

IN THE SUPREME COURT OF FIJI
CIVIL APPELLATE JURISDICTION

CIVIL PETITION NO. CBV 7 of 2021
(Court of Appeal No. ABU 59 of 2018)
(High Court No. HBC 86 of 2012)

BETWEEN : **SALESHNI GEETA RAM**
Petitioner

AND : **ITAUKEI LAND TRUST BOARD**
Respondent

Coram : **The Hon. Mr. Justice William Calanchini**
Judge of the Supreme Court

The Hon. Mr. Justice Terence Arnold
Judge of the Supreme Court

The Hon. Mr. Justice Filimone Jitoko
Judge of the Supreme Court

Counsel : **Mr R. Vananalagi for the Petitioner**
Mr J. Cati for the Respondent

Dates of Hearing : **2 and 14 August 2023**

Date of Judgment : **31 August 2023**

JUDGMENT

Calanchini J

- [1] This is a petition for leave to appeal from the judgment of the Court of Appeal allowing the Respondent's appeal from the High Court judgment delivered on 16 June 2016. The High Court (Abeyguneratne J) ordered specific performance of the contracts for a Residential Lease and an Agricultural Lease by the iTaukei Land Trust Board (the Board). The Board was ordered to pay \$8,000.00 as exemplary and punitive damages to Salesni Geeta Ram (the Petitioner) with post judgment interest fixed at 4% in accordance with section 4 of the Law Reform (Miscellaneous Provisions)(Death and Interest) Act 1935. Costs summarily assessed in the amount of \$2,000.00 were awarded to the Petitioner. The claim for general damages was "declined".
- [2] Being aggrieved by the orders of the High Court the Board filed a notice of appeal. Leave to appeal out of time (by almost four years) had been granted by Guneratne JA (as he then was) in a brief written Ruling dated 29 May 2020. The Court of Appeal in a judgment delivered on 28 May 2021 concluded that the offers of leases had been induced by misrepresentations, so that the Board's revocation of them was valid. The appeal was allowed and the orders of the High Court were set aside. The Board was awarded \$5000.00 costs of the appeal and the taxed costs of the High Court proceedings.
- [3] The Petitioner has then filed her timely petition for leave to appeal the decision of the Court of Appeal. In order to obtain leave the Petitioner is required to establish under section 7(3) of the Supreme Court Act 1998 that the case raises (a) a far-reaching question of law, (b) a matter of great general or public importance or (c) a matter that is otherwise of substantial general interest to the administration of civil justice. The Petition raises 10 grounds of appeal relating to (1) the scope of Regulation 18 of the iTaukei Land and Trust (Leases and Licences) Regulations and (2) what if any misrepresentations were made by the petitioner up until the time the Board offered the two lease contracts on 16 November 2011 and the effect of any such misrepresentations.

Background

- [4] On 1 May 2009 the Petitioner applied to the Board for a residential lease for 99 years in respect of land referred to as Lomolomo Lot 1 on DP 1418 comprising an area of 0.5893 hectares located at Nailaga in Ba Province (the Residential lease). On 11 May 2009 the petitioner applied to the Board for an Agricultural lease for 30 years in respect of land referred to as Lomolomo Lot 1 on DP 415 comprising an area of 4.2795 hectares at Nailaga in Ba Province (the Agricultural lease). At the time of the applications the two lots comprised one lease (the existing lease). This lease was due to expire in April 2011. The evidence established that the petitioner was aware of the identity of the lessee of the existing lease (Ashok Bai Govind, administrator of the Estate of Ram Dulari). However the petitioner was not a previous leaseholder of any area of the existing lease nor any part of the lands when she made her applications. Furthermore, when the petitioner lodged her applications there was no evidence that the existing lessee had at that time applied to renew the existing lease nor was there any other competing application for a lease or leases. However there was material (not in evidence at the trial) that indicated that the existing lessee had applied for renewal of the existing lease on 07/06/2010 but that his application had been overlooked by the Board (Record P127).
- [5] The application for a residential lease was made by way of a document with the heading "*Native Land Trust Board*" "*Application to Lease – Purposes Other than Agriculture.*" In this document the petitioner stated that her occupation was "*law student (USP)*" and that her "marital status" was "married". At line 2.7 the details of the land are required with particular reference to whether the application is for a "*New / Expiring Lease.*" The words "*new lease*" were written in response. The same responses appear in the later Application for an Agricultural Lease. Both applications were admitted into evidence as exhibits P13 and P5 respectively.
- [6] Shortly after the Board received the applications, it proceeded to interview the petitioner. The interview was by way of a document with the heading "*Native Land Trust Board*" "*Application Screening Form (Internal use Only).*" It is dated 11 May 2009 and has been signed by both the petitioner and a witness. (Ex PE21). At line 2.3 it is stated that the process is related to the Residential Lease application. Once again the Petitioner's marital status is requested and once again she has answered "*married*". At line 1.12 (page 2) the petitioner is requested to provide information as to any "*security offered for payment of*

lease offer and rent if application is successful.” The petitioner replied: “*Willing to pay full amount of offer, husband is working overseas.*”

- [7] Between 11 May 2009 and 8 November 2011 the Board’s file in relation to these applications appears to have remained dormant. There was no evidence before the trial Judge as to the reason for the prolonged inactivity on the part of the Board. It may be that the Board delayed any decision on the applications until the existing lease had expired. That occurred in April 2011 and still no action by the Board until November 2011. It would appear that no activity occurred until the petitioner was interviewed by “Lui” on 8 November 2011 (Exhibit DE1). Further communication from the Board before 16 November 2011 related to the Petitioner’s marriage certificate.
- [8] The parties are in agreement that on 16 November 2011, the Board offered the petitioner a residential lease for a period of 99 years commencing from 1 January 2012 over the land described in the application. The offer was accepted by the petitioner on the same day and referred to as a contract for Residential lease. Pursuant to the contract the petitioner on 16 November 2011 paid \$8283.00. On the same day the petitioner executed a residential lease prepared by the Board which was delivered to the Board for its execution, stamping and registration. (P259-261 High Court Record)
- [9] In relation to the Agricultural lease it was agreed that on or about 16 November 2011 the Board also offered to the Petitioner an Agricultural Lease for a period of 99 years (although the offer letter states 30 years) commencing from 1 January 2012 over the land described in the application. The offer was accepted by the petitioner on the same day and referred to as a Contract for Agricultural lease. Pursuant to the contract the petitioner on 16 November 2011 paid \$500.00 to the Board to enable the Board to attend to stamping and registration of the lease. It was agreed that the balance premium, rental for 1 year, lease administration fees and part of the lease processing fee would be paid from cane proceeds after the petitioner was issued with the Agricultural lease. On the same day (16 November 2011) the petitioner executed an Agricultural lease prepared by the Board and then delivered the lease to the Board for its execution, stamping and registration. (P259 – 261 High Court Record)
- [10] Subsequent to the undisputed events set out in paragraphs 10 and 11 above, the existing lessee wrote two letters that were admitted into evidence. The first is dated 18 November

2011 (ex. DE2) addressed to the Manager Western with cc copies to the Prime Minister, the Board's General Manager in Suva and others. Although the lessee claims to have sought renewal of the existing lease, there was no evidence before the High Court to substantiate that claim. According to an internal Board memorandum in the Record before this Court, an application from the existing lessee was never considered by the Board, although apparently received on 7 June 2010. (Record P127). It should have been served on the Board no later than April 2010 as required by Regulation 18.

- [11] The second letter is dated 21 November 2011 (ex. DE3) and is addressed to the Board's Manager in Lautoka. There is no reference in this letter to an application for renewal of his existing lease. The principal complaint appears to relate to the immediate occupancy by the petitioner of the residential lease when "letter of offer gives her start of 1/1/12."
- [12] By letter dated 9 February 2012 (ex. DE4) the Permanent Secretary, Prime Minister's Office, wrote to the Board's General Manager enclosing a copy of correspondence addressed to the Prime Minister concerning a lease renewal and "Forced takeover" of the leased land in Ba. The Board's General Manager was directed to "resolve the issues highlighted immediately." Unfortunately the remaining relevant correspondence was not put into evidence. The Board subsequently repudiated both contracts. During cross-examination the Board's witness conceded that but for the complaint made by the existing lessee the petitioner would have "retained" the leases. The same witness also stated that to his knowledge no application for the renewal of the existing lease had ever been made by the existing lessee.

Regulation 18

- [13] Regulation 18 of the iTaukei Land Trust (Leases and Licences) Regulations is headed "Renewal of Leases" and so far as is relevant provides:

"18(1). This regulation shall apply in relation to a person holding iTaukei land under a lease for a term of fixed duration by virtue of an agreement for a lease for which such a term whether such term commenced before or after the commencement of the Regulations except where: (none of the exceptions are relevant to the present proceedings).

- [14] Regulation 18(2) requires a person described in sub regulation (1) to serve on the Board not earlier than 2 years and not later than one year before the expiration of the existing lease (the current term) a notice in writing "of his or her desire" (i.e. a notice to renew).
- [15] Apart from granting the renewal of a lease it is open to the Board to issue a new lease to an applicant who is not an existing lessee of iTaukei land. An application for a new lease may be made at any time whether or not there has been an application to renew served on the Board within the prescribed time. It was conceded by Counsel for the Board that the same form is to be used by both an application for renewal by way of the prescribed notice and by an applicant for a new lease. The issue raised in the petition concerning Regulation 18 is whether the petitioner's applications were in effect applications by an existing lessee to renew an existing lease or whether the applications by the petitioner were for new leases. An application for a renewal of lease must be made in accordance with Regulation 18 and an application for a new lease may be made using the same form at any time. Ordinarily an application for a new lease would not be considered or processed until the time for applying for a renewal by an existing lessee had passed. It should be noted however that this issue was not directly raised in either the statement of claim or the Defence.
- [16] Apart from observations in paragraph 6.10 of the High Court judgment, which were based on a mistake of fact, the learned Judge has not directly addressed the issue of the scope of Regulation 18.
- [17] The Court of Appeal appears to have concluded that the Petitioner was applying for the renewal of an existing lease which in Regulation 18 is also referred to as a new lease. This should be read as a new lease to an existing lessee of the leased land in question. Regulation 18(3) sets out the options open to the Board when it determines an application under Regulation 18(2). However the Court of Appeal did not consider that the same form is to be used for an application for the renewal of a lease under Regulation 18 and also for an application for a new lease by an applicant who does not fall within Regulation 18(1), in other words, who is not an existing lessee in respect of the land the subject of the application. It is quite clearly stated at line 2.7 of the application documents that the application may be for a new lease or for an expiring lease. Furthermore for an applicant applying for a new lease under section 8 of the iTaukei Land Trust Act there is no limitation

on when such an application may be made or must be made. Also it appears that an expiring lease does not ordinarily require a notice from the Board to the existing lessee until and or unless a renewal application is lodged in accordance with the requirements of Regulation 18. The Petitioner's applications were not and could not be regarded by the Board as renewal applications since on the face of the applications the Petitioner had no family connection to the existing lease and nor was there any indication on either application from that the Petitioner was claiming any such connection. The Petitioner and her first husband were divorced in 2002 and although they had a child together in 2006, she had ceased residing with him in about 2008. Although he was related to the existing lessee, that alone was not sufficient to indicate that the Petitioner's applications constituted an attempt to obtain the renewal of a lease under Regulation 18.

- [18] The Court of Appeal referred to and relied upon a file note dated 15/11/2011. However that note is unsigned and was not put into evidence. Under those circumstances its reliability has not been tested and I would not be prepared to attach any weight to its contents.
- [19] As a result, on the evidence before the learned Judge I do not accept that the Petitioner attempted to establish a family connection with the Bal Govind family (the existing lessee) in order to give the appearance that her applications were for the renewal of a lease or leases. The fact that the Petitioner had applied early for the two new leases was explained on the basis that she had been advised to do so by one of the Board's officers. That evidence was not challenged. Her applications were not applications under Regulation 18.
- [20] Counsel for the Board relied on exhibit P16 being a receipt dated 01/05/09 for \$3,000.00 received from the Petitioner. Counsel pointed out that the receipt was for money paid in respect of "renewal of lease Lot No. 1418." However as Counsel for the Petitioner pointed out, the receipt was given by the landowning *mataqali* for the payment of \$3,000.00 as a good will payment. To that extent whether the lease in question was a renewed lease by an existing lessee or a new lease by a different lessee may not have been of great concern to the *mataqali*.

Misrepresentations

- [21] The misrepresentation that appears to have concerned the Court of Appeal was that relating to marital status. It is correct that on the initial application documents the Petitioner described her "marital status" as married. These documents were dated in May 2009. At that time the Petitioner had ceased residing with her first husband (divorced in 2002) a year or so earlier and had not yet married her future (second) husband. However as far as can be ascertained that appears to be the only misrepresentation on the application forms. By itself it is difficult to determine how material the question and answer were in relation to the ultimate decision of the Board to enter into contracts with the Petitioner for the two leases.
- [22] There was no evidence adduced at the trial concerning the relevance of marital status. The same question would be required to be answered by a male applicant. The name of any spouse is not requested, nor whether they live together or are living separately. Particulars of the spouse or any children are not required. There was no evidence before the court as to whether it made any difference to the fate of the applications if an applicant provides a particular answer in preference to another answer. In other words there was no evidence to determine whether a wrong answer to that question was in any way material to the outcome of the application. The Petitioner was not asked in cross-examination any questions as to why she answered 'married'. The defence on that aspect of misrepresentation was not established to the extent that it justified the refusal to register the leases and then repudiate the contracts.
- [23] The evidence established that before the offers of lease contracts in the two letters dated 16 November 2011 were sent to the Petitioner, the Board was aware that the Petitioner was married to Arvin Chand. On page 318 of the Court Record the Petitioner in her evidence provided the following answers:

Q. Prior to offer did you ever ask Lui or any other TLTB officer what about marriage status?

A. No. Towards the end they told me to bring marriage certificate before offer.

Q. What did you do?

A. I get it from Registrar's Office and gave it.

- Q. *What marriage certificate?*
A. *Arvin present husband.*
Q. *Who asked to give it?*
A. *Manager.*
Q. *What happen after handing over marriage certificate?*
A. *Offer from TLTB – 16/11/2011."*

[24] The Board also knew that Arvin, who was working in New Zealand, was not connected to the family of the existing lessee. The Board proceeded to offer two lease contracts to the Petitioner armed with that information. The Board did not appear to be particularly concerned about the Petitioner's marital status, whatever it may have been, between May 2009 and November 2011.

[25] As a result I am not satisfied that the Petitioner has induced the Board to issue the offer letters and enter into the two contracts for leases, nor am I satisfied that the Petitioner has misrepresented any material fact that would constitute a basis for the Board avoiding the contracts. It is apparent from the evidence that the Board has reacted to the political pressure from the office of the Prime Minister as a result of a complaint made by the original lessee. The complaint was based on a claim by the existing lessee that he had sought a renewal of his existing lease. The subsequent justification for avoiding the contracts was framed in terms of misrepresentation thereby attempting to shift responsibility to the Petitioner. The fact was that the Board had not fulfilled its obligation to administer iTaukei Land in the best interests of the *matagali* owners. I can do no better than refer to the observations of Jitoko J in **iTaukei Land Trust Board v. Lal** [2023] FJSC 10; CBV 3 of 2021 (28 April 2023):

"The Board has a statutory duty and responsibility to ensure that the management of iTaukei land is carried out in a proper manner in accordance with the law and in keeping with the trust placed upon it by the native (iTaukei) landowners. Unfortunately it does appear that it failed in this instance."

Conclusion

[26] For the reasons stated I would grant the Petitioner leave to appeal to the Supreme Court. I would do so on the basis that the Petition has raised a matter of great public importance concerned with the management of iTaukei Land by the Board and its statutory obligations to manage the grant of new leases and the renewal of existing leases. I would treat the application for leave to appeal as the hearing of the appeal. I would allow the appeal. I

would set aside the orders of the Court of Appeal and I would restore the orders of the trial Judge. I would also order the Board to pay to the Petitioner her costs in the Court of Appeal and the costs of her appeal to the Supreme Court which I would summarily assess in total at \$10,000.00

Arnold J

- [27] I have had the opportunity to read the judgment of Calanchini J in draft. I agree with his reasoning and with the orders he proposes. There is, however, one point I wish to emphasise.
- [28] As Calachini J notes, although it was not formally in evidence in the High Court, there was an internal email, sent in November 2011 from one officer of the Board to another, in the Record before this Court. It was an exhibit to an affidavit filed on behalf of the Board in opposition to the petitioner's application for summary judgment. That email memorandum notes that Ashok Balgovind, the son of the existing lessee (who was deceased), had filed an application for renewal of the lease on 7 June 2010. This was not within the 1 – 2 year timeframe required by Reg 18(2), but was close to it. The memorandum records that the Board made no response to this application.
- [29] Accordingly, as from 7 June 2010, the Board had notice of both the petitioner's applications for new leases and Mr Balgovind's application for a renewal of the existing lease (albeit that it was filed out of time). Given that the leases did not expire until April 2011, the Board had both the obligation and the time to consider the competing applications and satisfy itself as to the position of each of the applicants.
- [30] It appears, however, that the Board failed to address Mr Balgovind's application at all. The blame for that cannot be attributed to the petitioner but must rest with the Board. It was its failure to do what it should have, namely consider the applications from both the petitioner and Mr Balgovind, that created the predicament the Board now finds itself in. Quite apart from the matters which Calachini J discusses about the petitioner's alleged misrepresentations (with which I fully agree), the Board could not have been misled had it addressed Mr Balgovind's application in the way it should have.

Jitoko J

[31] I have had the advantage of reading in draft the judgment of Calanchini J. I agree that for the reasons given, the appeal should be allowed.

I equally share Arnold J's concern on the Board's inattentiveness to its statutory responsibilities which, if it exercised with due care and attention, would not have brought these proceedings this far.

The Orders of the Court are:

- (1) *Leave to appeal granted.*
- (2) *Appeal allowed.*
- (3) *Orders of the Court of Appeal set aside.*
- (4) *Orders of the High Court restored.*
- (5) *Petitioner's costs in this Court and in the Court of Appeal summarily assessed at \$10,000.00 in total.*



**Hon. Mr Justice William Calanchini
Judge of the Supreme Court**



**Hon. Mr Justice Terence Arnold
Judge of the Supreme Court**



**Hon. Mr Justice Filimone Jitoko
Judge of the Supreme Court**

