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IN THE FIJI COURT OF APPEAL AT SUVA
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ARU0028 OF 1998S
(High Court Civil Action No. HBC203 of 1998)

BETWEEN:

NATIVE LAND TRUST BOARD
EMPLOYEES ASSOCIATION

Appellant

AND:

NATIVE LAND TRUST BOARD

Respondent

In Chambers: **The Hon. Mr. Justice J.D. Dillon, Justice of Appeal**

Hearing: **4 August, 1998**

Counsel: **Mr. Maharaj for the Appellant**
Mr. G. Leung, Miss L. Ganilau and Miss S. Cevalawa
for the Respondent

Date of Judgment: **5 August, 1998**

JUDGMENT OF DILLON J.

Background

On 15 April 1998 the appellant filed a writ of summons and statement of claim in the High Court seeking by way of relief five specific declarations as well as an order that the implementation of certain redundancy provisions proposed by the Respondent be deferred. These proceedings have not been considered by the High Court and it appears from the record that no application for a fixture has been sought by the appellant.

Instead on 23 April 1998 the appellant filed a notice of motion seeking -

"An Order that the defendant be restrained, by itself or its servants, agents, or howsoever, from implementing its decision on enforcing redundancies on its employees as contained in the structural reorganisation report prepared by the accounting firm of Coopers & Lybrand until the substantive action herein numbered 203 of 1998 has been fully adjudicated upon by this Honourable Court."

In reply the respondent filed a notice of motion -

"That the whole of the Plaintiff's Statement of Claim be struck out on the ground that:

- (i) it discloses no reasonable cause of action;*
- (ii) it would prejudice, embarrass or delay the fair trial of the action;*
- (iii) it is otherwise an abuse of the process of the court."*

Both motions were fully argued before His Honour Mr Justice Fatiaki on 8 May 1998 and both were dismissed. His Honour's reasons were set out in a carefully reasoned decision dated 22 May 1998.

The appellant then filed a notice of motion dated 13 May 1998 -

"That there be a stay of all actions on the part of the Respondent in implementing its redundancy resolution which is the subject of this appeal until the appeal in this matter has been heard and a final decision of the this Court given therein."

On 9 July 1998 the High Court ordered -

"That the Applicant's Motion for an order that there by a stay of all actions on the part of the respondent in implementing its redundancy resolution is dismissed."

The appellant has now filed a notice of motion pursuant to the provisions of section 20 of the Court of Appeal Act (Cap. 12).

“That there be a stay of all proceedings on the part of the Respondent in implementing its redundancy resolution which is the subject of this appeal until the appeal in this matter has been heard and a final decision of the this Court given therein.”

The Issues

The Respondent, has accepted the recommendations contained in a structural reorganisation report prepared by the accounting firm of Coopers & Lybrand, and is proceeding with a staged programme of staff redundancy.

The appellant, as the Employees association, is challenging such redundancies which involve some 121 employees. The challenge is that the respondent has no right to declare even 1 employee redundant.

The question of redundancies is specifically referred to in the “Terms and Conditons of Employment” also called the collective agreement, applying to staff employed by the Native Land Trust Board. It provides as follows:-

“ Redundancies

8.08 *Where it is proposed to declare an employee redundant the Board shall inform the Association not less than 6 months before the date on which the redundancy is to take effect.*

8.09 *An employee declared redundant shall be entitled to at least 6 months notice thereof or cash in lieu together with the benefits and subject to the obligations referred to in clauses 8.02, 8.03 and 8.04, and cash in lieu of long service leave on a pro-rata basis, provided that the latter applies to an employee who has had at least 5 years employment with the Board.*

8.10 *The Board shall pay the cost of transporting an employee made redundant and the employee family and personal effects to the employee's original place of recruitment or nominated place of abode within Fiji."*

Those provisions clearly set out the procedure both parties agreed to accept when originally adopted. At the date of the Judgment on 22 May 1998 His Honour found that "no redundancy notice has been served on any employee of the Dependant Board pursuant to Clause 8.09 of the Collective agreement." Counsel for the appellant has not indicated that such a position has altered in any way that is between May and the present time implementation of redundancy procedure has not commenced.

Submissions by counsel for the appellant in support

Mr Maharaj conceded that his notice of motion disclosed no ground upon which "a stay of all proceedings" was sought. He was prepared however to rely upon the four grounds referred to in the affidavit of Amena Soqoiwasa filed in support of the motion. They are:-

1. Because the Native Land Trust Board is a statutory body constituted by the Native Land Trust Act (Cap. 134) -

“The extent of the restructuring including the decision to create mass redundancy of 121 employees is so extensive and fundamental that there ought to have been an amendment to the said act authorising the defendant to restructure in the manner and mode they are currently pursuing.”

The appellant in submitting “————— that there ought to have been an amendment to the said Act——” implies that the act has no provision preventing “structural reorganisation.” But the collective agreement accepted and adopted by the appellant is unambiguous.

Apart from that, Section 30 of the Act specifically authorises the Board to so control its staff “——as may be necessary to carry out the provisions of this Act.” If administration by the Board for the period 1991 to 1996 has created a consistent deficit for every one of those years totalling in all \$12.3 million then clearly structural reorganization including redundancy must be adopted. In any case the collective agreement provides for such measures and the procedure to be adopted.

The Native Land Trust Act specifically authorises the redundancy process now proposed by the Board.

2. The respondent has failed to comply with the relevant provisions of the Public Enterprise Act 1996 and that the restructuring proposed is therefore ultra vires.

It is conceded by Counsel for the appellant that the Respondent is not named in Part A of Schedule 2 of this Act. But what he contends is that to be able to undertake the restructuring proposed by the Board it should comply with section 14 of the Public Enterprise Act and to be nominated for inclusion in the Schedule to that Act. But section 14(2) provides that -

“A nomination is made under this section for the purpose of the government entity being reorganized and it may be part of a process by which a government entity becomes a government commercial Company, a government company, a part of another government entity or any other government entity or part thereof.”

The application of those criteria to the restructuring proposed by the respondent is frankly misconceived. The Native Land Trust Board is presided over by the Governor-General as President and the Minister as Chairman together with 8 other nominees. Its purpose is the control of native land vested in the Board. The suggestion that this Board should apply to the Public Enterprise Minister to be gazetted as a government commercial company or such other commercial organisation before it can proceed with normal managerial and structural re-organisation cannot be accepted nor sustained. The Public Enterprise act has no application to the present circumstances. Section 14 does not provide the authority relied upon by the Appellant.

3 and 4 Mr Maharaj conceded that grounds 3 and 4 could be considered together, viz. that members of the association had "... a legitimate expectation that they would be employed until the retiring age of 55 years ..."; and that the balance of convenience was retention of the status quo to enable "... functioning in the same way as it has done for over a 100 years."

That submission takes no account of the abnormal losses incurred by the Board since 1991 which losses are born not only by the owners of the land administered by the Board but also by the country as a whole in the form of the subsidies paid to the Board and amounting to \$12.3 million for the period 1991 to 1996.

Those are the two competing and conflicting interests that have to be considered in the proper exercise of a discretionary jurisdiction i.e. a stay of all proceedings until the appeal, not on the substantive action which has not even commenced, but rather on the refusal of the High Court to grant an interim injunction; and a refusal of such stay against the respondent proceeding with its recommended structural reorganization. The appellant has chosen the process of challenging the legislation under the Native Land Trust Act and the Public Enterprise Act. Those challenges have been rightly rejected for the reasons given. The fact that no steps have been taken to arrange a hearing of the substantive action would seem to indicate that the present proceedings are intended to provide some advantages to the appellant by the delays involved.

But the collective agreement does provide redundancy in terms negotiated at the time by the appellant and the respondent. No evidence has been presented to suggest that the terms of redundancy are unfair in any way or that they are not the terms that the appellant negotiated and accepted. Whether 1 or 121 employees are involved does not alter the redundancy obligations of the respondent.

The purpose and policy of redundancy legislation has been judicially explained as follows:-

"The policy behind redundancy payments is not that they should tide a worker over a period of unemployment, earnings related benefits are intended for that purpose. The stated purpose of the redundancy payments scheme is twofold: it is to compensate for loss of security, and to encourage workers to accept redundancy without damaging industrial relations. A redundancy payment is compensation for loss of a right which a long term employee has in his job. Just as a property owner has a right in his property and when he is deprived he is entitled to compensation, so a long term employee is considered to have a right analogous to a right of property in his job, he has a right to security and his rights gain in value with the years. The purpose of redundancy pay is to compensate a worker for loss of job, irrespective of whether that loss leads to unemployment. It is to compensate him for loss of security, possible loss of earnings and fringe benefits, and the uncertainty and anxiety of change of job. These may all be present even if a man gets a fresh job immediately."

That definition of redundancy embraces the concerns expressed by Mr Maharaj in his submissions on behalf of the redundant employees of the respondent. That is what a redundancy payment is for. That is why it was negotiated by the appellant in the first place but is now rejected.

Submissions by Counsel for the Respondent in reply

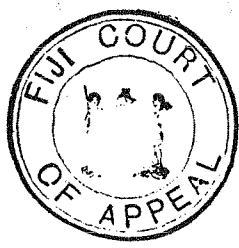
Mr Leung in his helpful submissions emphasised the following principles viz:

- 1) **“Neither the court below nor the Court of Appeal will grant a stay unless satisfied that there are good reasons for doing so. The Court does not ‘make a practice of depriving a successful litigant of the fruits of his litigation...’ (White Book (1993)).**
- 2) **Contracts of employment are personal in nature and not generally subject to applications for specific performances.**
- 3) **The redundancies are critical to the survival of the Respondent.**
- 4) **The Respondent gives an undertaking to be liable for any damages in the event that the substantive action proceeds to trial and is successful. This undertaking does not relate to the redundancies payable under the collective agreement. Rather the undertaking relates to any damages over and above redundancies that may result from the Appellant eventually succeeding in its action against the Respondent.”**

Conclusion

The Appellant seeks an order "That there be a stay of all proceedings on the part of the Respondent in implementing its redundancy resolution". In this case the Appellant has failed to establish that there are any good reasons for granting such an order. For the reasons already stated the order sought is refused and the application dismissed.

Costs in favour of the Respondent to be made by the Registrar if not agreed upon.



J.D. Dillon

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Mr. Justice J.D. Dillon
Justice of Appeal

Solicitors:

J.K. Maharaj Esq. Suva, for the Appellant
Howards, Suva for the Respondent