

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

**CIVIL APPEAL NO. ABU 0012 of 2015**  
**(High Court No. HBC 269 of 1999)**

**BETWEEN** : **FML RESORTS LIMITED**  
**ROBERT McLAUHLAN**

**Appellants**

**AND** : **NBF ASSET MANAGEMENT BANK**  
**PERMANENT SECRETARY FOR LANDS**  
**PAPAGENO RESORT (FIJI) LIMITED**  
**ATTORNEY GENERAL OF FIJI**

**Respondents**

**Coram** : **Lecamwasam, JA**  
**Almeida Guneratne, JA**  
**Jameel, JA**

**Counsel** : **Mr D Sharma for the 1<sup>st</sup> and 2<sup>nd</sup> Appellants**  
**Ms M Fong and Mr J Baledrokadroka for the 1<sup>st</sup> Respondent**  
**Ms O. Solimailagi, Ms N. Lagi and Ms G. Naigulevu for the 2<sup>nd</sup>**  
**and 4<sup>th</sup> Respondents**  
**Ms R D Lal for the 3<sup>rd</sup> Respondent**

**CIVIL APPEAL NO. ABU 0128 of 2017**  
**(High Court No. HBC 269 of 1999)**

**BETWEEN** : NBF ASSET MANAGEMENT BANK  
*Appellant*

**AND** : FML RESORTS LIMITED  
ROBERT McLAUHLAN  
PERMANENT SECRETARY FOR LANDS  
PAPAGENO RESORT (FIJI) LIMITED  
ATTORNEY GENERAL OF FIJI  
*Respondents*

**Coram** : Lecamwasam, JA  
Almeida Guneratne, JA  
Jameel, JA

**Counsel** : Ms M Fong and Mr J Baledrokadroka for the Appellant  
Mr D Sharma for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents  
Ms O Solimailagi, Ms N Lagi and Ms G Naigulevu for the 3<sup>rd</sup>  
and 5<sup>th</sup> Respondents  
Ms R D Lal for the 4<sup>th</sup> Respondent

**Date of Hearing** : 12 February, 2019

**Date of Judgment** : 8 March, 2019

**JUDGMENT**

Lecamwasam, JA

[1] I agree with the reasons and conclusions of Almeida Guneratne, JA.

**Almeida Guneratne, JA**

- [2] This is an appeal and cross-appeal against the judgment of the High Court of Fiji at Suva dated 13<sup>th</sup> February, 2015.
- [3] The judgment is at pages 6 – 31 of Vol. I of the Copy Record. The facts as contained in the evidence are comprehensively recounted in the judgment. Without repeating them here I shall refer to them where appropriate and necessary in the ensuing judgment.

*“Grounds of Appeal*

1. *That the Learned Judge erred in fact and in law in his analysis and findings of Section 6 of the Land Sales Act, cap. 137 in that he failed to consider relevant case authorities on the issue when an offer was deemed to have been accepted in a mortgage sale and when a contract was deemed to have been made.*
2. *That the Learned Judge erred in fact and in law in not upholding the Appellants submission that a contract was made between the 1<sup>st</sup> Respondent and the 3<sup>rd</sup> Respondent’s agent Suresh Chandra on 28<sup>th</sup> November 1997 prior to any Ministerial consent being obtained as was required under Section 6 of the Land Sales Act, Cap 137.*
3. *That the Learned Judge erred in fact and in law in holding that the 2<sup>nd</sup> Appellant had lied and in light of the evidence adduced in Court such a finding was a highly improbable inference.*
4. *That the Learned Judge erred in fact and in law in not upholding the Appellants claim for damages for loss of the items that belonged to the 1<sup>st</sup> Appellant which were left on Malawai Resort and which were in the custody and care of the 1<sup>st</sup> Appellant when it became mortgagee in possession of Malawai Resort.*
5. *That the Learned Judge erred in fact and in law when he failed to appreciate that the 1<sup>st</sup> Respondent had failed to comply with a Standing Cabinet Policy requirement to advertise and seek offers from indigenous buyers before applying for approval of sale of land in excess of 10 acres to a non-resident from the Minister of Lands.”*

## **Grounds of Appeal No. 1 and No. 2**

### **Relevant Facts**

- [4] The matter concerned a Mortgagee Sale. The extent of land involved was 400 Acres. The 3<sup>rd</sup> Respondent's agent Suresh Chandra submitted a tender to purchase the land. The 3<sup>rd</sup> Respondent was a non-resident Company which fact had not been disclosed to the 1<sup>st</sup> Respondent Bank. (vide: p.947 – Vol. III of the Copy Record). The said tender (offer) was accepted by the Bank. This was on 27 November, 1997. (p.950 of Volume III of the Copy Record). Suresh Chandra counter-signed the acceptance letter. (p.950).
- [5] The transfer document was prepared on 17<sup>th</sup> December, 1997 and signed on 18<sup>th</sup> December, 2017. The consent of the Minister for the sale was also obtained on 18<sup>th</sup> December, 2017.

### **Legal Submissions made on behalf of the Appellants on the aforesaid facts**

- [6] Learned Counsel for the appellants submitted that, Section 6 of the Land Sales Act (Cap. 138) was pivotal to a determination in this appeal and in the context of that provision the crucial inquiry was as to when a contract of sale and purchase could be said to have come into being.
- [7] Reading the aforesaid provision in the light of chronology of events, Mr. Sharma for the Appellants argued that:
- (a) With the acceptance of the tender on 27<sup>th</sup> November, 1997 a contract came into existence. The witness Basilio also accepted this (p.1195 of Vol.III of the Copy Record).
  - (b) (But) that contract was void in as much as the Minister's prior consent had not been obtained as required by Section 6(1) of the LS Act. Subsequent consent by the Minister did not suffice.
- [8] With all due respect to learned Counsel, I fail to understand how it could be argued that, a contract came into existence with the acceptance of the tender on 27<sup>th</sup> November, 1997

and, in the same breath argue that, because the Minister's prior consent had not been obtained the contract was void.

- [9] Both in law and in common sense there was no contract at all on 27<sup>th</sup> November, 1997 in as much as a contract to have taken foot the pre-condition in Section 6(1) of LSA had to be ratified.
- [10] Witness Basilio, stating that, a contract was formed on 27<sup>th</sup> November, 1997 cannot overcome the law. The consent given by the Minister was not a subsequent consent given to a void contract. A contract had not been formed at all.
- [11] Viewing the matter thus, Suresh Chandra not disclosing the fact that he was an agent of a non-resident company until 18<sup>th</sup> December, 1997 was rendered a non-issue.

### **Pre-Contractual Negotiations as distinguished from Contract**

- [12] The fact that Suresh Chandra was acting as agent for a non-resident company was implied when the Minister's consent was sought and obtained on 18<sup>th</sup> December, 1997. The only contract that was to be considered was a contract as envisaged in Section 6(1) of the L S Act which was exemplified by the documents that were in conformity with Section 6(2) thereof. Prior to 18<sup>th</sup> December, 1997 there was no contract at all as envisaged by those provisions. At the most they were pre-contractual negotiations to the contract that came into being on 18<sup>th</sup> December, 1997. In other words, the material question was when the contract (agreement) for sale was confirmed in final written form – not prior discussions, proposals or oral agreements (vide: **Sakashita v. Concave Investments Ltd.** [1999] 45 FLR 13.
- [13] Furthermore, when the documentation for the sale was completed on 18<sup>th</sup> December, 1997 there was no conditional or unconditional acceptance of a tender. That was past history. Thus, I could not see how the case of **Vere v. NBF Asset Management Bank** could have been of any assistance to the Appellants [2004] FJCA 50.

[14] In my view, Section 6 of the L S Act is a stand-alone provision. Viewing the matter from that perspective, the definitions of ‘dealing’, ‘sale’ and ‘seller’ contained in the Act have no bearing on the same.

[15] Finally, although the Appellants lamented that the learned Judge had not referred to the authorities cited, his reasoning and conclusion I found to be consonant with the authorities I have cited above.

[16] For the aforesaid reasons I reject Grounds of Appeal Nos. 1 and 2.

### **Ground of Appeal No. 3**

[17] The learned Judge’s adverse comment was apparently based on the evidence of the 2<sup>nd</sup> Appellant regarding the proposals and correspondence he had engaged in during a protracted period between 1993 and 1997 in his attempts to redeem the Mortgage.

[18] It is true that at times the witness said that there were ‘no response’ to those proposals and at some other points in his cross examination he conceded that, there was ‘some response’.

### **Could that evidence have been construed as constituting lies?**

[19] I think not.

[20] A distinction between “Inconsistencies” in a witness’s evidence and what amounts to “lies” surely needs to be drawn.

[21] At the most the 2<sup>nd</sup> Appellant’s evidence did constitute some inconsistencies. Given the vagaries a witness is exposed to in cross examination given the combination of an astute counsel and a tiring witness is to be expected. But, to regard such ‘inconsistencies’ as ‘lies’ surely would be a stricture passed on his reputation.

[22] Accordingly, I have no hesitation in expunging those parts in the judgment of the High Court labelling the 2<sup>nd</sup> Appellant effectively as a liar. (vide: page 15 of the Copy Record and consequently I hold that Ground of Appeal No.3 is entitled to succeed.

#### **Ground of Appeal No. 4**

[23] In this regard Mr. Sharma (for the Appellants) drew this Court's attention to the document contained at page 976 of the Copy Record (Vol. III).

[24] That document showed the list of items on the land that were left on the Malawai Resort when the Appellant had to leave the same together with the value of the said items.

[25] The learned Judge is seen holding that, the Appellants had failed to established ownership of the said items.

#### **Does that finding bear scrutiny?**

[26] I think not, and I state my reasons for saying so as follows:

- (a) The Bank in question at no time did claim ownership to the said items which the Appellants claimed were left on the Malawai Resort (the land) when they had to leave the same.
- (b) After the Appellant had surrendered possession of 'the land', neither the Bank nor the 4<sup>th</sup> Respondent had taken an inventory of the said items.
- (c) As against that, the Appellants had done their best in doing so as reflected in the said document (vide: page 976 of the Copy Record – Vol. III).
- (d) Consequently, in my view, there arose a presumption that the said items belonged to the Appellants and it was the burden of the Respondents to rebut the same. I could not see on the proceedings/evidence led at the High Court that the Respondents had succeeded in doing so.

- (e) Accordingly, I accept the Appellants documentary evidence reflected at page 976 of the Copy Record in the absence of the evidence led by any of the Respondents to the contrary to rebut the same.

[27] On the basis of the aforesaid reasoning I hold that, the said Ground of Appeal No. 4 is entitled to succeed and consequently the Appellants are entitled to claim the damages they claimed for the loss of the items they claimed which had been left on 'the land' (vide: Relief No. (c) prayed for in the High Court.

### **Ground of Appeal No. 5**

[28] In that regard I re-iterate the reasons adduced by me in rejecting grounds of appeal Nos. 1 and 2. Arguments based on Cabinet Policy and advertisements all stood relegated to the background on 18<sup>th</sup> December, 1997 when "the Contract" came into being conforming to Sections 6(1) and (2) of the L S Act.

[29] Accordingly I reject Ground of Appeal No. 5.

### **Determination of the Cross-Appeal**

[30] The 1<sup>st</sup> Respondent's (the original 1<sup>st</sup> Defendant Bank) cross-appeal is against the ruling of the High Court declining the counter-claim for residual debts owed to it. The learned Judge declined the said counter claim on the basis that it was time-barred in terms of Section 25 of the Limitation Act.

### **Chronology of Events**

[31] In order to avoid possible confusion I shall refer to the parties as they are described in the original caption in relation to the sequence of events and the relevant dates of pleadings to make a determination as to whether the 1<sup>st</sup> defendants counter-claim stood time-barred.

- (a) The plaintiff's statement of claim was filed on 2<sup>nd</sup> June 1999.



- (b) The 1<sup>st</sup> Defendant's Amended Statement of Defence and counter claim was on 10<sup>th</sup> October 2007 but which stood related back to the date of the original statement of defence was filed. (vide: Supreme Court Practice 1999, page 377) but which is not relevant for the question to be determined.
- (c) The relevant date for the determination of the issue at hand, in my view, was 16<sup>th</sup> October, 1998 after the Mortgagee Sale of the property in question and when the plaintiffs could be said to have incurred liability to pay the said alleged residual debts.

### **The Limitation Act – Section 25**

[32] In the background of those events, I shall now look at what is decreed in Section 25 of the Limitation Act.

*“25. For the purposes of this Act, any claim by way of set-off or counter claim shall be deemed to be a separate action and to have been commenced on the same date as the action in which the set-off or counter claim is pleaded.”*

[33] Thus, it is made plain as a pikestaff that, that date was 2<sup>nd</sup> June, 1999 when the plaintiff initiated the action and the plaintiff could be said to have incurred liability to pay the said residual debts after the mortgage sale of the property in question, that is, 16<sup>th</sup> October, 1998.

[34] Consequently, for purposes of computing the limitation period, it was just a period of 1 year and 4 months and not a period of over 6 years (vide: Section 4 of the Limitation Act) according to the reasons given by the learned Judge in arriving at his computation.

### **Conclusion**

[35] Accordingly, I have been driven to the conclusion that the cross-appeal is entitled to succeed.

**Jameel, JA**

[36] I agree with the conclusions of Almeida Guneratne, JA.

**Orders of Court**

1. *Grounds of Appeal Nos. 1, 2 and 5 are rejected.*
2. *Grounds of Appeal Nos. 3 and 4 are allowed.*
3. *The Registrar is directed to expunge those parts in the High Court Judgment making reference to the 2<sup>nd</sup> Appellant (in the main appeal) as having 'lied'.*
4. *The cross-appeal of the 1<sup>st</sup> Respondent (in the main appeal) is allowed.*
5. *However, in view of Order 2 above, in the context of the Ground of Appeal No.4 the matter is remitted back to the High Court to make a determination as to what sums of money are to be set off.*
6. *In all the circumstances of this case, the parties to bear their own costs, both in the High Court and this Court.*



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**Hon. Justice Susantha Lecamwasam**  
**JUSTICE OF APPEAL**

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**Hon. Justice Almeida Guneratne**  
**JUSTICE OF APPEAL**

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**Hon. Justice Farzana Jameel**  
**JUSTICE OF APPEAL**