

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION**  
**AT LAUTOKA, FIJI**

**CIVIL JURISDICTION**

**Civil Action No. HBC 36 of 2018**

**BETWEEN** : **NATURE'S WAY COOPERATIVE FIJI LIMITED**, established  
under the Co-operative Act of Fiji and having its principal office of  
business at Nadi Airport, Nadi.

**PLAINTIFF**

**AND** : **FIJIAN COMPETITION AND CONSUMER COMMISSION**  
established under the Commerce Commission Act 2010 and having  
its principal office of business at 43 Gorrie Street, Suva.

**DEFENDANT**

**Counsel:** : Mr Damodaran Nair for the Plaintiff  
: (Ms) Christina Choy for the Defendant

Date of Hearing : Tuesday, 08<sup>th</sup> May, 2018

Date of Ruling : Monday, 16<sup>th</sup> July, 2018

**RULING**

**(A) INTRODUCTION**

(1) The matter before me stems from the Plaintiffs 'Originating Summons' filed on 21<sup>st</sup> February, 2018, seeking the grant of the following orders;

1. *DECLARATION that the exclusion provisions of Section 46 (e) & (g) of the Commerce Commission Act 2010 is applicable to the Plaintiff.*

2. A DECLARATION that the Defendant acted in excess of its jurisdiction and without any justification by issuing the demand notice dated 6<sup>th</sup> February 2018 against the Plaintiff without first identifying the breach under the Commerce Commission Act 2010.
  3. AN ORDER that the Defendant withdraws the said demand notice dated 6<sup>th</sup> February 2018 issued against the Plaintiff.
  4. Any further relief or orders the Court may consider appropriate in the circumstances.
  5. Damages.
  6. Costs of this application.
- (2) The 'Originating Summons' is supported by an Affidavit sworn by 'Livai Tora', the 'Board Chairperson' of the Plaintiff, sworn on 20<sup>th</sup> February, 2018.
- (3) The application is vigorously resisted by the Defendant. An 'Affidavit in Opposition' sworn on 12<sup>th</sup> April, 2018 by 'Irfan Hussain', the Investigating Officer in the employ of the Defendant was filed. The Plaintiff did not file an 'Affidavit in Answer'.

**(B) THE FACTUAL BACKGROUND**

- (1) What are the circumstances that give rise to the present application?

To give the whole picture of the action, I can do no better than set out hereunder the averments/assertions of the pleadings/affidavits.

- (2) The 'Affidavit in Support of the Summons' which is as follows sets out sufficiently the facts surrounding this case from the Plaintiffs' point of view.
1. THAT the Plaintiff is a Co-operative that comprise of its bona fide members who have satisfied the requirements of the Bilateral Quarantine Arrangement between New Zealand and Fiji for the treatment of fruit fly species of economic significance for the export of commodities under the said agreement.

2. THAT on 20<sup>th</sup> March 2017 we received a letter from the Defendant alleging misuse of monopoly power emanating from the complaint by three expelled members of the Plaintiff. Copy of the said letter is annexed as annexure "LT-01".
3. THAT the Defendant failed to identify the monopoly power which the Plaintiff possessed that it has purportedly abused but primarily was seeking the reinstatement of the three expelled members to the Co-operative; Pacific Harvest Ltd, Deens Exports and Tropiko Exports.
4. THAT the expulsion of the three members was justified fair and lawful therefore the Defendant did not have any jurisdiction to intervene into the conduct of the affairs of the Plaintiff.
5. THAT on 22<sup>nd</sup> March 2017 the Plaintiff responded denying the allegations contained in the letter referred to in paragraph 2 above and further explained the functions of the Plaintiff which did not constitute any breach or unfair conduct. Copy of the said letter is annexed as annexure "LT-02".
6. THAT on 28<sup>th</sup> July 2017 the Defendant wrote stating that it has the powers to receive and consider complaints concerning the interest of consumers who were merely seeking reinstatement. The proprietors of these companies were expelled due to breach of the by-laws of the Plaintiff and since then they have been soliciting influence from the respective agencies seeking their reinstatement. Copy of the said letter is annexed as annexure "LT-03".
7. THAT on 23<sup>rd</sup> August 2017 the Defendant acknowledged that the High Temperature Forced Air (HTFA) facility was for the export of certain commodities to New Zealand after treatment but proposed to regulate the price for treatment which is contrary to the Co-operative Act and the by-laws under which the Plaintiff operates and in excess of its jurisdiction. Copy of the said letter is annexed as annexure "LT-04".
8. THAT on 30<sup>th</sup> August 2017 we wrote to the Defendant explaining the circumstances why the three persons named in paragraph 3 above were expelled from the Co-operative. Copy of the said letter is annexed as annexure "LT-05".
9. THAT on 20<sup>th</sup> September 2017 the Defendant responded stating that the competition in the Fijian Market has lessened when in the contrary there is no competition as the Plaintiff merely facilitates the quarantine services under the bilateral agreement to treat the fruit fly species and operating at breakeven point,

a non-profit organization. Copy of the said letter is annexed as annexure "LT-06".

10. THAT on 30<sup>th</sup> August 2017 we provided a comprehensive background of the nature of our operations and why the services are only available to the members of the Plaintiff but the membership is not restricted to the existing members and any exporter who meets the criteria of the Bilateral Quarantine Agreement may apply for membership and upon paying the appropriate fees can become members to use the facility. Copy of the said letter is annexed as annexure "LT-07".
11. THAT on 6<sup>th</sup> February 2018 the Defendant caused a demand notice upon the Plaintiff seeking certain information which we believe was beyond their jurisdiction and unjustified. Copy of the said letter is annexed as annexure "LT-08".
12. THAT on 15<sup>th</sup> February 2018 the Defendant executed a search warrant against the Plaintiff and uplifted the various documents for the purpose of which did not fall within their statutory powers. Copy of the said letter is annexed as annexure "LT09".
13. THAT the Defendant's cause of action is unjustified as it was purported to serve the interest of the three expelled exporters whose lawful redress would have been to seek recourse in the Court and not to unduly influence the Defendant in the pursuance of their ulterior motives.
14. THAT I am advised and verily believe that the Defendant is a creation of Statute therefore it does not possess unfettered discretion in investigating the Cooperative whose operation does not fall within its purview.
15. THAT this Honourable Court is respectfully requested to determine whether the Plaintiff is covered under the exclusion clauses under which the Defendant is purporting to exercise its powers.
16. THAT I pray to this Honourable Court to grant me the prayers sought in the Summons filed herein and any further or other orders or relief as this Court deems just in the prevailing circumstances.

(3) The Defendant in its 'Affidavit in Opposition' deposes *inter alia*;

1. *I am the Investigating Officer in this matter and depose the facts herein as within my knowledge save and except where stated to be on information and belief and where so stated, I verily believe to be true.*
2. *I have read through the Plaintiff's Affidavit in Support filed on 21<sup>st</sup> of February 2018 ("the said affidavit") and have understood its meaning and effect.*
3. *IN order for me to respond accordingly to the said affidavit, I will have to set out the background to the events, which incidentally gave rise to the Plaintiff making such an application.*
4. *ON 8 March 2017, Fiji Commerce Commission (FCC) which is now known as Fijian Competition and Consumer Commission (FCCC) received three (3) complaints from expelled members of Nature's Way Cooperative (Fiji) Limited namely Pacific Harvest Limited, Deans Marketing and Tropiko Exports. They had complained that Nature's Way Cooperative (Fiji) Limited (hereinafter referred to as the Plaintiff) was discriminatory and prohibitive in its business practice and abused its monopolistic position to deny same opportunity to non-members and expelled members to use the High Temperature Forced Air (HTFA) quarantine treatment facility in Nadi.*
5. *ALL three exporters (Pacific Harvest Limited, Deans Marketing and Tropiko Exports) were exporting four (4) products as per Bilateral Quarantine Agreement (BQA) commodities since 2007, namely egg plants, papaya, mangoes and breadfruit which required the use of the High Temperature Forced Air (HTFA) quarantine treatment.*
6. *THE High Temperature Forced Air (HTFA) quarantine treatment is located at the Plaintiff's treatment facility in Nadi, which is the only working High Temperature Forced Air (HTFA) quarantine treatment facility in Fiji.*
7. *THAT according to the complainants, they were expelled in 2016 from the Cooperative on the bases of the votes of bona-fide members of the Plaintiff. Subsequent to expelling them from the Cooperative, they were stopped from accessing the High Temperature Forced Air (HTFA) quarantine treatment facility of NWC to treat their Bilateral Quarantine Agreement (BQA) commodities which lead to closure of their business as they were unable to export commodities as per the BQA. This lead to the reduction in the number of employees and income lose for the three (3) businesses.*

8. THE Plaintiff's High Temperature Forced Air (HTFA) quarantine treatment facility is the only such facility in Fiji which is operational hence the monopolistic nature consequently there is no competition in the market.

*The said affidavit*

9. I will respond to the substantive parts of the said affidavit and where no response is made to a particular paragraph that non-response is not to be taken as an admission by me.
10. THE contents of paragraph 2 are agreed upon however contents of paragraph 3 and 4 are disputed. As per the letter dated 20 March 2017 on paragraph 7 it clearly stated that the Commission was seeking a response from the Plaintiff and not seeking the reinstatement of the three (3) members. The letter in the 2<sup>nd</sup> paragraph had informed that pursuant to Section 15 of the Fijian Competition and Consumer Commission Act 2010 (FCCC Act 2010), the Commission has powers to receive and consider complaints concerning matters affecting competition and interest of consumers, and to investigate if it warrants. As such complaints were received and the Commission needed a response from the Plaintiff to ascertain the facts. Section 119 of the FCCC Act 2010 gives the powers to the Commission to obtain information. The conduct of the Plaintiff is not justified by denying access to HTFA treatment facility to expelled members, which is an essential facility.
11. THE contents of paragraph 5 are agreed upon. On 31 March 2017 the Commission replied to the Plaintiff's response. As per the same letter the Commission clarified its position and stated that it seeks a response as investigation is currently underway.

*Annexed herewith is a copy of the letter dated 31<sup>st</sup> March 2017 marked as "A1".*

12. THAT thereafter, on the 10 April 2017 FCCC received a response dated 4 and 5 of April 2017 to our letter dated 31 March 2017 where the Plaintiff requested for more time to submit all the documents.

*Annexed herewith is a copy of the letter dated 10 April 2017 marked as "A2".*

13. IN response to paragraph 6, FCCC had written to the Plaintiff and upon further investigation by the Commission it was ascertained that the Plaintiff is in contravention of certain provisions of the FCCC Act 2010. As such the

*Commission wanted to resolve the issue at hand and called for a meeting with Ministry of Industry, Trade and Tourism (MTT) and Biosecurity Authority of Fiji (BAF) to meet with the plaintiff. The Commission was proposing for a meeting and wanted confirmation from the Plaintiff.*

14. *THAT subsequently on 9 August at 9.00am a joint meeting was held at Aviva Farms with Mr. Livoai Tora (Plaintiff Chairperson), Mr Hilary M. J. Kumwenda (Chief Executive Officer BAF), Mr. Marika Naiyaga (Registrar of Cooperatives MITT), Mr. Joel Abraham (Chief Executive Officer FCCC) and Mr. Roshan Shah (Senior Compliance Officer FCCC). During the meeting the issue of refusing non-members from accessing the HTFA treatment facility was discussed. Mr Abraham suggested a two-tier payment system which would allow access to HTFA treatment facility for members and non-members. Mr. Tora agreed with the proposal and proposed \$0.72 for members and \$0.80 for non-members. Mr. Hilary Kumwenda emphasized that the facility is essential.*
  15. *THAT paragraph 7 is agreed upon and it is further added that FCCC wrote to Mr. Livoai Tora and it was regarding updates of the meeting which was held on 9 August 2017.*
  16. *THE contents of paragraph 8 are agreed upon which was a response to FCCC's letter dated 23 August 2017.*
  17. *AS per paragraph 9, FCCC responded on 19 September 2017 and not on 20 September 2017, the Plaintiff was given an opportunity to have the matter resolved and had not acted so. FCCC had to consider alternative options under the FCCC Act 2010 to address the problem. Thereafter, the Plaintiff responded on 20 September 2017.*
- Annexed herewith is a copy of the letter dated 20 September 2017 marked as "A3".*
18. *AS per paragraph 11 it is agreed that a Demand Notice was issued to the Plaintiff from FCCC dated 6 February 2018 however it is within the Commission's jurisdiction pursuant to section 119 of FCCC Act 2010.*
  19. *AS per paragraph 12 of the Affidavit and demand Notice dated 6 February 2018, 5 days was given to the Plaintiff to furnish FCCC with the required information.*

*Since the plaintiff did not adhere and failed to furnish the documents as requested a Search Warrant was executed which is well within the jurisdiction of FCCC.*

20. *THE contents of paragraph 13 and 14 are disputed. FCCC is an independent Fijian statutory authority whose role is to enforce the FCCC Act 2010, promoting competition, fair trading, regulating prices in markets where competition is lessened or limited and regulating monopolistic market situations including national infrastructure for the benefit of all Fijians. FCCC acted in accordance with section 43C "Procedural Fairness" of the FCCC Act 2010 and maintaining procedural fairness. Upon investigation FCCC noted that the conduct of the Plaintiff constitutes unfair trade practice and misuse of market which are possible breaches of the FCCC Act 2010 whereby the Plaintiff has stopped its expelled members from using the HTFA quarantine treatment facility.*
21. *THAT the Plaintiffs' application is humbly opposed and it is respectfully submitted to dismiss their application with costs.*

**(C) DETERMINATION**

- (1) As a preliminary point, it should be first observed that the immediate origin of these proceedings is an application by the Plaintiff by way of 'Originating Summons' filed on 21<sup>st</sup> February 2018.

In the 'Originating Summons', the Plaintiff was described as;

*NATURE'S WAY COOPERATIVE FIJI LIMITED, established under the Co-operative Act of Fiji and having its principal office of business at Nadi Airport, Nadi.*

- (2) The Plaintiff, 'Nature's Way Co-Operative Fiji Limited' is a 'Co-Operative' registered under the **Co-Operatives Act, 1996**.
- (3) **What is the effect of the registration?**

Section 14 of the Co-Operatives Act, 1996 provides;



### *Effect of registration*

*The registration of a co-operative shall render it a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold movable and immovable property, to enter into contracts, to institute and defend suits and other legal proceedings and to do all things necessary for the purposes of its by-laws.*

(Emphasis added)

#### (4) **What does this mean?**

It means that the Plaintiff, 'Nature's Way Co-Operative Fiji Limited' is a **body corporate**. Body Corporate broadly means a Co-operate entity which has a legal existence. Therefore, the Plaintiff has a legal standing in the eyes of the law, meaning it has the legal capacity to enter into contracts, assume obligations, incur and pay debts, sue and be sued, and to be held responsible for its actions.

#### (5) It is important at this juncture to note that the 'Originating Summons' was filed **in person**. What is more, the Plaintiff proceeded in person in all the pleadings filed until the submissions made by "**Oceanica IP Lawyers**" at the hearing before this Court. Of course, this is in breach of Order 5, r.6(2) which states that a body corporate may not begin or carry on proceedings in the High Court otherwise than by a barrister and solicitor. In the current climate, it is desirable to set out Order 5, r.6 in full. It is as follows;

#### *Right to sue in person (O.5, r.6)*

*6.-(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.*

The wording of Order 5, r.6 (2) of the High Court Rules, 1988 is perfectly clear to me. The language is clear and distinct; **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. Therefore, the Plaintiff is disentitled to commence proceedings otherwise than by a Barrister and Solicitor. The Plaintiff has no standing to commence the proceedings in person. As I said earlier, the Originating Summons was filed in person. The Plaintiff proceeded in person in all the pleadings filed until the submissions made by “Oceanica IP Lawyers” at the hearing before this Court. As His Lordship Justice Finnigan pointed out in Sunview Motel & Youth Hostel Limited v Babu Singh and Others, HBC 097 of 2006, Date of Decision, 19<sup>th</sup> July, 2006 this is a fundamental defect and it cannot be cured under Order 2. I am content to adopt the same approach. That really concludes the matter and the Originating Summons should be dismissed.

The circumvention or avoidance of the provisions of Order 5, r.6 (2) of the High Court Rules, 1988 cannot be condoned. It is notorious that the provisions of the Order 5, rule 6(2) is ignored. It is rather startling that the Defendant did not choose to bring the attention of the court to the fundamental defect in the immediate origin of these proceedings in the High Court. That causes me concern. In my opinion it would be most unwise, and it might be in many cases most injurious to the necessities of justice, that the Court should say that it has no power to make an order because the Defendant did not choose to bring the attention of the Court to the fundamental defect in the immediate origin of these proceedings in the High Court. Beyond that, of course, the Court is bound to observe the rules of the High Court. The Court cannot say, because the rule is disregarded by those whose duty is to regard it, therefore the rule must be treated as obsolete and of no consequence.

The Court would be acting contrary to its plainest duty if it refused to observe the High Court Rules. The rules are an indispensable framework for the orderly administration of justice. The principle is that the rules of Court and the associated rules of practice devised in the public interest to promote orderly administration of justice must be observed.

I do not think this Court can for a single moment give countenance to the notion that any neglect of the provisions of High Court Rules can absolve persons from the consequences of disregarding them when objection is not raised, as it is here not raised, by a person having right to raise it.

The Court's duty is to give meaning to the rules of the High Court in the language in which it is expressed, to achieve its apparent purpose and to apply them to litigation in today's world.

**The High Court Rules, 1988 should be given its proper operation!**

One final word. The need for and the importance of complying with the Rules were emphasized as far back as 1984 by the Fiji Court of Appeal in "Kenneth John Hart v Air Pacific Ltd", (Civil Appeal No. 23 of 1983, Judgment delivered on 16<sup>th</sup> July 1984).

In 1995, the Fiji Supreme Court, the highest Court in the land warned; "*we now stress, however, that the Rules are there to be obeyed. In future practitioners must understand that they are on notice that non-compliance may well be fatal to an Appeal*" See; Venkatamma v Ferrier – Watson, (Fiji Supreme Court Civil Appeal No. CBV 0002 of 1992, judgment delivered on 17<sup>th</sup> November 1995, at p.3 of the judgment).

In August, 1997, the Fiji Court of Appeal in Rabuka v Dreunamisimisi (1997, FJCA 24) held as follows:-

*"In all the circumstances, having regard to the history of the proceedings in the High Court and bearing in mind what the Supreme Court said in Venkatamma, we have decided that the proper course for us to follow now is to reject the application for further time to comply with rule 17 and to dismiss the Appeal."*

In the decision of the Privy Council in Ratnam v Cumarasamy and Another [1964] 3 All E.R. at page 935, Lord Guest in giving the opinion of the Board to the Head of Malaysia said, *inter alia*:

*"The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation. The only material before the Court of Appeal was the Affidavit of the Appellant. The grounds there stated were that he did not instruct his Solicitor until a day before the record of appeal was due to be lodged, and that his reason for this delay was that he hoped for a compromise."*

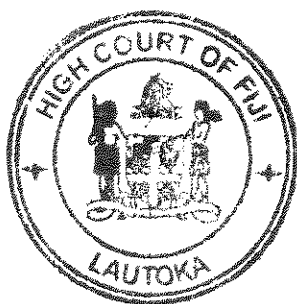
*Their lordships are satisfied that the Court of Appeal was entitled to take the view that this did not constitute material on which they could exercise their discretion in favour of the Appellant. In these circumstances, their lordships find it impossible to say that the discretion of the Court of Appeal was exercised on any wrong principle."*

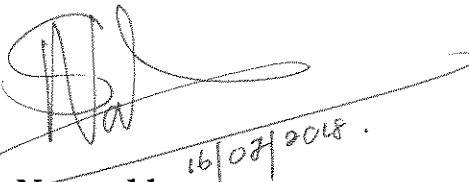
*(Emphasis added)*

- (6) In view of the approach I have adopted, it will be at best a matter of academic interest only or at worst an exercise in futility to inquire into the merits of the Plaintiff's application.

**(D) ORDERS**

- (1) The Plaintiffs' 'Originating Summons' filed on 21<sup>st</sup> February, 2018 is hereby dismissed.
- (2) I make no order as to costs.



  
16/07/2018.  
**Jude Nanayakkara**  
Judge

**At Lautoka, Monday,**

**16<sup>th</sup> July, 2018.**