IN THE FIJI COURT OF APPEAL
Civil Jurisdiction
Civil Appeal No. 51 of 1981

Between:

TEKOTI ROTAN — Appellant

and

UAIETA ERI & ORS. and
RABI HOLDINGS LIMITED — Respondents

M.D. Benefield for the Appellant.
P. Knight for the Respondents.

Date of Hearing: 24th March, 1982.
Delivery of Judgment: 2 APR 1982

JUDGMENT OF THE COURT

Henry, J.A.

This is an appeal from a judgment of Kermode J. in which he gave judgment in favour of appellant for the sum of $7,812.22 on his claim and also gave judgment against appellant for $40,537.88 and costs in favour of respondent Rabi Holdings Limited (in liquidation) in respect of a counter-claim. Appellant contends that the award in his favour is too low and that the award to respondent on the counter-claim is too high. The notice of appeal did not contain, as the Court of Appeal Rules require, (R.15(3)) a precise statement of the judgment which he sought in this Court but there are a number of heads of claim in dispute which may either increase the amount awarded to appellant on the claim or reduce the amount awarded against him on the counter-claim. These will be considered under appropriate headings. The dispute arises out of the termination by respondent of his employment as its managing director. The other directors and secretary of respondent were also made parties to the

action but no question now arises as to any liability on their part and it is convenient to refer to Rabi Holdings Limited only as respondent.

Prior to 1970 appellant, who is a Banaban, was a civil servant employed in the Co-Operatives Department of the Fiji Government. Whilst so employed he was approached by members of the Rabi Council of Leaders, and the Banaban community, to take part in the establishment of a commercial enterprise for Banabans. On September 3, 1970 respondent was duly incorporated with shareholding of $2,000,000 limited to Banaban shareholders. Appellant resigned as a civil servant early in 1971 and was duly appointed as managing director of respondent pursuant to Article 82 of the Articles of Association and continued in that position until May 15, 1978. In general, it may be stated (but not quite accurately) that appellant was to enjoy the same terms and conditions as to salary, leave, passage and other allowances as were enjoyed by him at that time as a civil servant. No formal written contract was entered into between the parties which has been described as an oral agreement but there are relevant documents to be considered.

The learned Judge found that appellant was not a credible witness, and, on matters in dispute, the evidence of appellant was not accepted. This finding on credibility was not expressly attacked in the grounds of appeal except that it appears that grounds 3 and 4 were aimed at showing that the learned Judge made a wrong approach, and, on a mistaken basis, when he made findings on credibility. Grounds 3 and 4 read:

> "3. That the learned trial Judge erred in law and in fact in holding that the Appellant (Plaintiff) had left the affairs of the company in such a mess that the liquidator had been unable to locate many of the records of the company and that he had been unable to trace payments when there was no evidence to support such a conclusion or the evidence was to the contrary.
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> 4. That the learned trial Judge misdirected himself in arriving at the conclusion that

it was the Appellant (Plaintiff) who left the affairs of the company in such a mess when in fact the evidence showed that the Appellant (Plaintiff) was locked out of his office in April, 1978 and that Mr. Sultan Ali the liquidator did not take charge of the affairs of the company until June, 1979. "

It is correct that appellant was locked out of his office in April 1978 and that the liquidator did not take charge until June 1979 but the gravamen of the charge that appellant was responsible for what has been described as a "mess" is the state of respondent's business affairs during the period when appellant controlled it as managing director. Respondent was manager of a concern, which, he said in evidence, had grown during his managership "so big" with millionsturnover that a more experienced person (than himself) was required to take charge of the work. He admitted accumulated losses of over $3,000,000 and that the filing of accounts and reports was "considerably behind". As managing director of a large concern this was the prime responsibility of appellant and is a serious matter. The liquidator said that when he took over the records were "pretty much of a mess" and he complained about a lack of records of a loan of respondent's funds to appellant. His evidence confirms a lack of proper records. It is also clear that the directors were concerned about the management by appellant of the affairs of the company and that a meeting was called on April 10, 1978 for the purpose of enabling appellant to answer allegations against him as there was concern about the financial affairs of the company. In our judgment there was more than ample evidence upon which the learned Judge could, apart from his personal assessment of appellant when giving evidence, properly come to a conclusion that appellant was not a credible witness. Grounds 3 and 4 fail.

Grounds 1 and 2 read as follows:-

"1. That the learned trial Judge erred in law and in fact in dismissing the Appellant's (Plaintiff's) claim for general damages after having found that the purported

dismissal of the Appellant (Plaintiff) as Managing Director by the Board whether on 10th April or the 21st April, 1978 was void and of no legal effect.

2. That the learned trial Judge erred in law and in fact in holding that the Appellant (Plaintiff) was only entitled to salary and allowances (if any) upto 15th May, 1978 and no salary in lieu of reasonable notice after having found that he was properly dismissed as a Director on 15th May, 1978 by the members of the Respondent Company. "

The crux of these grounds is whether or not appellant was properly dismissed on May 17, 1978, and, if not, what damages was he entitled to by reason of a failure to give reasonable notice of termination. The answer lies in the pleadings. Appellant claimed in para. 5 that he was appointed as managing director pursuant to Article 82 of the Articles of Association which reads:-

"82. The directors may from time to time appoint one or more of their body to office of managing director or manager for such terms and at such remuneration (whether by way of salary, or commission, or participation in profits or partly in one way and partly in another) as they may think fit; but his appointment shall be subject to determination ipso facto if he ceases from any cause to be a director, or if the company in general meeting resolve that his tenure of the office of managing director or manager be determined."

Two attempts were made to exercise this power of termination, namely, on April 10 and 21, 1978 but it is conceded that the resolutions were invalid because they were not passed in accordance with the Articles of Association. However, a resolution on May 15, 1978 was duly and correctly passed terminating the services of appellant forthwith. Appellant in his pleadings (para.21) accepts that his employment was so terminated. He made no claim that this termination was unlawful, indeed, it is clear that the power in Article 82 was properly exercised. What appellant claims is that he was entitled to reasonable notice of such termination.

Appellant's claim is a complete misconception of the law. Article 82 is part of his contract of employment. It provides for the manner in which his employment may be terminated. It was so terminated. Whilst we do not make any pronouncement on the applicability of the Employment Act (Cap.92) to the present contract, it is to be noted that section 24(1), (which is a section containing provisions as to notice of termination of employment) retains the right of the parties to agree upon the form of notice which will terminate their particular contract. There was no breach of contract by reason of failure to give reasonable notice, indeed, no breach of contract is alleged in the statement of claim. There is only a claim that, in some way not stated, appellant is entitled in addition to the express provision for termination of his contract, to some additional notice. He is not. The only notice which the contract provides for is the notice necessary for the passing of a resolution in terms of Article 82 when, as the Article provides, there is termination ipso facto. The learned Judge and counsel were correct when it was said:-

> " Mr. Maharaj however, during cross-examination of the second defendant stated that the plaintiff was asked to step down and was given one month's notice which he accepted but that before the notice expired he was thrown out of his office. He does not now dispute that he was legally dismissed on the 15th May, 1978, when the members of the defendant company in general meeting dismissed him. "

This concession and finding makes it abundantly clear that there is no foundation for a claim for damages for wrongful dismissal. The abortive attempts during April to pass resolutions were of no effect. Appellant's employment continued until May 17, 1978 up to which time he is entitled to salary and allowances. No damages, not even nominal damages as counsel claimed in this Court, can arise from those abortive resolutions. They are, as ground 1 states, void and of no legal effect. The discussion on this topic has been futile and a waste of

time of the Court. It is axiomatic that no damages can flow from the proper exercise of an express right to terminate a contract of employment. Grounds 1 and 2 fail.

We turn now to deal with disputed items upon which appellant claims either that the judgment in his favour should be increased, or that the amount awarded against him should be reduced.

(1) Passage Grants: Appellant claimed $12,000 for two passages to the U.K. This claim was based on para.6 of the statement of claim which alleged that his contract was on the same "terms and conditions.....enjoyed (in 1970) as to.....passage" as applied in his said occupation as a civil servant. The claim for relief stated only "Passage allowance for two tours $12,000". His evidence-in-chief was unsatisfactory so he was further questioned in cross-examination. He then said:-

> " My understanding because had I stayed in the civil service I would have received passage grants. I claim $12,000 - that was figure set by the Board. I adopted that figure which I believe is proper figure. At that time return fare to U.K. was about $2,000 return and I was entitled to 3 adult fares. I am claiming presumably for 1976 - other is for 1979. I did not go to U.K. in October 1973. I received payment in lieu of going on that trip."

This is pure hearsay because there should have been produced the documentary evidence which spelt out the rights of a civil servant in similar employment. This objection does not appear to have occurred either to counsel or the Court. It was a clear case where the best evidence rule applies. Such conditions are the subject matter of provisions properly made and laid down by Government for the purpose of defining the rights of civil servants in their employment.

It was contended that the claim for $12,000 was supported by the events which took place at a Board meeting on April 10, 1978 when a settlement of leave and passage money was under discussion. It was stated that the figure

of $12,000 was fixed for passage money and that two cheques were accordingly made out and handed to appellant but payment was stopped, seemingly on the basis that appellant had made a claim for an amount to which he was not entitled. On this point the learned Judge held as follows:-

> " On the evidence before me that plaintiff was not entitled to be paid that sum and a resolution by the Board that he be paid it, which the Board later cancelled, does not entitle the plaintiff to the payment. "

We can see no reason to differ from this finding and certainly, in our view, counsel for appellant has not shown any ground upon which that finding ought to be set aside. It will be seen later in this judgment that the appellant was not justified in making a claim for 2 tours of the United Kingdom and that, accordingly, payment of the cheques was rightly stopped.

The only relevant evidence on the question of passage money was that of Paula Ramasima, a civil servant employed as an executive officer for the Public Service Commission. He was a witness for the defence. The relevant entitlement was that obtaining in 1971. This witness said appellant came under 1957 leave conditions. Under those conditions appellant was entitled to passage grant to New Zealand and Australia every tour, that is to say after each successive 3 years service. This grant is for 3 adults. Also that appellant could qualify for a U.K. passage once in addition to the New Zealand and Australia grant. Official documents referable to this question were produced by consent. The relevant passage refers only to passages to New Zealand and not to New Zealand and Australia.

The learned Judge found that appellant, in August 1974, received $4,853.40 being passage for 3 adults to London and return. This accounted for that entitlement to which Mr. Ramasima referred. He then went on to find

as folows:-

> " As to passage grants, the plaintiff would have been entitled to a once only passage to the United Kingdom for which he was paid in 1974. He could only have been entitled to one more passage grant for up to 3 adults to New Zealand before he was dismissed in May 1978. "

In our view, on the relevant evidence which we have carefully considered, the learned Judge came to a correct conclusion and correctly allowed 3 adult passages to New Zealand and return. The sum of $1,000 allowed does not appear to have been challenged as being inadequate for that purpose. This ground (ground 5) fails.

(2) Sums of $4,000 and $4,340 raised as part of respondent's claim in the counter-claim

This refers to ground 6 in the notice of appeal which reads:-

> "6. That the learned trial Judge erred in law and in fact in not holding that the two sums of $4,000.00 and $4,340.00 were refund of salary and housing allowance deductions made in error by the company and were agreed to be refunded as claimed when whatever evidence there was showed that such was the case. "

The learned Judge reviewed the evidence on this topic. He did not believe appellant when he gave an explanation why he should not repay these moneys which, on his instructions, were paid to him by the company. Appellant relied on grounds 3 and 4 to attack the finding by the learned Judge on the credibility of appellant but we have already dealt with that. Appellant was in a position of trust. On his instructions he caused these moneys to be paid to himself. He was called upon to justify such appropriation unto himself of the moneys of respondent. His explanation was rightly rejected. That being so he was in possession of company moneys to which

he could establish no right. Counsel for appellant contended that an onus lay on respondent to prove its case on this claim and that the burden had not been discharged. It had. Appellant failed to establish, as he was bound to in the circumstances, any basis for such an appropriation of company funds for his own personal benefit. With respect we agree entirely with the learned Judge when he found as follows:-

> " The sums of $4,000 and $4,340, which on the documentary evidence were refunds payable due to the property being taken over by the company as exhibits E and F disclose, must be repaid to the company on the negotiations for the purchase not being completed as pleaded by the plaintiff. The plaintiff cannot be permitted to keep not only the proceeds of the sale of the property but also refunds that became payable to him on the company taking over the property. He admitted in his defence to the counterclaim receiving these sums but alleged they were "refund of salary and housing allowance deductions made in error" by the company and agreed to be refunded. "

Ground 6 fails.

(3) This is a claim for a reduction in the amount allowed against appellant in respect of the counter-claim. It can best be explained by setting out ground 7 of the notice of appeal. It reads:-

> "7. That the learned trial Judge erred in law and in fact in not allowing a set off in the sum of $6,000.00 for housing from October, 1976 to May, 1978 at $300.00 per month and $6,480.00 for house rent in Fletcher Road Vatuwaqa property owned by the Appellant (Plaintiff) assigned to and received by the 6th defendant (Respondent) from May, 1975 to April, 1978 inclusive at $180.00 a month when there was evidence to the effect that the Appellant (Plaintiff) was in receipt of such housing allowance for some time vide a letter from the Respondent Company confirming such allowance. "

It was admitted that, apart from the civil service provisions applicable, appellant was entitled to

a housing allowance. The claim of $6,000 for such an allowance from October 1976 can be shortly disposed of. On January 25, 1972 appellant was authorised to enter the appropriate housing allowance on his wages book as a credit in his favour. However, the Board passed a resolution in October 1972 with the result that it increased the salary of appellant to $7,500 with an added condition that the housing allowance would cease on the week ending October, 1972. Appellant accepted these terms so no further allowance can be claimed. This claim must fail.

There remains the claim for a set-off of $6,480 for house rent from May 1975 to April 1978. This claim was dealt with at some length by the learned Judge. It concerns the purchase by appellant of a house in Fletcher Road, Vatuwaqa. This claim is also involved in the claim for $6,000 which we have already disallowed on other grounds, nevertheless it comes within the facts concerning the present claim for a set-off of $6,480. The judgment finds as follows:-

> " The plaintiff sought to set off two sums against the amounts claimed by the company namely $6,000 he claims is due to him for housing from October 1976 to May 1978 at $300 a month and $6480 "house rent in Fletcher Road Vatuwaqa property owned by the plaintiff assigned to and received by the 6th defendant of May 1975 to April 1978 inclusive at $180 a month".
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> The plaintiff's own evidence discloses that the Rabi Island Council lent him $16,000 to purchase the Fletcher Road property. Assignment of his rent was for repayment of this loan as he admitted in evidence. This explains why he did not claim a refund from 6th May, 1975, to April, 1978, in his statement of claim.
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> The plaintiff in his claims does not claim either the $6,000 or the $6480.
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> The plaintiff was entitled to little credence. As managing director he should have ensured that records and accounts of the company were properly kept. I do not accept his evidence of alleged agreements reached with the company. Records do not now exist which would enable the liquidator to check on the legality of all the payments to the plaintiff. "

There is a slight qualification to be made to the statement that appellant did not claim either $6,000 or $6,480. He did in fact claim $3,600 in respect of the item of $6,000 but nothing turns on this.

It is clear that the learned Judge did not believe appellant when he put forward a claim that he was entitled to set-off the sum of $6,480 against the sum claimed in the counter-claim. There were ample grounds for this finding and the learned Judge neither misdirected himself on any onus of proof nor on any question of fact. His finding on credibility cannot be questioned in this Court unless the well settled principles, laid down in the following cases, apply. I refer to Watt (or Thomas) v. Thomas [1947] A.C. 484; Benmax v. Austin Motor Co. Ltd. [1955] A.C. 370 and SS Hontestroom [1927] A.C. 37. As we have earlier stated it has not been demonstrated that the learned Judge was not entitled to disbelieve appellant. The claim for a set-off of $6,480 fails. So ground 7 also fails.

The appeal is dismissed with costs to be fixed by the Registrar.

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VICE PRESIDENT

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JUDGE OF APPEAL

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JUDGE OF APPEAL