



## Employment Relations Tribunal

# Decision

**Title of Matter:** Sumeet Sagar Kumar  
v  
Rinesh Prasad trading as The Royale Wine Shop

**Section:** Section 211 *Employment Relations Act 2007*

**Subject:** Notice of Motion to Set Aside Defective Judgment and Order

**Matter Number:** ERT JDS No 09 of 2018

**Appearances:** Ms R Kadavu, Labour Office, on behalf of the Claimant  
Mr S Sharma, Samusamuvodre Sharma Law, for the Respondent

**Date of Hearing:** Friday 30 November 2018

**Before:** Mr Andrew J See, Resident Magistrate

**Date of Decision:** 3 December 2018

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**KEYWORDS:** Enforcement of judgment debt arising from unjustifiable and unfair dismissal hearing; Correction of Defect in Name of Party to Original Judgment; Section 238(2) *Employment Relations Act 2007*; Applicable Rules Where No Provision Exists; Order 3 Rule 8 *Magistrates Court Rules 1945*.

### **CASES CITED:**

*Ambaram Narsey Properties Ltd v Khan* [2016] FJSC 13; CBV0003.2015 (22 April 2016)  
*Chief Registrar v Goundar* [2016] FJCA 153; Misc Action 01.2016 (29 November 2016)  
*Cook v DA Manufacturing Co P/L & Anor* [2004] QCA 52 (5 March 2004)  
*Nunn v Honey & Anor* [2013] QDC 58)(12/0233)(21 March 2013)  
*Pati v Pratap* [1977] FJCA 16; Abu0053u.96s (16 May 1997)  
*Raybos Australia Pty Ltd v Tectran Corporation Pty Ltd* [1988] HCA 2; (1988) 77 ALR 190; (1988) 62 ALJR 151 (10 February 1988)

### **Background**

[1] The Claimant Grievor Sumeet Kumar, applied for a Judgment Summons against 'Royal Wine Shop' in the Employment Relations Tribunal in Labasa on 14 August 2018. That matter was brought on before Senior Magistrate Green on 31 August 2018 at which time the court file shows that the Labour Officer was appearing on behalf of Mr Kumar and had sought further time in which to gain additional instructions before proceeding with the application<sup>1</sup>. When the matter returned before this Tribunal on 19 September 2018, in the absence of the Respondent, the Tribunal elected of its own accord to issue an Enforcement Order for the purposes of directing

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<sup>1</sup> It would appear that the further instructions that were sought related to a claim by Mr Rinesh Prasad Prasad, that there was no registered business in the name of Royal

Mr Prasad to comply with the terms of the original judgment of the then Honourable Magistrate dated 28 November 2017. The reason for doing so, was that the Tribunal was of the view that Section 212(1)(b) of the *Employment Relations Act 2007* should be relied upon for the purposes of seeking compliance of the Tribunal's decision or orders<sup>2</sup>.

[2] The present proceedings arise as a result of Notice of Motion filed by Solicitors for the Respondent on 2 November 2018. The Respondent seeks orders:-

1. That the judgment or default judgment entered against the respondent dated 29/11/2017 to be set aside.
2. That there shall be an order that the enforcement of the order dated 29<sup>th</sup> day of November 2017 and 19<sup>th</sup> day of September 2018 be stayed pending the hearing of this application.

### **Argument in Support of Notice of Motion**

[3] In support of the Notice of Motion, an Affidavit was provided by Dorin Ronika, Human Resource Manager of The Real Group Limited, sworn on 14 October 2018. The essential thrust of the Affidavit is that there is no registered business name, 'Royal Wine Shop' and on that basis, according to Mr Sharma for the Respondent, renders the original judgment of the then Honourable Magistrate, unenforceable against his client Mr Prasad. To understand what has transpired here, requires firstly some background as to what the original judgment issued on 29 November 2017 was all about. The Claimant Mr Sumeet Kumar was a former shop assistant employed by Mr Rinesh Prasad at what is known as the 'Royale Wine Shop' Nasekula Road, Labasa. Mr Kumar lodged an employment grievance with the Ministry of Labour on 18 February 2013, after he says he was:

"terminated by the employer on spot when I demanded him for my wages which was pending from last 8 weeks."

[4] Mr Prasad and Mr Kumar were required to attend mediation of the grievance on 6 March 2013 and 27 March 2013 in Labasa and when the matter could not be resolved by agreement it was referred to the Employment Relations Tribunal in accordance with Section 194(5) of the Act<sup>3</sup>. For some reason, which is hard to ascertain from the material before me, the matter was not heard by the Tribunal until 6 March 2017. A decision was not issued in the matter until 29 November 2017 and on 20 December 2017, a signed Order provided to the parties, requiring that:-

1. That the employer pays the sum equivalent to three (3) months wages to the Grievor for unlawful termination; and
2. That both parties will bear their own costs.

[5] At the time the Labour Officer made application for the Judgment Summons, the exact calculation of the compensation awarded in the judgment was \$3160.92.

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<sup>2</sup> See specifically Section 238(2)(a) of the Act, where reliance on the enforcement provisions within the Magistrates Court Rules 1945, should only take place where no provision is otherwise made for a particular circumstance under the *Employment Relations Act 2007*.

<sup>3</sup> The date of the referral was 29 April 2013.

### Submissions Made by Mr Sharma

[6] At the start of proceedings, Mr Sharma indicated that the Judgment Summons and the subsequent Enforcement Order issued by this Tribunal on 19 September 2018, were defective. The starting point for his argument was that a business name could not be entered as a party to proceedings, neither could a creditor seek to enforce any debt owed against a business name. Mr Sharma told the Tribunal that there was no business operating under the name of the 'Royal Wine Shop'. In response to that claim, the Tribunal then asked Mr Sharma, who is it that he says he was representing in proceedings and what is the name of the person behind the business?,<sup>4</sup> to which Counsel responded, that he was representing Mr Rinseh Prasad, who he claimed was the individual that the Labour Office was attempting to pursue these enforcement proceedings against, despite the fact it was claimed he was not a party to the proceedings that gave rise to the original judgment order. The Tribunal asked, what is Mr Prasad's interest? to which the Counsel replied, "he is not a party". When asked by the Tribunal, who is the registered owner of the business?, Mr Sharma replied, "that is the duty of that person (to find out)."<sup>5</sup>

[7] When initially asked by the Tribunal, does Mr Prasad have any interest in the Royal Wine Shop, the response from Counsel was that "he is not the registered owner." The Tribunal sought to be more precise in this regard and so further asked, whether Mr Prasad had any current or previous involvement in the business operating under the name Royal Wine Shop, whether as an employee, Director of a company or partner. Mr Sharma replied, "he was the supervisor." The questioning continued. The Tribunal asked, Mr Sharma, was Mr Prasad an employee? to which Counsel replied, "yes." Mr Sharma was asked, so who was his employer?, to which he replied, "I don't know." At that stage, the Tribunal asked Mr Sharma to find out and the proceedings were adjourned to allow this to take place. Upon the resumption of proceedings, the questioning of Counsel for the Respondent continued. Mr Sharma was again asked, "Who was the employer of Mr Rinesh Prasad when he was an employee of the Royal Wine Shop?" Mr Prasad replied, "he is not the owner of the Royal Wine Shop."<sup>6</sup> When re-asked the question, Mr Prasad ultimately referred the Tribunal to the Affidavit in Support of Ms Dorin Ronika, filed on 2 November 2018 and thereafter claimed that the company operating the business was The Real Group Limited and that the other operator of the business is the Royale Diner<sup>7</sup>. The questioning continued by the Tribunal:

Tribunal: And what is the Royal Wine Shop?  
Mr Sharma: It does not exist.

[8] The Tribunal continued, with words to the effect:

Tribunal: There is a business name here that submitted to a grievance. The business that the claim was against was the Royal Wine Shop. Are you saying that you don't know what the Royal Wine Shop is?  
  
Mr Sharma: Yes Sir.

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<sup>4</sup> At this juncture, Mr Sharma protested, "the court is not listening to me."

<sup>5</sup> The reference here, presumably was to the Labour Office in carriage of the proceedings.

<sup>6</sup> Aside from the fact that at this point in time, nobody had brought to the Tribunal's attention the fact that the spelling of the unregistered business name should be "Royale Wine Shop," this response is totally and in the Tribunal's view deliberately false and misleading.

<sup>7</sup> This is somewhat ironic, where Counsel in one breath claims a business name has no persona and in another, claims that is the operator of a business.

- [9] Mr Sumeet Kumar, who was the former employee working at the business the subject of the original employment relations grievance, was asked by the Tribunal, “what do you say the Royal Wine Shop is?” to which he replied, “a wine shop in the main street”. Further clarification was sought by the Tribunal as to the exact location from where the business operated and this was explained by Mr Kumar to be Nasekula Road, “just beside Gokals.” It is perhaps useful to flag that it was at this time, that the Tribunal clarified with the former employee, whether the name was the ‘Royal Wine Shop’ or the ‘Royale Wine Shop’, to which he replied, “the Royale Wine Shop.”<sup>8</sup>
- [10] For the sake of the record, the Tribunal has subsequently requested that a photograph of that shop front be taken. As can be seen, there are two signs displayed, that include one that reads ‘Royale Wine Shop’.

**Photograph T1 - Taken by Departmental Officers at 1.15pm 1 December 2018  
Nasekula Road – Labasa Town<sup>9</sup>**



- [11] Mr Sharma was then asked the following question:

Tribunal: Who are the directors of The Real Group Limited? Is Mr Prasad, a Director of The Real Group Limited?

Mr Sharma: I cannot confirm or deny that.

- [12] In response to that answer, the Tribunal requested that Mr Prasad be contacted and asked to attend the proceedings<sup>10</sup>. At this juncture, an adjournment was called in order to have Mr Prasad attend<sup>11</sup>.

<sup>8</sup> While at one level this is a significant issue, at another for reasons that will be dealt with later, the fact that the business at the time was operated by a sole trader, does not alter the legal responsibilities of that person, despite an error made in identifying the business to which that person is the owner.

<sup>9</sup> It is noted that this photograph is taken in 2018 and not at the time of the employment of the Grievor Mr Kumar, so to that extent is instructive only.

### **Mr Rinesh Prasad**

[13] When the proceedings resumed, the Tribunal asked Mr Rinesh Prasad if he was involved in an 'unfair dismissal' hearing in 2017, before Senior Magistrate Green. Mr Prasad confirmed that he had been. The Tribunal put to Mr Prasad, that his lawyer Mr Sharma had told the Tribunal that he was a supervisor at the Royale Wine Shop, to which Mr Prasad indicated that he was. At this juncture and for reasons that should be abundantly clear to all, Mr Prasad was asked to be 'sworn in' to allow all of his evidence to be taken under oath. Mr Prasad told the Tribunal that he did not attend the hearing before SM Green in March 2017 that gave rise to a ruling on 29 November 2017 in which he was ordered to pay three months compensation to Mr Kumar. What did transpire though, was that Mr Prasad admitted to having participated in a mediation activity that was the pre-cursor to the Tribunal hearing. Mr Prasad indicated that he had attended several mediation activities under the auspice of the Ministry of Labour, Industrial Relations & Employment and admitted attending one matter before Senior Magistrate Green in or around August 2018, that coincided with these enforcement proceedings.

[14] Mr Prasad told the Tribunal, that he had understood that the grievance that Mr Kumar had with him in relation to his employment at the Royale Wine Shop, had been brought to an end, when he claims to have resolved that matter by an undertaking in writing that had been provided to him at the time<sup>12</sup>. The witness told the Tribunal that he understood that he had settled a claim by the former employee, in which he had paid him the sum of one thousand dollars. At this point, Ms Kadavu intervened and explained to the Tribunal that the settlement document to which Mr Prasad had referred, only related to a Claim for the Payment of Outstanding Wages that was referenced within that communication by Case No 53/13. Mr Prasad admitted to the Tribunal that in April 2015, his Manager, Mr Aaron Phillips who worked for The Retail Group Limited, attended a scheduled hearing of the 'unfair dismissal' proceedings on his behalf, although it should be noted that no such hearing took place on that day. The Tribunal then directed the attention of Mr Prasad to the Order that was issued by then Magistrate Green dated 20 December 2017, in which the "Royal Wine Shop" was ordered to pay three months wages to Mr Kumar for his unlawful termination. Mr Prasad told the Tribunal, that he had seen that Order before, but was not sure who had provided the document to him.

### The Retail Group and the Royale Wine Shop

[15] Mr Prasad further told the Tribunal that The Retail Group Limited was registered on 10 September 2014,<sup>13</sup> but did not operate until around August 2015<sup>14</sup>. Prior to that time, Mr Prasad explained, that the Royale Diner was the registered business name that was being operated by him, in his capacity as a sole trader. The witness explained that the 'Royale' brand name was

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<sup>10</sup> It should be noted here, that at this point in time, Mr Sharma protested that the Tribunal had already prejudged the outcome of this application. The Tribunal assured Mr Sharma at this juncture, that no such view had been formed and that the purpose for requiring Mr Prasad's attendance, was to ultimately 'get to the bottom' of the issues.

<sup>11</sup> During the course of the discussion that ensued, Mr Sharma had sought to be excused from the proceedings, because he says he was involved in a pre-trial conference. Given the Tribunal's belief that Mr Sharma had deliberately sought to mislead the Tribunal, no such allowance was given and an instruction was issued that he must remain in attendance at these proceedings until such time as he was excused.

<sup>12</sup> See Exhibit R1, which is a photograph of the original letter of undertaking provided by Mr Kumar on 12 June 2013, in which he stated that he will "have no further claims against the Royale Wine Shop."

<sup>13</sup> Note this is well after the grievance had been commenced in 2013 by Mr Kumar against Mr Prasad.

<sup>14</sup> This is somewhat contradictory evidence, given that he confirmed that Mr Phillips was his Manager representing him in the Employment Relations Tribunal in April 2015.

associated with the 'Royale (Labasa) Hotel' that was located across the road from the wine shop, the subject of proceedings. There was also the Royale Diner, a kitchen and eating venue, that according to the witness was now closed down. It too was operating from the same side of the road as the Royale Labasa Hotel. And of course, there was the Royale Wine Shop. Mr Prasad attempted, albeit only in a veiled way, to suggest that the wine shop had been previously operating under the business name of the Royale Diner<sup>15</sup>. Mr Prasad was asked what the shop sign said and he claimed, 'RWS.' Mr Kumar on the other hand had indicated to the Tribunal when asked, that the sign read Royale Wine Shop. Mr Prasad told the Tribunal that now in 2018, the business name 'The Royal Diner', was only being used in relation to the collection of rent from the building that he owned, in which was located amongst other things, the Royale Wine Shop.

### **Intimation by the Tribunal that it Would Reissue Enforcement Order**

[16] It was at this juncture, that the Tribunal indicated that it was intending to issue an amended Enforcement Order consistent with Mr Prasad's evidence, against "Mr Rinesh Prasad trading as The Royale Diner." The Tribunal indicated that it appeared obvious to it, that the original judgment was erroneous insofar as it did not reveal the correct identity of the Employer at the time. That is, if the wine shop at the time was really an activity under the auspice of the Royale Diner trading name, then the correct Respondent and Judgment Debtor should have been *Mr Rinesh Prasad trading as The Royale Diner* and not, the *Royal Wine Shop*<sup>16</sup>. In response, Mr Sharma submitted to the Tribunal, that the Grievor would have to amend his application and allow the Respondent an opportunity to respond to it, before any corrected Enforcement Order could be issued. In support of this argument, Counsel cited Rules 1 and 2 of Order 7 of the *Magistrates Court Rules 1945*<sup>17</sup>, however despite the fact that this was his client's Notice of Motion, further requested that he be "given time to carry out research" in support of his contention that the existing judgment order and enforcement order be set aside.

### **Setting Aside A Judgment**

[17] The Tribunal made it very clear to Mr Sharma, that against the backdrop of this case, that there would have to be very good reason to now set aside the original judgment and/or to suspend the enforcement proceedings against Mr Prasad<sup>18</sup>. The Tribunal indicated that whilst it was happy to entertain further oral submissions, that it would be reluctant to delay the proceedings any further. One of the reasons for this, is that the original grievance took place in 2013. Mr Kumar is entitled to certainty and to have this matter brought to a conclusion. What the Tribunal also made clear at this time, was that it would need to understand that the Employer's conduct in not ultimately participating in arbitration proceedings before the Tribunal on 6 March 2017, was of its own doing and for its own purposes. Specifically, the Tribunal made clear, that if the Respondent's argument was solely that it claimed that the judgment was not enforceable in law, that the Tribunal would have some reservations as to whether the application had any real merit. On the other hand, the Tribunal explained, that if there was some other reason that the Respondent sought to rely upon, such as that it was completely unaware of the events that

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<sup>15</sup> The Tribunal would find it highly unlikely that a wine or bottle shop would be advertised to the world as a "diner."

<sup>16</sup> The Tribunal nonetheless finds it somewhat difficult to comprehend or accept, how the trading name of the wine shop would be anything other than the Royale Wine Shop (RWS). It seems more likely that Mr Prasad simply did not both, registering the business name that the wine shop was for all intents and purposes, operating under.

<sup>17</sup> The Tribunal is unclear exactly how it is said that these Rules would advance the argument as put.

<sup>18</sup> The Tribunal is of the view that it has no powers to suspend an Enforcement Order issued under Section 212 of the Act.

transpired and having regard to the merits of the case in the initial proceedings, then some justification made be had in entertaining a more vigorous analysis of the issues.

[18] It was at this time, that Mr Sharma again sought to withdraw from his involvement in these proceedings and suggested to the Tribunal that it would be appropriate that his law clerk remain and appear on his behalf. Mr Prasad who was still under oath, was asked to wait outside, whilst the Tribunal explored why it was the case that Mr Sharma again wished to leave and particularly leave the Respondent without suitable legal representation<sup>19</sup>. What transpired beyond that point was a further questioning of Mr Sharma as to the earlier and misleading representations that he had made. Those representations included, that his client was not a party to proceedings; was not the registered owner of the business; was a supervisor and an employee of the Royal Wine Shop;<sup>20</sup> that he had no knowledge of Mr Prasad's status as a Director of The Real Group Limited; and that he was not the owner of the Royal Wine Shop.

[19] Mr Sharma was then questioned in relation to his business dealings with Mr Prasad, specifically relating to the nature of the legal services that he had provided to him, that would otherwise expose Counsel to an understanding of, for example, who was a director of The Real Group Limited. It is perhaps not that relevant to the substantive matter before the Tribunal, as to the detail of the discussions that transpired between the Tribunal and Mr Sharma, suffice to say that ultimately Counsel claimed that he was only aware that Mr Prasad was a Director of the Real Group Limited after he made a telephone call to him during an adjournment given to him by the Tribunal to do so. The fact that the Affidavit of Dorin Ronika at Paragraph 4, stated that "Rinesh Prasad is the proprietor of Royale Diner and Real Group Limited" and that Mr Sharma at the outset portrayed him otherwise as a "supervisor" and "employee" supports the conclusion that Counsel had wilfully obstructed the Tribunal in the undertaking of its task. For that reason amongst others<sup>21</sup>, Mr Sharma was withdrawn from the proceedings in accordance with Section 228(2) of the Act.

### **Continuing Evidence of Mr Prasad**

[20] Mr Prasad was thereafter returned to the Labasa Court Conference Room, where a further examination of his business activities and relationship with Mr Sharma, was undertaken. In effect, what Mr Prasad told the Tribunal was that for approximately 3 years ago now, that Mr Sharma had been his lawyer. According to Mr Prasad, sometime in early October 2018, he had discussions with Mr Sharma in relation to the Enforcement Order that had been issued by the Tribunal and the different entities and businesses that he controlled. The witness made it clear, that at this stage, discussions took place in relation to the Royale Wine Shop and that it was not a registered business name. In relation to the proceedings to which Mr Prasad attended before Senior Magistrate Green on 31 August 2018, the business owner conceded that he was told to return on 19 September 2018, but failed to do so. The witness claimed that after the August hearing, that whilst he wanted to make contact with Mr Sharma, he was unable to meet him for approximately one month and claims to have been liaising with a law clerk from that office in the

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<sup>19</sup> The Tribunal sensed at this juncture, that Counsel was well aware that he had been exposed for misleading and obstructing the Tribunal in the undertaking of its tasks.

<sup>20</sup> Keep in mind at this point, neither party had alerted the Tribunal to the fact that the correct spelling of the business name was 'Royale Wine Shop.'

<sup>21</sup> For example, when asked did he understand an instruction, Counsel responded, "I understand that, I understand English"; or when requested for the second time to take his hands out of his pockets, replied with words to the effect, "I thought you wanted me to keep my hands in my pockets, is there anything else that you want me to change?"

interim period<sup>22</sup>. According to Mr Prasad, when he did ultimately have the opportunity to discuss the matter with Mr Sharma, he explained to him the ownership structure of the business undertakings that he had.

### **Information from the ERT File 112/2013**

[21] For the sake of completeness, the Tribunal requested access to the original case file of the grievance proceedings that gave rise to the judgment order. What became clear from an examination of the Notice and email communications on that file, is that Mr Prasad himself had been a party to proceedings and a person with whom the Registry had been directly communicating in relation to those proceedings. The Tribunal took Mr Prasad to various communications and the witness confirmed that the email address that had been cited in those documents was in fact his.<sup>23</sup> Finally, both the Labour Officer and Mr Prasad were given the further opportunity to make any additional submissions that related to the request to set aside the decision and stay the Enforcement Order.

### **Analysis of the Issues**

[22] It is probably worthwhile at the outset to consider what it is that was being sought by the Respondent business, the Royale Wine Shop. There are several tranches to the Respondent's argument. Firstly, Mr Prasad is in effect asking that the original judgment order or enforcement order be now set aside, because he was of the belief that the agreement he entered into with Mr Kumar on 12 June 2013, was made in full and final settlement of all matters arising out of the employment relationship. Secondly, the thrust of what was being advanced by Mr Sharma, was that it is claimed that as the Royal Wine Shop or Royale Wine Shop is not a registered business name, that this somehow would render void any judgment order made against that name, on that basis. Though there has been no elaboration as to what the true description of the Employer should have been, it would seem at the time, based on what Mr Prasad has said, that he claimed that the registered business name that was operating the wine shop, was The Royale Diner. If that was the case, the extension of that claim would be, that the Order should have been made against Mr Rinseh Prasad trading as The Royale Diner. Under the umbrella of this argument, the Respondent's case is, that no such correction should be presently allowed under the relevant *Magistrate Court Rules*. That is, that a separate application would be required to be made by Mr Kumar seeking the amendment of the named Respondent and in turn, the Respondent should be given the opportunity to address that application.

[23] On the other hand, the argument on behalf of the Labour Officer, is essentially one of bringing to account an Employer who is evading his legal responsibilities. That is, he was aware of the grievance against him, knew that the grievance was not settled, decided to ignore any further requests to participate in the Tribunal process and ultimately now wants to shirk his responsibility by not meeting the terms of the Order that was made against him, for what Magistrate Green saw, was the unjustifiable dismissal of Mr Kumar. First and foremost, the Tribunal is of the belief that the Notice of Motion is misconceived for several reasons. Of course, to set the scene, the Tribunal does not accept the evidence of Mr Prasad or the submissions of his Counsel, where it was claimed somehow that Mr Prasad could not be held

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<sup>22</sup> It is noted here, that Mr Prasad claimed that he was advised by that law clerk, that he needed to discuss his issue with Mr Sharma.

<sup>23</sup> How an Officer of the Court could possibly make submissions denying that Mr Prasad was an interested party against that backdrop, simply cannot be understood.

liable as Mr Kumar's employer, when operating the business that was known as the Royale Wine Shop. During proceedings and despite the claim by Counsel for the Respondent that this Tribunal had pre-judged the matter, the Tribunal was of the view that it does have the capacity to alter the name of a party to proceedings, so as to avoid any doubt or correct any technical defect that was an unintended consequence of the initial judgment Order. Such a view seems consistent with that expressed by the Supreme Court in *Ambaram Narsey Properties Ltd v Khan*<sup>24</sup> where the Court held:

*Once the court's order has been finalised, the court has no further role to play in respect of the issue which the court's order addressed. To use the time-honoured Latin maxim, the court is said to be functus officio. That means that apart from correcting clerical mistakes or an accidental slip or omission under the slip rule, the court has no power to alter the order it made.*

[24] Whilst Mr Sharma seemed keen to bring the Tribunals attention to the work that he claimed the *Magistrates Court Rules 1945* play in such cases, it is perhaps useful to revisit the relationship between those Rules and the provisions that govern the activities of this Tribunal.

#### **The Slip Rule: Where Do We Look to Cure Error or Defects in Proceedings?**

[25] In the case of a matter brought to the Employment Relations Tribunal, a Magistrate must exercise her or his jurisdiction having regard to Section 61B(2) of the *Magistrates Court 1945* that requires

*Subject to any rules and directions made by the Chief Justice under this Part, any magistrate exercising the jurisdiction and powers or performing any duties or functions of any statutory tribunal subject to this Part, shall do so in accordance with the written law which established that statutory tribunal.*

[26] Section 238 (2) of the *Employment Relations Act 2007* provides that that where no provision within the Act is made for a particular circumstance, then the *Magistrate Court Rules 1945* would apply to proceedings. In turn, Order III Rule 8 of the *Magistrates Court Rules* provides, that:

*In the event there being no provision in the Rules to meet the circumstances arising in a particular cause, matter, case or event, the court and /or the clerk of the court and/or the parties shall be guided by any relevant provisions contained in the High Court Rules 1988.*

[27] In relation to mistakes or errors arising from accident, slip or omissions, the guiding provision must be Order 20 Rule 10 of the *High Court Rules 1988*. Under the heading of Amendment of Judgment and Orders, the rule provides:

*Clerical mistakes in judgments or orders, or errors arising therein from any accident, slip or omissions, may at any time be corrected on motion or summon without an appeal.*

[28] In the case of the how the 'Slip Rule' is to apply, at least within the High Court, in *Pati v Pratap*<sup>25</sup> the Court of Appeal observed that an application by a party to have an order corrected, can be done at any time either under Order 20 Rule 10 specifically, or under the Court's inherent

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<sup>24</sup> [2016] FJSC 13; CBV0003.2015 (22 April 2016)

<sup>25</sup> [1977] FJCA 16; Abu0053u.96s(16 May 1997)

jurisdiction. It is true, that when exercising powers as a Magistrate under the Magistrates Court Act 1945, that there is no inherent jurisdiction of the Court. The question therefore begs, does a Magistrate who is undertaking her or his duties in accordance with Part 8A of the *Magistrates Court Act* and having regard to the combined effect of Section 238(2) of the *Employment Relations Act 2007* and Order 20 Rule 10 of the *High Court Rules 1988*, have the capacity to correct an error arising from an accident, slip or omission of a brother or sister Magistrate?

[29] Specifically in this case, the question needs to be asked does a Magistrate have power to correct an order that has been issued incorrectly, citing the name of the Respondent as an unregistered business name, rather than the name of an individual owner of that business? At first blush, there would appear to be a lacuna in the legislation. The reason for this is that it seems that unless an application for correction was made by a party to proceedings, then it would appear that no correction could otherwise take place by the Tribunal of its own motion. That though hardly seems a workable result, because if a clerical mistake was made by the Tribunal, which often happens, the argument would run that there was simply no capacity to correct such a mistake, without a motion or summon from one of the parties. It is noted that Section 235(2) of the Act, provides that the Tribunal may, at any stage of the proceedings, on its own motion, or upon application and, upon terms as it thinks fit, by order- amend a defect in proceedings. Though after the judgment or order has been issued, it would seem that in the absence of any other statutory authority or inherent jurisdiction, that the Tribunal Member would be *functus officio* in such matters. This may be a matter for the consideration of the legislator.

#### **Can the Correction Take Place as a Consequence of the Current Proceedings?**

[30] The Tribunal is of the view that the current proceedings do provide a vehicle to allow for a correction of the defect in the Orders, consistent with Order 20 Rule 10 of the *High Court Rules 1988*. Specifically, whilst the Respondent has moved that the Tribunal set aside the original judgment dated 29 November 2017 Order and thereafter suspend the enforcement of both that Order and the later Enforcement Order, the Grievor implicitly by his submissions is asking that the Tribunal correct any defect in order, so he may receive the monies deemed owing and due to him. Order XXVI Rule 2 of the *Magistrates Court Rules 1945*, provides:

*Unless the Court shall otherwise order, no motion shall be entertained unless the party moving has filed a motion paper distinctly stating the terms of the order sought.*

[31] It is clear here, what the motion of the Grievor who was unjustifiably dismissed in his employment in 2013 is, as has been expressed by Ms Kadavu. The Grievor wants the Employer to make good the compensation payment and nothing more. In order to do that, the defective Orders need to be corrected. The Tribunal has dispensed with the need for a filing of a motion paper in such circumstances.

#### **Inadvertence Rather Than Opening Up Claim For New Entitlements**

[32] There is no doubt whatsoever, that the then Honourable Magistrate would have been well aware, that a registered or unregistered business name could not be an Employer and that the proceedings before him were very much about Mr Rinesh Prasad as the owner of the Royale Wine Shop. So much can be ascertained from his Worship's decision where at Paragraph 4, he states:

*"That the Employer was still in operation but the owner resides in abroad".*

[33] It therefore cannot be said, that at the time of the decision in the Employment Relations Tribunal, that a distinction was not made between the “Royal Wine Shop” and its owner. In *Raybos Australia Pty Ltd v Tectran Corporation Pty Ltd*,<sup>26</sup> Toohey J, said:

*In many cases the slip rule or its equivalent is invoked when, through error or oversight, a judgment or order fails to express correctly the intention of the court at the time when the judgment or order was announced. But it is clear that this power of correction extends to cases where a matter, through inadvertence, was not dealt with at the hearing.*

[34] Further, a Full Bench of the Court of Appeal stated in *Chief Registrar v Goundar*<sup>27</sup>

*[32] What constitutes an accidental slip or omission has generated a large body of case law. The essence of the Rule commonly referred to as the “slip rule” is that it is a rule permitting the correction of any accidental slip or omission in judgments and orders. Correction can be made only of typographical or clerical errors or other careless mistakes. (See: Lautoka City Council v. Ambaram Narsey et al and Others, Civil Appeal No. ABU 0019 of 2012, CA Minutes of 30<sup>th</sup> May, 2014.*

*[33] It can be used to correct a minute of order that fails to implement the intention of the Court. (Bristol Myers Squibb v. Baker Norton Pharmaceuti [2001] EWCA Civ 414.*

*[34] In contrast, it cannot be used where the Court left the parties to agree on the precise terms of an Order as to interest. (Leo Pharma (a/s Leo Laboratories Ltd. v. Sandoz Ltd [2009] EWCA Civ 1188. See also [2010] EWHC 1911.*

[35] It is clearly the case, that the exclusion of the business owner’s name from the initial decision, as well as the Enforcement Order, was nothing more than an inadvertence. A case is often given a ‘name’ upon the registration of a file after a grievance has been referred to the Tribunal from the Mediation Unit and thereafter, that name is given a life of its own. These proceedings therefore serve as a useful reminder to the Tribunal, that greater precision needs to be taken when the names of a party to proceedings are formally entered. The original judgment order should be corrected to have the named party as ‘Rinseh Prasad trading as The Royale Wine Shop’.<sup>28</sup> Thereafter, the Enforcement Order that was issued by this Tribunal on 19 September 2018, similarly should be altered accordingly.

[36] It is perhaps also worthwhile to raise one other issue within the Notice of Motion, where it seeks that this Tribunal stay the Enforcement Order that it had earlier issued. That simply is not within the powers of this Tribunal. The Enforcement Order was issued in accordance with Section 212(1)(b) of the Act. Any attempt to either challenge or have that Order suspended, would need to be made by way of an application to the Employment Court. There is simply no discernible power of the Tribunal, to do anything beyond correcting the defect in the named Respondent.

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<sup>26</sup> [1988] HCA 2; (1988) 77 ALR 190; (1988) 62 ALJR 151 (10 February 1988)

<sup>27</sup> [2016] FJCA 153; Misc Action 01.2016 (29 November 2016)

<sup>28</sup> The Tribunal does not accept that the wine shop was trading under the business name as The Royale Diner and believes that such a claim is a contrivance for the sake of attempting to thwart the outstanding obligations that arise out of the ERT Grievance 112/2013.

### Other Reasons Why the Original Judgment Should be Set Aside

[37] Williams JA in *Cook v DA Manufacturing Co P/L & Anor*<sup>29</sup>, identified principles that could be followed in the case where a party, such as possibly being alleged here, failed to participate in proceedings in which a judgment order was made and where it was alleged they were deprived the opportunity to otherwise do so. In that case, his Honour noted that some cases would be amenable to setting aside where:-

- (i) The Applicant does have a satisfactory explanation for failing to appear in the Court and responding to the application at the relevant time;
- (ii) There was no delay in making an application to respond to the default judgment, only a disruption brought about by the withdrawal of a legal representative; and
- (iii) The Applicant does have a prima facie defence to the Statement of Claim that has substantial merit.<sup>30</sup>

[38] In the present proceedings, no discernible explanation was provided to this Tribunal, explaining the failure of the Respondent to argue its case before the Employment Relations Tribunal on 6 March 2017. It appears that Mr Prasad had been long engaged with the Tribunal Registry staff in relation to various steps in proceedings. He had attended mediation and sent a representative in April 2015 to appear before the Tribunal in that matter on his behalf. How it could be said that Mr Prasad was not the Employer in the circumstances is simply hard to comprehend.

[39] Further, as was said in the case of *Nunn v Honey & Anor*<sup>31</sup>, arguments to be advanced on behalf of a party seeking to set aside a default judgment<sup>32</sup> need to rely on more than bare assertions, but must raise real questions that need to be fairly considered by the court. The Tribunal sees no such real questions emerging out of the submissions and argument advanced by either Mr Sharma or Mr Prasad.

[40] As a result and as envisaged, the Notice of Motion is dismissed and the Labour Officer must prepare Amended Judgment and Enforcement Orders in the same terms as that sealed on 20 December 2017 and 20 September 2018 respectively, consistent with the requirements expressed in this decision.

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<sup>29</sup> [2004] QCA 52

<sup>30</sup> See *Aboyne Pty Ltd v Dixon Homes Pty Ltd* (1980) Qd. R 142

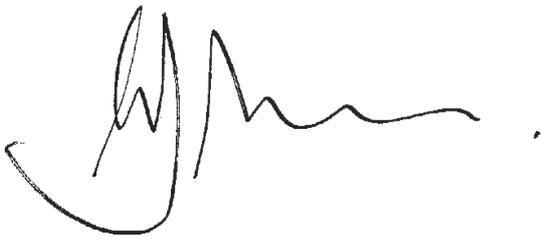
<sup>31</sup> [2013] QDC 58).

<sup>32</sup> Not that it is a default judgment. Section 233 of the Act provides, that If, without good cause shown, a party to proceedings before the Tribunal fails to attend in person or by representation, the Tribunal may act as fully in the matter before it as if that party had duly attended or been represented. It is simply the case of an Employer failing to make submissions on its own behalf. There could often be the case, where some other employer witnesses could be subpoenaed to give evidence on the employer's behalf and still there is no attendance by the Employer.

**Decision**

[41] It is the decision of this Tribunal that:

- (i) The Notice of Motion be dismissed.
- (ii) That the Judgment Order of his Worship Mr Ropate Green RM, dated 20 December 2017, be corrected insofar as the name of the Employer is to read 'Rinesh Prasad trading as The Royale Wine Shop.'
- (iii) The Enforcement Order sealed on 20 September 2018, be corrected insofar as the name of the Employer is to read 'Rinesh Prasad trading as The Royale Wine Shop.'



**Andrew J See**  
**Resident Magistrate**