

**IN THE COURT OF APPEAL, FIJI**  
**[ON APPEAL FROM THE HIGH COURT]**

**CRIMINAL APPEAL NO.AAU 0002 of 2015**  
**[High Court Criminal Case No. HAA 007 of 2014)**

**BETWEEN** : **LAMI TOWN COUNCIL**

*Appellant*

**AND** : **FOODS PACIFIC LIMITED**

*Respondent*

**Coram** : **Gamalath, JA**  
**Prematilaka, JA**  
**Bandara, JA**

**Counsel** : **Ms. S. Nayacalevu for the Appellant**  
**Mr. V. Maharaj for the Respondent**

**Date of Hearing** : **15 November 2018**

**Date of Judgment** : **29 November 2018**

**JUDGMENT**

**Gamalath, JA**

[1] I have read in draft the judgment of Bandara, JA and I agree with the conclusion therein.

**Prematilaka, JA**

[2] I have read in draft the judgment of Bandara, JA and agree with the orders.

**Bandara, JA**

[3] The Appellant, Lami Town Council is a statutory local government body whereas the Respondent, Foods Pacific Limited is a limited liability private company.

[4] The Appellant brought criminal prosecution against the Respondent in the Magistrate's Court under four charges namely:-

- i) Failure to cease operating storage of containers from Toti Park, contrary to Section 7(2)(b) of the Town Planning Act, Cap 139;
- ii) Obstruction of Street contrary to Section 115(1)(f) of the Local Government Act, Cap 125. The charge alleged that the Respondent without proper authority placed their containers on Toti Street thereby causing obstruction on Toti Park;
- iii) Interfering with authorized use of Public Park; contrary to the Regulation 19(1) (f) of the Lami Town Council By-Laws Local Government Act Cap 125 and Regulation 54 of the Lami Town Bylaws, Local Government Cap.125. The charge alleged that the Respondent wilfully interfered with the authorised use of Toti Park by using it as storage space for its containers and depriving the people of Lami Town from its use as a park thereby causing prejudice to the people of Lami Town;
- iv) Causing injuries to street contrary to Section 15(1)(g) of the Local Government Act Cap.125.

[5] At the conclusion of the trial, the learned Magistrate had acquitted the Respondent company on the above 4<sup>th</sup> charge and convicted the company on the other remaining charges and passed the following sentences:-

- (i) For the 1<sup>st</sup> count of fine of \$100 was imposed;
- (ii) For the 2<sup>nd</sup> count a fine of \$1000 was imposed;
- (iii) For the 3<sup>rd</sup> count a fine of \$2000 was imposed.



The total fine of \$1300 is to be paid in one month and in default of the Respondent Company would be subjected to the process of executions for the payment of the same.

- [6] The Respondent appealed to the High Court against the conviction and sentence. The High Court allowed the appeal and set aside conviction and sentence in respect of Counts 1 – 3.

#### Grounds of Appeal raised before the High Court

##### Ground 1

- [7] The learned Magistrate erred in law and in fact in holding that the powers under the provisions of the Town Planning Act was exercisable by the Respondent because exercise of such powers was not subject to the type of tenure over the respective Lots;
- (a) Overlooks the clear provisions of Section 12 of the Native Land & Trust Act which prohibits any dealing of native land and is also unconstitutional.
  - (b) Overlooked clear evidence that the land had not been legally vested in the Respondent which is contrary to Section 12 of the Town Planning Act Cap. 139 and also contrary to Section 94 of the Local Government Act Cap.125.
  - (c) The learned Magistrate's finding is contrary to the evidence given by the Director of Town and Country Planning and the Respondent in relation to Lot 51.
  - (d) The legal validity of the initial approval given by the respondent to the appellant.

##### Ground 2

- (A) The learned Magistrate erred in law and in fact in failing to consider or apply the provisions of S.34 (1) of the Crimes Decree 2009 in light of undisputed evidence that the Native Land Trust Board had granted consent to the appellant to use Lot

51 which was capable of creating a bonafide belief in the appellant that it could use the said lot and therefore not criminally responsible.

(B) Alternatively the consent given by Native Land Trust Board was capable of creating a doubt whether the appellant was criminally liable and that doubt ought to have been exercised in favour of the appellant and acquitted of the charge.

### Ground 3

[8] The learned Magistrate erred in law and in fact in giving narrow and restricted meaning of the word 'obstruction' which is inconsistent and inappropriate in the circumstances of the case given the appellants physical location in an industrial area which admittedly failed to keep pace with the developments in the area and thereby wrongly convicted the Appellant on Count 2.

[9] Being aggrieved by the said order of the High Court, the Appellant filed a timely application for leave to appeal where Hon. Justice Goundar held that the Appellant has a right of appeal under Section 22(1) of the Court of Appeal Act, Cap 12 and granted leave for the Appellant to proceed with the appeal.

[10] Before this Court, the Appellant raises the following 6 Grounds of Appeal:-

### Ground 1

That the Learned Judge erred in law in failing to properly apply the law under Section 7(7)(b) of the Town Planning Act, when dealing with the appeal for Count 1 of the charge.

- i) In holding that the permission of the local authority is not required in respect of the 'development' carried out by the Respondent in Nakarawa Park (also known as Toti Park) as it sits on native land;



- ii) In failing to consider that the action of the Respondent at Nakarawa Park (also known as Toti Park) is a ‘development’ under Section 2 of the Town Planning Act.
- iii) In holding that the Native Land Trust Board (now known as the I-Taukei Land Trust Board) as the proper authority to commence any legal action against the Respondent, contrary to the provisions of the Town Planning Act and the Local Government Act.
- iv) In holding that the initial approval given by the Lami Town Council becomes illegal as no consent was given by the Native Land Trust Board (now known as the I-Taukei Land Trust Board) contrary to the provisions of the Town Planning Act.

#### Ground 2

That the Learned Judge erred in law in failing to properly apply the law under Section 115(1) of the Local Government Act, when dealing with the appeal for Count 2 of the charge –

- (i) In holding “that the obstruction is only a temporary obstruction and is done out of necessity”, when no authority was given by the Appellant, in breach of Section 115 of the Local Government Act.
- (ii) In holding that the Appellant failed to prove that the Respondent caused obstruction of the street in breach of Section 115 of the Local Government Act.

#### Ground 3

That the learned Judge erred in law by-

- (i) Misinterpreting the application of Section 12 of the Native Lands Trust Act, Cap 134 in the determination of the appeal for Counts 1 and 2 of the charge.
- (ii) Failing to properly consider and apply the provisions of the Local Government Act and the Town Planning Act.

#### Ground 4

That the Learned Judge erred in law in holding that the Lami Town Council was not the proper authority to institute Criminal Action number 356 of 2009 against the Appellant, contrary to the provisions of the Local Government Act and the Town Planning Act.

#### Ground 5

That the Learned Judge erred in law in failing to properly apply the case in the Supreme Court of **Nadi Township Board v Sukh Raj and Native Land Trust Board** [1971], 30<sup>th</sup> March and 13<sup>th</sup> April 1971; by

- (i) Holding that a Local government authority may not institute action to acquire lands for town planning scheme without prior consent from the Minister to commence proceedings; contrary to criminal prosecution for breaches of the Local Government Act and the Town Planning Act.

#### Ground 6

That the Learned Judge erred in law in setting aside Count 3 –

- (i) Without properly considering and applying regulation 19 (i) (f) of the Lami Town By Laws, Local Government Act. Cap 125 and Regulation 54 of the Lami Town By Laws, Local Government Act. Cap 125.

[11] The facts of the case briefly are:-

Prosecution witness No. 1 – Mr John MacLauchlan giving evidence before the Magistrate's court had stated that:-

- (i) they had complained to the Lami Town Council against the Respondent company, Foods Pacific Limited, for using the Toti Park as a container storage. Earlier the Respondent Company had used the Park to park containers on a casual basis but at the time of the complaint the park had become a container park. Accordingly, on 8<sup>th</sup> May 2009 he had made the complaint to the Lami Town Council in writing



under a letterhead of his company. The complaint was addressed to the Administrator, Lami Town Council (The above evidence of the witness pertains to Count One).

[12] The containers which were parked there had belonged to the Respondent company. Even previously the witness had seen the containers parked there on a temporary basis and then taken away. He had stated in evidence that the containers were not obstructing the foot path but in the process of unloading the trucks had blocked the road. (The above evidence of the witness pertains to Count Two).

[13] In the cross-examination the witness had said that whilst loadings and off loading were being done by many other companies the road had got damaged. Various truck companies had brought containers for business purposes to the Respondent Company. The containers that were being unloaded at the Toti Park had belonged to the Respondent company.

[14] Ms. Talei Rokotuibau who had been the Director of Town and Country Planning, had given evidence before the Magistrate stating the following:-

- 1) The Director of Town & Country Planning is the custodian of the Town Planning Act., Sub division Act and enforces the Act and subsidiary legislation.
- 2) Producing a copy of the survey plan, the witness had demonstrated to court that Toti Park as Lot 51 (which features in Counts 1 to 3) is a native land according to native land schedule. The witness had been familiar with the Lami Town Planning Scheme which was drawn up in the 1980's.

[15] The Toti Park in Wailada which is part of the Lami Town Planning Scheme has been designated as a recreation and playing area. The Lot 51, the Toti Park was to be transferred as a recreational reserve. Witness had stated that the Lot 51 was to be transferred to the State at the time of the offence. However the land had not been

transferred and still vested with the Native Land Trust Board (NLTB). When transferred it would be vested with the Lami Town Council. Lot 51 had belonged to the NLTB as its custodians.

[16] The witness has categorically stated that the Lami Town Council had the authority to regulate the use of the land. Any application in relation to Lot 51 had to be done with the consent of NLTB which had the title.

[17] Witness, Suguturaga, while giving evidence had stated that she had been the Enforcement Officer for the Lami Town Council. According to her, the Respondent Company had been conducting their own business operations at amalgamated Lots 30, 31 and 32 of the Survey Plan. The company had been located within Wailada Road. The premises of Foods Pacific Limited are located directly opposite Toti Park. From 2005 to 2008 she had sent notices to the Respondent Company for its obstruction of streets by the containers brought by the Respondent company. (Evidence pertaining to count 2)

[18] On 16<sup>th</sup> July 2008 the witness served a Notice on the Respondent Company for its street obstruction asking them to remove containers from Wailada Road within 24 hours. The said obstruction of the Respondent Company was a contravention of Section 115(1) of the Local Government Act (Cap.125). A similar notice for the similar offence was served on the Respondent Company by the witness on 22<sup>nd</sup> July 2008. Prior to the serving of the above notices the Respondent Company had asked for a period of 10 days to use the riverside and opposite premises to offload the items carried by the containers.

[19] On 16<sup>th</sup> August 2008, the Lami Town Council wrote a letter to the Respondent company granting them a temporary approval for the use of Toti Park for storing containers on a stipulated fee.

Two of the important conditions mentioned in paragraphs 8 and 9 therein were:-

“8. *Daily site inspection will be conducted by the council officers during these operations.*



9. *The tenant shall repair any damages caused to the park resulting from the above process”.*

The charges were as follows:-

\$20.00 per 20’ container per day.

\$40.00 per 40’ container per day.

- [20] After that the Council wrote another letter on the 29<sup>th</sup> of July granting the Respondent Company permission for the said purposes for further 10 days. The said 10 days expired on 26<sup>th</sup> July, 2008.
- [21] Even after the expiration of the further 10 days granted, the Respondent Company continued to use the said premises for container storage purposes. The witness himself had seen the Respondent Company committing the impugned offences. By way of a reminder, on 11<sup>th</sup> August the witnesses sent a letter again asking the Respondent Company to vacate the park.
- [22] In May 2009 there had been a meeting between Lami Town Council and Foods Pacific Limited. At the meeting, the witness had stated that some damages had been done to the Wailada road and Toti Park. However, that the damages was not only caused due to the activities of the Respondent company (A piece of evidence considered by the Magistrate to acquit the Respondent Company of the 4<sup>th</sup> count). Witness had categorically stated that the land in question came under the Lami Town Planning Scheme.
- [23] The Respondent company had subsequently applied for a lease from the NLTB for Toti Park.
- [24] From the 26<sup>th</sup> of July the Respondent Company used Toti Park (Lot 51) for container storage purposes. The Respondent Company had not obtained permission from any authority for the said functions.

- [25] In the course of carrying out their unlawful activities of the Respondent Company's containers blocked the footpaths surrounding the premises. By storing unloading and off loading containers from container trucks along the road, the Respondent company caused damage to the roads at 4 different locations (The damage caused was estimated to be around \$14,777) (Evidence pertaining to count 1 and 4).
- [26] The illegal activities conducted by the Respondent Company continued without obtaining any permission and they persisted in doing so, irrespective of the number of notices served on them, directing them to discontinue their operations, and vacate the premises they had been illegally using for container storage purposes.
- [27] According to the prosecution witness, Ms. Losana Rokotuibau, the Director of Town & Country Planning, as part of Town Planning scheme 5% of the total land area must be set aside as an open space for recreation. **The Toti Park designated as Lot 51 on the Town Planning Scheme had constituted that 5% space for re-creation.**
- [28] It was the position of the prosecution that the Lami Town Council is the enforcement authority for the Lami Town Planning Scheme. There was incontrovertible evidence before the Magistrate's Court that the Respondent Company blatantly violated regulations set out in the Town Planning Act.
- [29] According to the Director of Lands, the land on which Toti Park was located, was native land and the responsibility for acquiring that land lied with the Department of Town & Country Planning. The witness also stated that the dealings with Lot 51 had to be done with the consent of the NLTB.
- [30] However, the fact remains that the Lots in question lie within the Lami Town Planning Scheme and by virtue of Section 25 of the Town Planning Act; Lami Town Council is **responsible for regulating and enforcing the observance of the requirements of the scheme.** The relevant provision states as follows:-



*Operation of scheme*

*“25. When a scheme has been finally approved by the Director as aforesaid it shall be the duty of the local authority to observe and enforce the observance of the requirements of the scheme in respect of all development of any description thereafter undertaken with the area to which the scheme applies, whether by the local authority or by any person, and save with the consent in writing of the Director, the local authority shall not thereafter undertake or permit any alteration or modification of any existing buildings or works of such modification or alteration would tend to prevent or delay their being brought into conformity with requirements of the approved scheme”.*

[31] In terms of Section 27(1) (a) of the said Act “... the local authority may at any time;

- (a) remove, pull down or alter so as to bring into conformity with the provisions of the scheme any building or other work which does not conform with those provisions or the removal, demolition or alteration which is necessary for carrying the scheme into effect...”

[32] It is clear that the above provisions do not state, that the exercise of such powers is subject to the type of tenure over the respective lots within the scheme. It is an unchallenged piece of evidence that Lot 51 (Toti Park) has been designated as an open and re-creation space.

[33] The Town Council’s initial approval, and the latter approval by the NLTB, in no way could have regularised the unlawful use of Lot 51 (Toti Park) as a container storage yard.

[34] In the circumstances the first count before the Magistrate Court has been proved beyond reasonable doubt.

- [35] The Respondent Company had admitted the fact that from time to time they had off loaded their containers on the land adjacent to their factory due to the lack of space in their own factory yard premises.
- [36] The prosecution witness of the Local Authority had categorically stated that at no stage any approval had been given to the Respondent Company. This is a well established fact before the Magistrate's court. The Respondent Company's position in this regard was that those obstructions were not permanent obstructions, but temporary ones and were removed as soon as the containers were unloaded. This position is not supported by the evidence led at the trial. Hence the second count before the Magistrate Court is well established.
- [37] The 3<sup>rd</sup> count before the Magistrate Court was related to the first count which too has been established well.
- [38] The learned Magistrate has rightly acquitted the Respondent Company from the 4<sup>th</sup> count since the damages that were made to the road cannot be solely attributed to the Respondent Company.

Consideration of the High Court Judge's Order

- [39] At the conclusion of the Appeal hearing the learned High Court Judge had allowed the appeal and quashed the convictions and sentences made by the Magistrate on Counts 1 – 3. The learned High Court Judge has based his reasoning on the following factors;-
- 1) Lot 51, Toti Park belonged to the traditional landowning unit and any dealings had to go through the Native Land Trust Board and their consent was required.
  - 2) Lot 51 had not been transferred to Lami Town Council and therefore Lami Town Council could not claim any ownership to Lot 51.



- 3) The NLTB is the proper authority to commence any legal action against the Respondent and not the Lami Town Council.
- 4) The initial approval given by the Lami Town Council becomes illegal as they have not acquired Lot 51.
- 5) The obstruction is only a temporary obstruction and is done out of necessity.

[40] Having regard to the aforementioned analysis of evidence, I would hold that the grounds which prompted the learned High Court Judge to allow the appeal and acquit the respondent company of all charges are without any merits. The consideration of the following factors also becomes important in this regard.

[41] Section 7(7) (a) of the Town Planning Act states:-

- i) Preparation of the town planning scheme is done by the Town Planning with collaboration with the local authority that has requested a town planning scheme.
- v) The preparation of a town planning scheme, there are different types of land in the boundary. The type of land tenure is derived from Phase 1 is set out what a freehold native land, native reserve or crown land
- vi) The Director of Town & Country Planning and Council Planning gives the approval. The local authority administers the town scheme with the Supervisor of the Director of Local Authority and the local Councils.

[42] According to Section 7(7) (b) of the Town Planning Act the main authorities assigned with the administration of development of any land in question are the Town Council and the Director of Town & Country Planning.

[43] Section 7(1) of the said Act is to the effect that;-

*"7.-(1) Subject to the provisions of this section, the permission of the local authority shall be required in respect of any development of land carried*

*out within a town planning area during the period before a scheme affecting such area has been finally approved”.*

- [44] In terms of the above provision, converting a park which is under the purview of the local authority, to a container storage yard clearly amounts to a “development of land”.
- [45] As per page 157 of the copy record, (which has been led in the evidence at the trial) Toti Park is a civic recreation zone that is used for recreation playing ground. The zone for this site is decided by the council.
- [46] A civic recreation zone or a public park is defined in Regulation 2 of the Lami Town Bylaws as; ***“Any park, garden, reserve recreational area or sports ground vest in or controlled or maintained by the council”***
- [47] Using a recreational or public park (Toti Park) as a storage site for its containers clearly falls under the definition of a development under Section 2 of the Town Planning Act. “Development” in relation to any land means any building, operations or building operations...”
- [48] In relation to the learned High Court Judge’s observation, that the obstruction is only a temporary obstruction and is done out of necessity, consideration of Section 115 (1) of the Local Government Act becomes relevant, which states:

“Every person who without proper authority –

- (a) Encroaches on a street by making or erecting any building, fence, ditch or obstacle or work of any kind upon, over or under the street of planting any tree or shrub thereon;



[49] Section 25 of the Town Planning Act is to the effect that;

*“25. When a scheme has been finally approved by the Director as aforesaid it shall be the duty of the local authority to observe and to enforce the observance of the requirements of the scheme in respect of all development of any description thereafter undertaken within the area to which the scheme applies, whether by the local authority or by any person, and, save with the consent in writing of the Director, the local authority shall not thereafter undertake or permit any alteration or modification of any existing buildings or works if such modification or alteration would tend to prevent or delay their being brought into conformity with the requirements of the approved scheme”.*

[50] Accordingly in terms of page 157 of the copy record the Toti Park has been designated according to the Town Scheme Plan as a re-creational park – Public Park or open space which comes under the direct domain of the local authority.

[51] Section 26(1) of the Town Planning Act is to the effect that:-

*“26.-(1) Any local authority may from time to time of its own motion, and shall if so required by the Director or by the Minister, elaborate any of the provisions of an approved scheme, enlarge the scheme, modify or alter any of the details of the scheme or substitute a new scheme for the approved scheme. (Substituted by 56 of 1965, s. 3.)”*

[52] Having regard to above, it is clear that as long as Toti Park is a recreational or a public park(as borne by the evidence), it remains under the jurisdiction of the Lami Town Council.

[53] Having regard to the above, I would hold that the grounds on which the learned High Court Judge decided to acquit the Respondent Company, allowing its appeal, is erroneous and the appeal of the Appellant should succeed.

[54] Accordingly, I would set aside the order made by the learned High Court Judge on the 8<sup>th</sup> December 2014 and affirm the convictions and sentences imposed by the Magistrate on 14<sup>th</sup> October 2013.

**The Orders of the Court are:**

1. *Appeal allowed.*
2. *Order made by the Learned High Court Judge on 8<sup>th</sup> December 2014 is set aside.*
3. *Conviction and sentence imposed by the learned Magistrate on the 14<sup>th</sup> October 2013 on charges 1, 2, and 3 are affirmed.*



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**Hon. Mr. Justice S. Gamalath**  
**JUSTICE OF APPEAL**

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**Hon. Mr. Justice C. Prematilaka**  
**JUSTICE OF APPEAL**

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**Hon. Mr. Justice W. Bandara**  
**JUSTICE OF APPEAL**