/2024, filed its Affidavit in Response on 20/05/2024.
13. As per the Affidavit in Response, as sworn by one Laisani Y G Macedru, the Manager Legal, for the Defendant, it is averred that the Departure Prohibition Order (dated 4/10/2018) issued against the Plaintiff was made in relation to the unpaid mandatory contributions owed by the Plaintiff's business, "Sabir Builders" for the period, November 2011 to July 2017 for two employees, namely, Krishneel Rao and Mohammed Shariff and it has been issued pursuant to Section 104 of the Fiji National Provident Fund Act 2011 (The Act).
14. It is further averred that the Plaintiff, Sabir Hussain, has registered the business, 'Sabir Builders' with the FNPF on 16/06/2014 as the Director of the company and the Act provides for the issuance of Departure Prohibition Orders against the employers who fail to comply with the payment of mandatory contributions. The Plaintiff had

- left Fiji prior to the Departure Prohibition Order was issued by the Defendant on 04/10/2018.
15. The Defendant further avers that the unpaid mandatory contributions for the said period amounts to \$ 17458.68 and the loss of interests amounts to \$ 5515.41. It is further averred that the failure to pay the mandatory contributions is a 'strict liability offence' pursuant to Section 37 (1) (a) of the Act and an employer is duty bound to pay such contributions.
  16. Moreover, the Defendant has further averred that the offence under Section 37 (1) (a) is prosecuted under criminal proceedings and the limitation period of 6 years in civil matters has no application in such proceedings. It is also submitted that the business, 'Sabir Builders' could not be prosecuted as the Plaintiff had already left Fiji before a prosecution was instituted. However, a prosecution can still be initiated at anytime since there is no applicable limitation period for the criminal proceedings.
  17. It is also averred that the Plaintiff's actions in not paying the mandatory contributions have affected the retirement savings of the affected employees and the Defendant has a statutory duty to ensure that such contributions are paid by the employers.
  18. Further, the Defendant has averred that the settlement proposal made by the Plaintiff was not acceptable as the proposed sum was very low and that the Defendant intends to recover the full amount owed as unpaid contributions.
  19. Plaintiff, in filing an Affidavit in Reply on 18/07/2024 has averred,  
*"The Plaintiff does not have any record or knowledge that any individual by the name of Krishneel Rao and Mohammed Shariff ever worked or did work for Sabir Builders as our father was running Sabir Builders falsely representing himself as 'Sabir Hussain'.*
  20. It is also averred that as the Plaintiff is disputing the employment of the alleged employees, there is no legality in demanding a mandatory contribution. It is further averred that there is a time limitation for the collection of the contributions and the said demand by the Defendant is outside this time limit. Therefore, the demand for the contributions and the Departure Prohibition Order imposed on the said claim is therefore well outside the limitation period.
  21. It is further averred that the Defendant although placed a Departure Prohibition Order in 2018, failed to prosecute the matter until such time the Plaintiff made this application from the Court. The Plaintiff claims that the Defendant is acting in malice and that this is an extortion attempt to get money from the Plaintiff for people who never had any employment contract with the Plaintiff.
  22. It is also averred that pursuant to the Criminal Procedure Act, the Defendant is barred from bringing a summary trial before the Magistrates Court *'where the charge or*

*complaint was not laid within 12 months from the time when the matter of the charge or complaint arose.'*

23. Moreover, the Plaintiff avers that the Defendant had not placed any material before this Court to even consider whether these persons were employees of the Plaintiff. It is alleged that the salary slips are inconsistent in their handwriting, different in format and only some having stamps. It is alleged that the Defendant has failed to question the authenticity of these salary slips and thus has been biased against the Plaintiff.
24. Both parties have filed comprehensive written submissions in support of their respective positions and after completion of the Hearing, Court allowed both parties to file any supplementary written submissions, if they wished to do so. Accordingly, the Defendant had filed a supplementary written submission as well.
25. As argued in the Hearing and as per the written submissions of the Plaintiff, the main arguments against the issuing and maintaining the Departure Prohibition Order (DPO) against the Plaintiff dated 04/10/2018, are firstly, that the Defendants claim for unpaid contributions is out of time pursuant to Section 108 (2) (b) of the FNP Act 2011 (the Act) and as such, maintaining the DPO issued against Plaintiff is wrong in law. It is the contention of the Plaintiff that the unpaid contributions should only be recovered as a civil debt pursuant to Sec. 108 of the Act.
26. Defendant on the other hand has submitted that recovering unpaid contributions as a civil debt is only an option provided by the Act and that the Act does not preclude the Defendant in pursuing criminal proceedings pursuant to Sec. 37 of the Act.
27. I shall reproduce the relevant sections of the Act for clarity in this Judgment. Section 108 of the Act reads as follows,

***Recovery of unpaid contributions***

- 108 (1) Contributions, additional contributions and penalty amounts due under this Act and amounts due under the former law as contributions or surcharge may, without affecting any other remedy, be recovered by the Board as a civil debt from a person liable to pay them.*
- (1A) If payment of any contribution, additional contribution or penalty has not been made on or before the due date, a lien shall arise over the property of the person liable to pay such amounts to secure the payment of the amount of the contribution, additional contribution or penalty, and the Board or any officer or agent authorized by the Board may file a notice of such lien in the registry established under the Personal Property Securities Act 2017 to establish the priority date and time of such lien.*
- (2) Proceedings for the recovery of the amounts in subsection (1) as a civil debt—*
- (a) are to be commenced and continued by the Chief Executive Officer in the name of the Board; and*

- (b) *may, despite anything in any other written law to the contrary, be commenced at any time within 6 years after the date when the contribution or penalty amount became due.*

Section 37 of the Act reads as follows,

***Mandated contributions***

- 37 (1) *No later than the last day of each following month an employer must—*
- (a) *pay to the Board, for each person who was an employee of the employer for all or part of the month, the amount of contributions calculated in accordance with this section; and*
  - (b) *give the Board a remittance statement complying with the requirements of the regulations in relation to those payments.*

***Penalty — \$5,000.***

- (2) *Strict liability applies to subsection (1).*
- (3) *It is a defence to a prosecution for an offence against subsection (1) in respect of an employee that the employee was an exempt employee of the employer.*
- (4) *The amount of contributions for an employee for a month is the amount equal to 18% of the total wages payable to the employee by the employer for the month. The amount must be rounded up to the nearest cent.*

It is also important to note Section 112 of the Act which reads as follows,

***Court to order payment of contributions and interest***

- 112 *If a person is convicted or found guilty of an offence as a result of not paying contributions in respect of an FNPF member under this Act or the former law, the court shall, in addition to any other order that the court may make, whether by way of penalty or not, order the person to pay the Board any of the following—*
- (a) *mandated contribution;*
  - (b) *additional contribution;*
  - (c) *any other further unpaid contribution and additional contribution unpaid at the date of trial;*
  - (d) *a specified amount on account of the difference between the amounts that have been credited to the member's entitlements and the amounts to have been credited had the mandated or additional contributions been paid when due.*

28. Plain reading of Sec. 108 (1) of the Act makes it abundantly clear that recovering unpaid contributions as a civil debt is only one available remedy for the Defendant and the provisions under Sec. 108 shall not affect any other remedy available to the Defendant. Further, a clear reading of Section 37 along with the provisions in Section 112 of the Act is evident that the Defendant has an option for recovery of the unpaid contributions via criminal proceedings instituted pursuant to Sec. 37 of the Act.

29. However, the Defendant shall only be able to recover the unpaid contributions only if the employer is found guilty or convicted at such criminal proceedings. This is the reason the Act provides for a civil recovery process under Sec. 108 irrespective of any criminal proceedings being instituted. However, it is an option for the Defendant and is not the only remedy available. As such it is clear that there is no mandatory requirement for the Defendant to have commenced proceedings for recovery under Sec. 108 in this instance. Pursuant to Sec. 37 of the Act, there is no time limit to commence criminal proceedings. As such, the Court finds that the first argument of the Plaintiff holds no water and that it necessarily fails.
30. Secondly, it is the argument of the Plaintiff that the Plaintiff was not involved in hiring the two employees for which the unpaid contribution in question applies and that it was the father of the Plaintiff who was representing himself as the Director of the company and running all affairs relating to the company. Furthermore, the Plaintiff alleges that the claim for unpaid contributions is disputed on grounds of lack of proper documents and on the fact that the claim includes unpaid contributions from 2011 onwards whereas the company was registered with the Defendant only in 2014. It is therefore the contention of the Plaintiff that under these circumstances, maintaining the DPO is wrong in law.
31. It is however to be noted, that the Plaintiff is the Director of the company, Sabir Builders, and this entity is a sole trader. The Plaintiff, in the Court's considered view, cannot escape liability for the conduct of the business by simply stating that his father was running its affairs without the Plaintiff's knowledge. As a sole trader, the business entity, Sabir Builders, is the sole responsibility of the Plaintiff. I find this argument to be just a vague attempt by the Plaintiff to escape liability and has no merit.
32. Furthermore, the issues with the proof relating to unpaid contributions and of any disputes relating to the correct amount to be calculated as unpaid contributions, in Courts considered view are matters related to at any legal proceedings against the Plaintiff regarding such contributions. What is important to consider though is whether such disputes would legally affect the discretion of the Defendant to issue a DPO against the Plaintiff. In this regard, it is mandatory to consider Section 104 of the Act in its entirety.
33. Section 104 of the Act reads as follows,

***Departure prohibition orders***

104(1) *If—*

- (a) a person is liable to pay an amount as, or on account of, mandated contributions or additional contributions required to be paid by section 38(3);*
- (b) the amount is due and payable but has not been paid; and*

(c) *the Chief Executive Officer believes on reasonable grounds that it is desirable to prevent the person from departing from Fiji to another country without—*

(i) *fully satisfying the liability; or*

(ii) *making arrangements satisfactory to the Board for the liability to be fully satisfied;*

*the Chief Executive Officer may, by written order, prohibit the departure of the person from Fiji.*

- (2) *A departure prohibition order remains in force until revoked or set aside by a court.*
- (3) *A departure prohibition order in respect of a person does not prevent the deportation of the person under the Immigration Act 2003.*
- (4) *The Chief Executive Officer must, as soon as practicable after making a departure prohibition order in respect of a person—*
  - (a) *send a copy of the order to the person at the address of the person last known to the Board; and*
  - (b) *give a copy of the order, and such information as the Chief Executive Officer considers is likely to help facilitate the identification of the person, to the Permanent Secretary or the Director of the Department of Immigration.*
- (5) *The Chief Executive Officer may give a copy of the order and information described in subsection (4)(b) to any other department of the civil service if, in the Chief Executive Officer's opinion, to do so will assist in giving effect to the order.*

34. It is evident from Section 104 of the Act that the disputes on the proof of the claim and/or disputes regarding the amount of the claim shall not prevent the exercise of the discretion of the Defendant under Sec. 104 of the Act to issue a DPO. What is mandatory to be considered prior to exercising its discretion to issue a DPO is outlined in Sec. 104 (1) (a) (b) and (c) of the Act.
35. As averred by the Defendant in its Affidavit evidence, the Court finds that the requirements to be considered under Sec. 104 (1) (a) (b) and (c) has been duly considered by the Defendant whilst imposing the DPO. If there are any discrepancies regarding the amount due as mandatory contributions and/or any related issues, such matters can be brought to the attention of the Defendant to recalculate the said amount. However, in Courts considered view, such disputes shall not annul the exercise of the discretion by the Defendant to issue a DPO.
36. In this instance, it is clear that the Defendant has acted on the information provided by two employees of the Plaintiffs company and that the necessary information and the relevant calculations of the unpaid contributions have been duly communicated to the Plaintiff by way of a letter served at his last known address. (Annexure ABH 3 in the Supporting Affidavit is the letter so served). The father of the Plaintiff had even



responded to the said letter (Annexure ABH 4 in the Supporting Affidavit) and the Plaintiff in my view, cannot simply deny the knowledge of the same.

37. As already pointed out by the Court in the foregoing paragraphs of this Judgment, I do not find it to be a plausible argument that it was solely the father of the Plaintiff that was dealing with the affairs of the Plaintiff's company without any knowledge of the Plaintiff. The Plaintiff, as a sole trader, without taking any progressive steps whatsoever to resolve these issues relating to the affairs in his company has left Fiji and has kept silent over the years without any attempt to check on the status of his own company.
38. This conduct of the Plaintiff should necessarily be considered as victimizing the employees of the company who alleges that they are being deprived of their FNPF contributions rather than the actions of the Defendant in issuing the DPO to be portrayed as an attempt by the Defendant to victimize the Plaintiff as argued on behalf of the Plaintiff.
39. Thirdly, the Plaintiff argues that the DPO issued by the Defendant against him is a violation of his constitutional right to personal liberty. In its written submissions, the Plaintiff has referred to Section 9 (2) of the Constitution of Fiji. However, this section, as per the plain reading of it, applies to **a Court making an order** depriving a person of personal liberty for the purposes articulated in that section. I do not find that this section has any application to the current matter before the Court, as the DPO has not been issued by the Court.
40. Fourthly, the Plaintiff argues that the DPO issued by the Defendant against him is a violation of his constitutional right to freedom of movement. In this regard the Plaintiff relies on Sections 21 (1) and (3) of the Constitution of Fiji. There is no doubt that the Constitution of Fiji has guaranteed the right to freedom of movement to a person in Fiji. However, what the Plaintiff ignores to state is that this is not an absolute right. When considering Section 21 of the Constitution in its entirety, it is clear that there are limitations that can be legally placed against this right. I shall reproduce Section 21 of the Constitution in this Judgment for clarity.

***Freedom of movement and residence***

- 21.— (1) *Every person has the right to freedom of movement.*
- (2) *Every citizen has the right to apply for and be issued a passport or similar travel document, in accordance with any condition prescribed by written law.*
- (3) *Every citizen, and every other person lawfully in Fiji, has the right to move freely throughout Fiji and the right to leave Fiji.*
- (4) *Every citizen, and every other person who has a right to reside in Fiji, has the right to reside in any part of Fiji.*

(5) *Every person who is not a citizen but is lawfully in Fiji has the right not to be expelled from Fiji except pursuant to an order of a court or a decision of the Minister responsible for immigration on a ground prescribed by law.*

(6) *A law, or anything done under the authority of a law, is not inconsistent with the rights granted by this section to the extent that the law—*

(a) *provides for the detention of the person or enables a restraint to be placed on the person's movements, whether—*

(i) *for the purpose of ensuring his or her appearance before a court for trial or other proceedings;*

(ii) *in consequence of his or her conviction for an offence;*

or

(iii) *for the purpose of protecting another person from apprehended violence;*

(b) *provides for a person who is a non-citizen to be detained or restrained as a consequence of his or her arrival in Fiji without the prescribed entry documentation;*

(c) *provides for the extradition, on the order of the High Court, of a person from Fiji;*

(d) *provides for the removal from Fiji, on the order of the High Court, of any child who had previously been unlawfully removed from another country, for the purpose of restoring the child to the lawful custody of his or her parent or lawful guardian;*

(e) *provides for the removal from Fiji of a person who is not a citizen for the purpose of enabling the person to serve a sentence of imprisonment in the country of the person's citizenship in relation to a criminal offence of which he or she has been convicted in Fiji; or*

(f) *regulates, controls or prohibits the entry of persons on to land or property owned or occupied by others.*

(7) *To the extent that it is necessary, a law may limit, or may authorize the limitation of, the rights mentioned in this section—*

(a) *in the interests of national security, public safety, public order, public morality, public health or the orderly conduct of elections;*

(b) *for the purpose of protecting the rights and freedoms of others;*

(c) *for the purpose of protecting the ecology of any area;*

(d) *for the purpose of imposing a restriction on the person that is reasonably required to secure the fulfilment of an obligation imposed on the person by law; or*

(e) *for the purpose of imposing reasonable restrictions on the holders of public offices as part of the term*

(8) *Section 9(3) and (4) apply to a person whose right to freedom of movement is restricted pursuant to a measure authorized under a state of emergency in the same way as they apply to a person detained pursuant to such a measure.*

41. As evident from Section 21 (7) (d) of the Constitution of Fiji, the issuance of the DPO is not illegal or in breach of the rights guaranteed in the Constitution. Plaintiff has failed to satisfy this Court, with any acceptable evidence that the issuance of the DPO by the Defendant against the Plaintiff was ultra-vires and/or arbitrary or in breach of any fundamental rights of the Plaintiff as guaranteed by the Constitution.
42. Both parties have relied on the decision in *Nair v Fiji National Provident Fund; HBM108.2017 (27 September 2017)* in support of their respective positions in this matter. As per the principles accepted in this decision as a valid consideration for the issuance and maintenance of a DPO, as derived from the decision in *Herbert v Fiji Islands Revenue & Customs Authority; Mise Action 05.2010L (26 July 2010)*, I do not find the current DPO against the Plaintiff to be in breach of any of these principles. As discussed in previous paragraphs of this Judgment, the Plaintiff is a sole trader. The affairs of the company, therefore, are his sole responsibility.
43. Although duly notified of the unpaid mandatory contributions, the Plaintiff left the country without making any attempt whatsoever to resolve the issue. For over 07 years, he had remained silent on the matter, whereas it was his duty to resolve any issue relating to unpaid mandatory contributions pursuant to the FNPf Act. He appears to be currently residing abroad and as such is clearly a flight risk. I therefore find no violation of principles as referred to in the Nair's case (Supra) in the Defendants action in issuing the DPO. Besides, the Plaintiff has no obstruction in coming to Fiji. Upon his arrival in Fiji, he has the opportunity to duly attend to his statutory obligations on payment of unpaid mandatory contributions and then accordingly to have the DPO uplifted.
44. Finally, before I part with this Judgment, I find it necessary to mention here that the argument of the Plaintiff that pursuant to the Criminal Procedure Act, the Defendant is barred from bringing a summary trial before the Magistrates Court 'where the charge or complaint was not laid within 12 months from the time when the matter of the charge or complaint arose' has no application in this matter.
45. Although the Plaintiff, did not rely on this argument at the Hearing, it should be noted that, as correctly pointed out, on behalf of the Defendant, the relevant section in the Criminal Procedure Act, which had prompted this argument for the Plaintiff, is Section 187. However, Section 187 shall only apply to an offence which carries a maximum penalty which does not exceed 12 months imprisonment and/or a fine of \$ 1000.00. An offence under Sec 37 of the FNPf Act carries a penalty of \$ 5000.00. I shall reproduce Sec. 187 of the Criminal Procedure Act for clarity in this Judgment.

***Limitation of time for summary trials in certain cases***

- 187 (1) *This section applies to all offences the maximum punishment for which does not exceed imprisonment for 12 months or a fine of \$1,000 unless a longer time is allowed by any law for the laying of any charge for an offence under that law.*
- (2) *No offence shall be triable by a Magistrates Court, unless the charge or complaint relating to it is laid within 12 months from the time when the matter of the charge or complaint arose.*
- (3) *The Magistrates Court shall order the dismissal of any proceedings which are in breach of this section.*

46. Thus, in overall consideration of facts before this Court, it is the conclusion of the Court that the Plaintiff has necessarily failed to satisfy the Court to allow the prayers in the Originating Summons filed on 16/04/2024. The Court is therefore of the conclusion that the Originating Summons of the Plaintiff must accordingly be wholly struck out and dismissed subject to costs.

47. Orders of the Court,

- 1) The Originating Summons filed by the Plaintiff on 16/04/2024 is hereby wholly struck out and dismissed subject to the payment of costs as summarily assessed by the Court as follows,
- 2) The Plaintiff shall pay a cost of \$ 3000.00 to the Defendant within 21 days of this Judgment.



A handwritten signature in blue ink, appearing to read "L.K. Wickramasekara".

**L.K. Wickramasekara,**  
**Acting Master of the High Court.**

**At Suva**  
**05/11/2024**