

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 249 OF 2016

BETWEEN : **GANESH SAMI** formerly of Legalega, Nadi, but currently residing in Sydney, Australia, Nurse.
FIRST PLAINTIFF/APPLICANT

AND : **SHIVNESH SAMI** currently of Legalega, Nadi, Pundit.
SECOND PLAINTIFF/APPLICANT

AND : **I-TAUKEI LAND TRUST BOARD** is a Statutory Board having its registered office at 431 Victoria Parade, Suva.
FIRST DEFENDANT/FIRST RESPONDENT

AND : **RATU TAITO LOU NALUKUYA** of Saunaka Village, Nadi, Landowner.
SECOND DEFENDANT

AND : **SHIVANI NAIR** of Legalega, Nadi, Domestic Duties.
THIRD DEFENDANT/SECOND RESPONDENT

Appearances : Mr M. Raratabu for the plaintiffs
Ms E. Raitamata for the first defendant/first respondent
Mr J. Sharma with Mr K. Siwan for the third defendant/second respondent

Date of Hearing : 28 February 2018

Date of Decision : 30 April 2018

J U D G M E N T

[on committal proceedings]

Introduction and overview

[01] This is an application for the committal of the first and the third defendant, iTaukei Land Trust Board and Shivani Nair respectively (*'the respondents'*) for alleged contempt of court. The application is brought by the plaintiffs, Ganesh Sami and Shivnesh Sami (*'the applicants'*) with permission granted by me on 3 November 2017, permission was granted because the allegation of contempt appeared to be as serious as that should be heard and dealt with if proved. The allegation is that the respondents had committed contempt of court by demolishing the temple and building the fence around the property despite the prohibition by the order of the court dated 23 August 2017.

[02] The application to bring these proceedings was issued on 10 November 2017, some 2 ½ months after the judgment following a formal proof hearing on 23 August 2017.

[03] By their application, the plaintiffs seek the following orders:

- 1) *That the plaintiffs be at liberty to issue committal proceedings against the First and Third Defendants, I-TAUKEI LAND TRUST BOARD AND SHIVANI NAIR for the contempt of this Honourable Court by failing and/or refusing to comply with the Judgment of this Honourable Court dated the 23rd day of August 2017 and the Order sealed on the 15th day of September 2017 herein upon the grounds set forth in the copy of the Statement and Supplementary Statement served herewith and used in the application for leave to issue this Notice of Motion.*
- 2) *That the First and Second Defendants I-TAUKEI LAND TRUST BOARD AND SHIVANI NAIR herein pay to the Plaintiffs all costs of and incidental to the application and also of issuance and execution of Writ of Committal.*
- 3) *That the said I-TAUKEI LAND TRUST BOARD AND SHIVANI NAIR be fined or be committed to prison for such contempt and/or such further and/or other order be made as to this Honourable Court deems just and expedient.*

- [04] The respondents objected to the application and filed their statement in opposition.
- [05] The applicants also filed an affidavit in reply to the affidavit in opposition.
- [06] The affidavits in reply of the applicants and the first defendant were expunged out of the proceedings as they were not filed in compliance with the High Court Rules 1988.
- [07] The application came before me for hearing on 28 February 2018. The applicants were represented by their counsel Mr Raratabu. The second respondent (Shivani) was represented by her counsel Mr Sharma. There was no appearance for or by the first respondent (iTLTB). I heard oral evidence from the applicants and the second respondent. Both the parties made an application seeking leave of the court to file written submission. I accordingly granted 28 days for both the parties to file and serve written submissions simultaneously and I reserved my decision until 30 April 2018.

Background

- [08] The background facts can be stated quite briefly. A Mrs Parmawati (first applicant's mother) had a 30-year-agricultural lease. The lease expired in September 2015. In May 2014, the first applicant wrote to iTLTB expressing his intention of applying for renewal. The iTLTB converted the agricultural lease into a residential lease and subdivided into lots. The former agricultural lease consisted of a dwelling house and a temple on it. The iTLTB advised the first applicant that his application for residential lease would include both the lots (Lots 3 & 4). The first applicant did not get a lease for Lot 3 but it was given to Shivani Nair, the second respondent under Agreement for Lease iTLTB Ref No. 6/10/41103. The applicants brought a claim against the respondents in respect of an Agreement for Lease-iTLTB Ref No. 10/7841.
- [09] The respondents did not file their respective statement of defence which led to a formal proof hearing. The formal hearing came before me on 23 August 2017. At the formal proof hearing, the applicants gave evidence and I, considering the evidence that was put before me, pronounced a judgment in favour of the

applicants and made certain orders. I delivered my judgment on 23 August 2017 and it was sealed on 15 September 2017. The orders were in the following terms:

1. *That Injunction is granted restraining the Defendants, their servants or their agents or whosoever otherwise from engaging in any sort of transaction Native Lease Agreement for Lease TLTB Ref No. 10/7841.*
2. *That the Declaration Order granted for the 1st Defendant to rectify the Native Lease Agreement or Lease TLTB Ref No. 10/7841.*
3. *That the Declaration Order granted for the 1st Defendant to cancel any third party application for residential lease for Native Lease Agreement for Lease TLTB Ref No. 10/7841.*
4. *That there is no order as to costs.*

[10] The applicants allege that the respondents had committed breaches of the injunctions granted by me on 23 August 2017.

The Legal Framework

[11] Order 52 of the High Court Rules 1988, as amended ('HCR') are relevant to Committal Proceedings. Order 55 states in full that:

COMMITTAL

Committal for contempt of court (O.52, R.1)

- 1 (1) *The power of the High Court to punish for contempt of court may be exercised by an order of committal.*
- (2) *This Order applies to contempt of court-*
- (a) *committed in connection with –*
 - (i) *any proceedings before the Court; or*
 - (ii) *proceedings in an inferior Court;*
 - (b) *committed otherwise than in connection with any proceedings.*
- (3) *An order of committal may be made by a single Judge.*
- (4) *Where by virtue of any enactment the High Court has power to punish or take steps for the punishment of any person charged with having done any thing in relation to a court,*

tribunal or person which would, if it had been done in relation to the High Court, have been a contempt of that Court, an order of committal may be made by a single Judge.

Application for order of committal (O.52, R.2)

- 2 (1) *No application for an order of committal against any person maybe made unless leave to make such an application has been granted in accordance with this rule.*
- (2) *An application for such leave must be made ex parte to a Judge in chambers, and must be supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his or her committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on.*
- (3) *The applicant must give notice of the application for leave not later than the preceding day to the Registry and must at the same time lodge at the Registry copies of the statement and affidavit.*

Application for order after leave to apply granted (O.52, R.3)

- 3 (1) *When leave has been granted under rule 2 to apply for an order of committal, the application for the order must be made by motion and, unless the Court granting leave has otherwise directed, there must be at least 8 clear days between the service of the notice of motion and the day named therein for the hearing.*
- (2) *Unless within 14 days after such leave was granted the motion is entered for hearing the leave shall lapse.*
- (3) *Subject to paragraph (4), the notice of motion, accompanied by a copy of the statement and affidavit in support of the application for leave under Rule 2, must be served personally on the person sought to be committed.*
- (4) *Without prejudice to the powers of the Court or Judge under Order 65, Rule 4, the Court or Judge may dispense with service of the notice of motion under this Rule if it or he or she thinks it just to do so.*

Saving for power to commit without application (O.52, R.4)

4. *Nothing in the foregoing provisions of this Order shall be taken as affecting the power of the High Court or Court of Appeal to make an order of committal of its own motion against a person guilty of contempt of court.*

The Issue

- [12] The issue is whether or not the respondents are guilty of contempt of court for breaching the injunctions made against them on 23 August 2017, by demolishing the temple and putting up the fence around the premises.

The Evidence relied upon

- [13] The applicants called four witnesses, i.e. Shivnesh Sami (AW1), Ganesh Sami (AW2), Nilesh Krishna Mudaliar (AW3) and Apenisa Tuivuna (AW4), while Shivani Nair (RW1), the second respondent testified on her behalf.
- [14] The summary of evidence of AW1 shortly is as follows: the order dated 15 September 2017 was served on the defendants. It was served by one Bailiff, Peniasi. They demolished the temple on 23 September 2017. In the morning between 7.30 and 8.30, Shivani Nair's husband came with 4 workers. Gave the orders to Vinesh, one of the workers to serve to Shivani's husband. Vinesh said: *'there is no seal of the judge and there is no case against Shivani and you can't do anything.'* Ganesh Sami went to see Police with the orders. Then Shivani and her husband came with documents and ruling. Police asked her for the lease. I gave the ruling. Police told them to go and verify reference number. Police came to the scene. By the time Police came, the half temple was undone. Nilesh Pujari came and told him that they cannot offer kava at the temple. They sprinkled kava on the statues. Vinesh only gave 5 minutes to take out the statues. We took out the statues from the temple but the temple was still there. Vinesh told us that he has consent form iTLTB to dismantle temple. He did not show the authority. Shivani told us that she has the lease but did not show the lease to us. I did not help dismantle the temple. They were fencing around 8.30am on Saturday, 23 September 2017, and they demolished the roof and damaged the concrete walls. On Monday, he saw the entire building being demolished in the video.

- [15] In cross examination, AW1 states that: the injunction was granted restraining the defendants from engaging in any sort of transaction of Native Lease Agreement for Lease TLTB Ref No. 10/7841. He admitted that it was in respect of a different lease and not the third defendant's Lease. He also admitted that Shivani bought iTLTB Ref No. 6/10/41103. He further admitted that there is no Court order against Shivani Nair and her lease. The order was served on Shivani by a bailiff. Through my Solicitors, I paid for the service. The Bailiff who served the order is a registered bailiff. His name is Peniasi. He could not recall when it was served.
- [16] AW2 in evidence states that: after formal proof, he got a judgment in regards to temple in Lot 3 next to the residential lot. He received phone calls from Fiji. On Sunday, he was told that the roof was taken and the temple was half demolished.
- [17] In cross-examination, AW2 states that: He had a lease No. 4/10/5011, the temple which is in dispute. Before he applied for the lease, it was subdivided into two lots. The order dated 15 September 2017 and the Ruling dated 23 August 2017, relate to this property. The injunction was granted restraining the defendants from engaging in any sort of transaction on Native Lease Agreement for Lease TLTB Ref No. 10/7841. The order was in regards to Lease No. 10/7841. He admitted that there is no Court order for Lease No. 6/10/41103. He also admitted that the iTLTB issued a lease to Shivani (Lease No. 6/10/41103). Her lease is dated 4 October 2016. He did not know whether the order was served on Shivani.
- [18] AW3 testified that: he was present on that day and saw police coming and leaving. He saw Reddy (Shivani's husband) and some iTaukei boys having kava session on top of the temple. He saw Shivani there. He was neither cross-examined nor re-examined.
- [19] In his evidence, AW4 states that: He is a clerk at Baleilevuka & Associates. He is aware of this matter whilst employed at Baleilevuka & Associates. He has filed an affidavit of service. Shivani stays at Legalega. He served the judgment and order at her place. It takes 5 minutes from the driveway to her place.
- [20] In cross-examination, AW4 stated: He admitted that he is not a registered bailiff. He cannot recall the date of service. He served the order on Shivani Nair. He admitted that he did not explain the order. During the time of service, he was employed at Baleilevuka & Associates, the Solicitors for the plaintiffs. He admitted working for Messrs Iqbal Khan & Associates. He did not have any idea

if Messrs Iqbal Khan & Associates were Solicitors for the plaintiff at that point in time. He went in a taxi. He did not know Shivani Nair personally. He filed an affidavit of service for allegedly serving the order on Shivani on 21 September 2017. He was silent when asked to explain what he meant by: "...*personally serve the office of the Defendant Shivani Nair...*" in his affidavit of service sworn on 30 October 2017. It was put to him that Shivani was at work on 21 September 2017, between 8.00am to 4.00pm and again he stated that he served Shivani personally. He again said that he served the document and he saw the Hybrid (car) parked outside her house. He received instructions from Unaisi Baleilevuka to serve. He admitted that there is no entry in the register kept in the office if they go out of the office. The company paid the taxi fare. The taxi was hired from Namaka, Nadi. He cannot remember the fare. He went for service and when he came back then the taxi was paid from the petty cash from the office. He admitted that there is no signed voucher for the petty cash as well. He was aware of the need to explain the gist of the order to the person being served. He admitted that he did not explain to Shivani. He admitted that he is not an independent bailiff. He also admitted that he does not know the contents of the order.

[21] AW4 was not re-examination by the applicants.

Second respondent's evidence

[22] RW1 (Shivani) testified that: She is the Lessee in iTLTB Ref No. 6/10/41103. She was never served with any order dated 15 September 2017 on 21 September 2017. She was at work on 21 September 2017. She works for South Pacific Electronics Limited at Martintar, Nadi. She said she did not disobey the orders.

[23] In cross-examination, she states that: she can't recall where she was on 14 November 2017. The lease was issued to her so that she can build a house. The iTLTB advised her she can demolish the temple. The Agreement for Lease was in her name. The temple was on my property. The temple did not belong to anyone after the lease had expired.

Discussion

[24] On 10 November 2017, the applicants issued an application for the respondents' committal. The ground of the alleged contempt was that the respondents had breached the court order delivered, following a formal proof hearing, on 23 August 2017. Para 1 of the order was quite specific. It restrained the defendants

(respondents in these proceedings) from engaging in any act of transaction of Native Lease Agreement for Lease TLTB Ref No. 10/7841 (*Injunctive order*).

- [25] The injunctive order was granted in favour of the applicants (the plaintiffs in the substantive proceedings). Any party aggrieved has the right to bring before the courts any matter which he or she alleges amounts to contempt.

Locus

- [26] It is quite clear, as a party aggrieved, the applicants have locus to apply for committal of an alleged contemnor even if the contempt is civil and involves the breach of an order obtained. I wish to quote what Lord Reid said in *Attorney general v Times Newspapers Ltd* [1974] AC 273, 293:

“I agree with your Lordship that the Attorney-General has a right to bring before the court any matter which he thinks may amount to contempt of court and which he considers should in the public interest be brought before the court. The party aggrieved has the right to bring before the court any matter which he alleges amount to contempt but he has no duty to do so. So if the party aggrieved failed to take action either because of expense or because he thought it better not to do so, very serious contempt might escape punishment if the Attorney-General had not right to act. But the Attorney-General is not obliged to bring before the court every prima facie case of contempt reported to him. It is entirely for him to judge whether it is in the public interest that he should act”.

- [27] In this case, the applicants’ locus to bring these committal proceedings against the respondents was not put in dispute.

Onus of Proof

- [28] The applicants must prove their case beyond reasonable doubt and the standard of proof in contempt proceedings is proof beyond reasonable doubt. See, *Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd* [2005] FJCA 46; ABU0011 & ABU0011A.2004L (22 April 2005); *Shalini v Basanti* [2003] FJHC; HPP0036j.1999s (27 August 2003).
- [29] The allegations of breach of an order obtained have to be wilful. The breach has to be wilful in the sense that it was deliberate and intentional: *Ali v Chaudhary* [2004] FJHC 189; HBC0061J.2001L (29 March 2004).

[30] The applicants bear the duty to prove their case beyond reasonable doubt that the respondents had wilfully breached the order obtained on paragraph 1 of the order dated 23 August 2017 and sealed on 15 September 2018.

[31] In *Ali* (above), His Lordship Gates J (as he then was) sets out the general considerations of an allegation of contempt of court in the following terms:

"[11] A jurisdiction and a power to punish persons for contempt of court in accordance with the law is bestowed on the superior courts including the High Court by Section 124 of the Constitution 1997 [previously Section 121 Constitution 1990].

[12] The onus of proof in such proceedings is on the mover of the motion. Proof is to be established to that standard applying in the criminal courts, namely proof beyond reasonable doubt: Barclays de Zoete Wedd Securities Ltd and Others v Nadir [1992] TLR 141; Dean v Dean [1987] FLR 517 CA; Vijay Kumar v Shiu Ram & Anor. (unreported) Suva High Court Action No. HBM0026.00S, 19 September 2001, Shameem J.

[13] Where, as here, the contempt alleged is of disobedience to a court order the Accused contemnor must be shown to have wilfully disobeyed the order. An unintentional act of disobedience is not enough: Steiner Products Ltd & Anor v Willy Steiner Ltd [1966] 1 WLR 986 where Stamp J found breach of a consent order to have been wilful. His lordship cited with approval observation of the Court of Appeal in Fairclough v Manchester Ship Canal Co [1897] WN Z, CA which had said:

In these cases, casual, or accidental and unintentional disobedience to an order of the court is not enough to justify either sequestration or committal; the court must be satisfied that a contempt of court has been committed in other words, that its order has been contumaciously disregarded."

Stamp J added at p 991:

"I do not think that the Court of Appeal intended to use the word "contumaciously" as meaning something different from "wilfully,"

[14] In the instant case if the Accused contemnor deliberately lodged the caveats, a positive act, though he only intended to exercise his lawful rights, the lodging would be a deliberate act. It would be sufficient to prove a wilful disobedience if the lodging were deliberate even if it were not known to be in conflict with the orders: R v Sheppard [1981] AC 394. "Wilful" in this contempt means either deliberately doing an act knowing that there is some risk of the consequences, or doing an act not caring about the risks involved."

The task for the judge

- [32] Speaking on the task for the judge hearing an application for committal for breach of an order, Sir James Munby President of the Family Division in *Re L-W (Enforcement and Committal: Contact)* [2010] EWCA Civ 1253, with whom Jacob and Sedley LJ agreed, said this (para [34]):

“(1) The first task for the judge hearing an application for committal for alleged breach of a mandatory (positive) order is to identify, by reference the express language of the order, precisely what it is that the order required the defendant to do. That is a question of construction and, thus, a question of law.

(2) The next task for the judge is to determine whether the defendant has done what he was required to do and, if he has not, whether it was within his power to do it. To adopt Hughes LJ’s language, Could he do it? Was he able to do it? These are questions of fact. (3) The burden of proof lies throughout on the applicant: it is for the applicant to establish that it was within the power of the defendant to do what the order required, not for the defendant to establish that it was not within his power to do it. (4) The standard of proof is the criminal standard, so that before finding the defendant guilty of contempt the judge must be sure (a) that the defendant has not done what he was required to do and (b) that it was within the power of the defendant to do it. (5) If the judge finds the defendant guilty the judgment must set out plainly and clearly (a) the judge’s finding of what it is that the defendant has failed to do and (b) the judge’s finding that he had the ability to do it.”

Service of the order

- [33] Upon formal proof, the respondents obtained the judgment on 23 August 2017. The orders were sealed on 15 September 2017. It was served on the respondents 25 September 2017 and 21 September 2017 respectively.
- [34] The applicants filed an affidavit of Mr Apenisa, the bailiff in proof of service of the orders to Ms Shivani. In that affidavit, the bailiff states that he did serve the orders to Ms Shivani at her residence whereas he testified in court that he personally served the office of the defendant, Shivani Nair. The bailiff was unable to explain the contradiction between his evidence in court and averment in his affidavit. The bailiff’s evidence casts a doubt as to the place at which he served the orders on Shivani. She in her evidence stated that she was never served with the order dated 15 September 2017 on 21 September 2017.

[35] The temple was completely demolished on 23 September 2017. It was within Shivani's lease iTLTB Ref No. 6/10/41103.

[36] An order shall not be enforced unless a copy of the order has been personally served on the person required to do so or abstain from doing the act in question (see O.45, r.6 (2) (a), HCR).

[37] The respondents did not raise the service point seriously although they highlighted the impropriety of the service.

The basis of the application

[38] The applicants base the allegation of contempt on a breach of paragraph 1 of my order. Para 1 was an injunction, whether in form and effect. It was in the following terms: *That injunction is granted restraining the Defendants, their servants or their agents or whosoever otherwise from engaging in any act of transaction Native Lease Agreement for Lease TLTB Ref No. 10/7841* (Emphasis supplied). It directed that something not to be done. It did not order the defendants not to demolish the temple that was on the third defendant's (Shivani's) lease iTLTB Ref No. 6/10/41103. As Mr Sharma, counsel for the second respondent, argues the order on para 1 does not mention about Shivani's lease and it does not stop or prohibit the second respondent from removing or dismantling the temple that was on Shivani's lease iTLTB Ref No. 6/10/41103.

[39] The order complained of does not expressly prohibit the respondents from demolishing the temple that was on Shivani's lease. It simply directed the defendants (respondents) not to engage any act of transaction affecting Native Lease Agreement for Lease TLTB Ref No.10/7841. There is no complaint that the respondents had engaged in the acts prohibited by the injunction.

[40] It is worth noting that the applicants (plaintiffs) had attempted to vary, after the final judgement was pronounced, the orders dated 15 September 2017. The court, however, disallowed that application on the basis that the Slip Rule does not apply in the circumstances.

[41] 'It is impossible to read implied terms into an order of the court': *Deodat v Deodat* (unreported, 9 June 1978: Court of Appeal Transcript No 78 484) per Megaw LJ.

An injunction must be drafted in terms which are clear, precise and unambiguous. As Wall LJ said in *Re S-C (Contempt)* [2010] EWCA Civ 21, [2010] 1FLR 1478. [17]:

“if ... the order ... was to have penal consequences, it seems to us that it needed to be clear on its face as to precisely what it meant, and precisely what it forbade both the appellant and the respondent from doing. Contempt will not be established where the breach is of an order which is ambiguous, or which does not require or forbid the performance of a particular act within a specified timeframe. The person or persons affected must know with complete precision what it is that they are required to do or abstain from doing – see (inter alia) Federal Bank of the Middle East Limited v Hadkinson and Others [2009] 1 WLR 1695; D v D (Access: Contempt; Committal) [1991] 2 FLR 34 and Harris v Harris, A-G v Harris [2001] 2 FLR 895 at para [288].”

[42] In the present case, what the order required the respondents to do was to:

“restrain the defendants from engaging in any act of transaction affecting Native Lease Agreement for Lease TLTB Ref No. 10/7841.”

[43] It would be impossible to read in an implied term into the order that the restraining order obtained against the respondents included a direction to the respondents not to demolish the temple that was on Shivani's lease. It follows that the applicants have failed to prove that the respondents have done what they were required not to do by the injunction.

Conclusion

[44] It is for these reasons; I find that the applicants have failed to prove their allegation of contempt on a breach of paragraph 1 of the order dated 15 September 2017, beyond reasonable doubt. I should add that there was no basis for the applicants to bring committal proceedings against the respondents. The application must accordingly be dismissed.

Costs

[45] The second respondent seeks costs on an indemnity basis. The applicants were entitled to pursue the matter and to have the same tested before a judge. In my judgment, this is not a case to order indemnity costs against the applicants. In all

the circumstances, the appropriate order is that the applicants be ordered to pay costs of \$600.00, which I have summarily assessed.

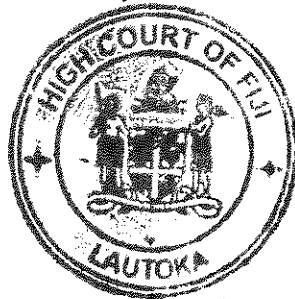
The Result

1. Application for committal of the respondents for contempt of court is dismissed.
2. The applicants will pay summarily assessed costs of \$600.00 to the second respondent (Shivani Nair).

H.M. Mohamed Ajmeer
30/4/18

M. H. Mohamed Ajmeer

JUDGE



At Lautoka
30 April 2018

Solicitors:

For the applicants: Messrs Baleilevuka & Associates, Barristers & Solicitors

For the first respondent: Legal Department, ITaukei Land Trust Board

For the second respondent: Messrs Janend Sharma Lawyers, Barristers & Solicitors