

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBA 24 of 2017

BETWEEN : **AZIZ BEGG** trading as **NORTHERN ICE PLANT SERVICES**
of Namara, Labasa
APPELLANT

AND : **FARAZ KHAN** trading as **KHAN LUBE BAY AND**
MECHANICAL REPAIRS of Nakasi
FIRST RESPONDENT

AND : **ABDUL HAMID** of Waitai Street, Nakasi and Businessman
SECOND RESPONDENT

AND : **HAMID'S ICE AND FISH SUPPLIES LIMITED** having its
registered office at Suva.
THIRD RESPONDENT

Counsel : **Mr. A. Chand** for the Appellant
Mr. S.Nandan for the 1st Respondent

Date of Hearing : **23rd January, 2018**

Date of Judgment : **31st January, 2018**

JUDGMENT

INTRODUCTION

1. This is an appeal against an interlocutory decision of the Resident Magistrate (RM) delivered on 7th March, 2017. The RM dismissed the summons to strike out of the action. The said strike out was based on the failure of the Respondent-Plaintiff (the Plaintiff) to obtain the consent of the Director of Lands (DOL) before the institution of action in terms of Section 13 (1) of State Lands Act. It is an admitted fact that the Plaintiff was granted

consent of DOL, after the institution of the action, but before this application for strike out. So the narrow issue before the court below was whether absence of consent of DOL at the time of institution of action is fatal to the action. Though there are three grounds of appeal the issue is failure to obtain consent of the DOL before institution of the action and subsequently obtaining the consent of DOL.

2. The Grounds of Appeal are as follows:

1. The learned Magistrate erred in law and in fact in failing to dismiss the action when he did not have any jurisdiction and court was functus ab initio
2. The Learned Magistrate erred in law and in fact in failing to hold that the action was nullity in absence of consent from Director of Lands under Section 13 of Crown (State) Lands Act as plaintiff had to obtain consent from Director of Lands prior to the filing of the action.
3. The Learned Magistrate erred in taking into consideration the submissions filed by the appellant and dealing with question of law and facts raised therein.
4. The Learned Magistrate erred in law and in fact in failing to hold that any consent subsequently obtained from the Director of Lands after institution of proceedings is of nil effect and did not validate proceedings."

ANALYSIS

3. The decision of RM delivered on 7th March, 2017, had dismissed the application of strike out and said decision had stated the two authorities supplied by the Appellant in the court below and the statutory provision. The learned RM had not made a determination of the said issue, but summons for strike out was dismissed.
4. Though no finding was made regarding the said preliminary objection, the RM had stated that Court of Appeal decision delivered on 9th August, 2013, (*Denarau Corporation Ltd v Slatter and Gutherie Company Ltd* [2013] FJCA 94; Miscellaneous 10/2013), which was submitted was not conclusive. I agree with said finding of RM.
5. The learned RM has stated the argument of the Defendant contained in the written submission regarding the *Waigele Sawmills Ltd v Colonial Mutual Life Assurance Ltd*

[2002] FJHC 297; HBC0042.1999 (20 May 2002) but has not stated anything regarding the application of the said case to the issue raised for strike out. The ratio of the said case cannot be applied to strike out an action where DOL has granted consent for the institution of the proceedings subsequently. High Court decision in *Waiqele Sawmills Ltd* (supra) is distinguishable from the issue before the court below and ratio of the said case cannot be applied to the court below.

6. So it is worth considering statutory provision and the cases submitted in the court below

Section 13 of the State Lands Act states as follows

'13 -(1) Whenever in any lease under this Act there has been inserted the following clause:-

"This lease is a protected lease under the provisions of the State Lands Act"

(hereinafter called a protected lease) it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease or any part thereof whether by sale, transfer or sublease or in any other manner whatsoever nor to mortgage, charge or pledge the same, without the written consent of the Director of Lands first had and obtained, nor, except at the suit or with the written consent of the Director of Lands, shall any such lease be dealt with by any court of law or under the process of any court of law, nor, without such consent as aforesaid shall the Registrar of Titles register any caveat affecting such lease.

Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void.

(2) On the death of the lessee of any protected lease his executors or administrators may, subject to the consent of the Director of Lands as above provided, assign such lease.

(3) Any lessee aggrieved by the refusal of the Director of Lands to give any consent required by this section may appeal to the Minister within fourteen days after being notified of such refusal. Every such appeal shall be in writing and shall be lodged with the Director of Lands.

Earlier Crown Lands Ordinance Section 15(1) where it stated 'Protected Lease under the provisions of the Crown Lands Ordinance, 1945'

(4) Any consent required by this section may be given in writing by any officer or officers, either solely or jointly, authorised in that behalf by the Director of Lands by notice published in the Gazette. The provisions of subsection (3) shall apply to the refusal of any such officer or officers to give any such consent. (Inserted by 21 of 1959, s. 2)

(5) For the purposes of this section "lease" includes a sublease and "lessee" includes a sublessee.' (emphasis added)

7. The Court of Appeal decision submitted by the Appellant in the court below was a decision of a single judge of Court of Appeal granting leave. In that judgment Calanchini P held, that

'The appeal also raises issues under section 13 of the State Lands Act which should be considered by the Court of Appeal. In particular the meaning of being dealt with by the Court and whether the consent of the Director for commencing the proceedings can be obtained after interlocutory ruling as long as the consent is obtained before final determination. It is also of some interest to determine whether the proceedings relate to a dealing with the lease

In my judgment the appeal raises a number of important issues and legal questions which warrant the consideration of the Court of Appeal and leave to appeal is granted.'

8. The said decision supports the Plaintiff's contention as there was no final determination on this issue by the Court of Appeal. The Full Court decision of the said case was not submitted to the court below. This Appeal is re-hearing on the documents, and above decision does not help the Defendant. Said Court of Appeal decision is an authority to dismiss strike out. Strike out is granted only when the action is doomed to fail. Even a weak case needs the time of the court. The Court of Appeal had held that there was an important legal issue as to proceedings in court relate to 'dealing with the lease'. So, that case cannot be relied to strike out the action in the court below. The learned RM correctly rejected the argument of the Defendant, regarding that case.
9. The only other case that the Defendant had submitted in the court below, was a High Court decision *Waigete Sawmills Ltd v Colonial Mutual Life Assurance Ltd* [2002] FJHC 297;

HBC0042.1999 (20 May 2002). This decision was delivered after conclusion of the hearing, and there was clear evidence of breach of Section 13(1) of State Lands Act. There was no issue raised in that case regarding the consent of the DOL for institution of the said action.

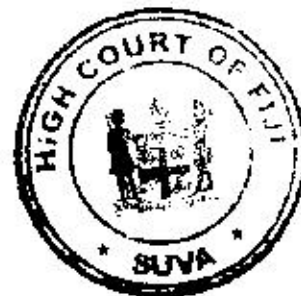
10. It was not a decision delivered on an interlocutory application for failure to obtain consent of the DOL before institution of action. So ratio of the said case cannot be binding to the issue raised for strike out.
11. In any event in that case there was no issue was raised regarding the institution of the action without the consent of the DOL and there was no determination on that legal issue. The issue that was raised in that case was, was whether DOL could grant consent to an agreement that require consent ('dealing') subsequently. So the ratio of the said case can apply to a 'dealing' where subsequent consent was obtained and not to institution of an action. These are two different things in terms of Section 13(1) of State Lands Act.
12. It should be noted that dealing entered without the consent of the DOL is *null and void* in terms of **proviso to subsection Section 13(1)** of State Lands Act, but importantly this proviso does not include, institution of action without consent null and void. The other categories of 'dealings' were specifically made null and void. Such *ab initio* nullity will apply to *'any sale, transfer, sublease, assignment, mortgage or other alienation or dealing'* only.
13. The proviso the subsection 13(1) of State Lands Act states as follows
'Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void.' (emphasis added)
14. Litigation is not included in the above proviso to Sub Section 13(1) of State Lands Act, though 'process of court of law' also needed consent of the DOL in Section 13(1), this express omission is clearly distinguishable the proceedings in court from other 'dealings' stated in above quoted proviso to subsection 13(1) of State Lands Act.


15. What was dealt in High Court decision of Waiqele Sawmills Ltd v Colonial Mutual Life Assurance Ltd [2002] FJHC 297; HBC0042.1999 (20 May 2002) was a dealing that is expressly made null and void *ab initio* as stated in proviso to Subsection 13(1) of State Lands Act. This is not so when it is a litigation, or process of court as the said proviso is silent on that. So the High Court decision can be distinguished from the issue raised in court below.
16. There ratio of the two cases submitted in the court below as well as in this appeal do not support the strike out of the action in the court below. In such a situation the RM was correct in his refusal to strike out the action. There is no error of law in dismissing the strike out. I affirm the decision of RM delivered on 7th March, 2017. The appeal is dismissed. The cost of this appeal is summarily assessed at \$1,000.

FINAL ORDERS

- a. The Appeal is dismissed. The interlocutory decision of RM delivered on 7th March, 2017 is affirmed.
- b. Cost is summarily assessed at \$1,000.

Dated at Suva this 31st day of January, 2018.




Justice Deepthi Amaratunga
High Court, Suva