IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 007 of 2020
[High Court Civil Case No. HBC 277 of 2015]

BETWEEN : **JONE BATINIKA**

Appellant

AND : **iTAUKEI LAND TRUST BOARD**

Respondent

Coram : **Dr Almeida Guneratne, P**
Jitoko, VP
Dayaratne, JA

Counsel : **Mr J. Lanyon for the Appellant**
Mr J. Cati for the Respondent

Date of Hearing : **06 July 2023**
Date of Judgment : **28 July 2023**

JUDGMENT

Almeida Guneratne, P

[1] I am in complete agreement with the judgment of Justice Jitoko including the aspect of the involvement of "the Mataqali" in land ownership and use as a source of customary law in Fiji.

Jitoko VP

[2] This is an appeal against Kumar J's judgment of 5 December, 2018 dismissing the appellant's claim for specific performance and damages for alleged breach of contract.

Brief Facts

[3] The iTaukei Land Trust Board (formally the Native Land Trust Board) is vested, under the iTaukei Land Trust Act 1940, with all the powers to administer all native land. It is the landlord to the land in question.

[4] The appellant claims to be a member of Mataqali Rara (Naduru) which owns the land in question, native land known as Vunivaudamu situate in Naduru village in the Tikina of Bau in the province of Tailevu. The land comprised of 6 acres 3 roods and 19 perches was under an agricultural lease (Instrument of Tenancy No. 1089) for a term of 30 years to one Savenaca Ranatawake Ramokosoi, the appellant's older brother. The lease commenced on 1.1.1983.

[5] On 31 March 2011 the Board granted its consent to the assignment of the remainder of the lease of less than two (2) years to Jone Batinika, the appellant. On 29 April 2011, the lease was formally transferred from Savenaca Ranatawake Ramokosoi to Jone Batinika, for a peppercorn.

[6] On 1 July 2011, some 18 months prior to the expiry of the lease, the appellant applied for a renewal of the lease. He duly paid the $57.50 application fee.

[7] On 28 November, 2012, the Board wrote to the appellant informing him of the offer of a new lease in the following terms:"

> *"After careful consideration, the Board is prepared to approve your request provided that you pay this office the sum of one thousand one hundred and fifty dollars ($1,150.00) being our lease processing fees including consultation meetings with the customary landowners of Naduru village."*

[8] The appellant paid the processing fees of $1,150.00 on 4 December, 2012.

[9] Pursuant to the standard practice, if not specifically legislated, the Board is required to consult with the iTaukei landowners, before a lease or licence is granted under the Act. As the result of the consultations with the landowners and the appellant being also in attendance, landowners agreed to and endorsed the Master Land – Use Plan approved by the Directorate of the Town and Country Planning to change the primary use of the mataqali land from agricultural to residential. On 28 May 2013, the Board issued an offer letter to the appellant for a residential lease for a term of 50 years from 1.1.2013. The offer letter also required payment of premium of $4,500.00 and other requisite fees.

[10] The appellant refused the offer and instead issued a Writ seeking specific performance by the Board of its offer to renew the Instrument of Tenancy No. 1089.

Proceedings

[11] In the Writ of Summons issued against the Board dated 11 August 2015, the appellant outlined the facts as set out above and claimed that the Board was in breach of the agreement it made in its offer letter of 28 November, 2012, to issue a new agricultural lease in his name for the whole of the 6 acres 3 roods and 19 perches.

[12] In his prayer, the appellant sought:

> *"a. Declaration that the iTaukei Land Trust Board has acted outside its powers.*
>
> *b. Specific performance of the Agreement between the plaintiff and the defendant for the renewal of Instrument of Tenancy No. 1089 and that is through the issuance of a new lease over the land known as "VUNIVAUDAMU" (TLTB File No. 4/14/7697) situated in the Tikina of Bau in the province of Tailevu, containing an area of 6 acres 3 roods and 19 perches for agricultural purpose.*
>
> *c. Further or alternatively, an injunction restraining the defendant, whether by its servant, agents or whosoever from dealing with the*

property comprised and described in the Instrument of Tenancy No. 1089.

d. Further and alternative damages for breach of contract.

[13] The High Court in Suva, in its judgment of 5 December, 2018 per Kumar J held, that the so called, *"Re: New Lease Offer"* of 28 November, 2012 was not an approval by the Board for the issuance of an agricultural lease to the appellant. The Court furthermore ruled that promissory estoppel, which was argued before it, given the circumstances and facts of the case cannot be sustained. The court furthermore found that the appellant was not a member of Mataqali Rara. The court dismissed the claim.

[14] On 17 January 2019 the appellant filed his notice and nine (9) grounds of appeal as follows:

"1. The learned trial Judge erred in law and in fact when he did not take into account the membership of the Plaintiff in Mataqali Rara which was confirmed by him during examination in chief and also by his birth certificate.

2. The learned trial Judge erred in law and in fact in in failing to consider that that the Defendant's letter dated 28th November 2012 was an offer under common law principles of contract.

3. The learned trial Judge erred in law and in fact when he disregarded the offer, the consideration and acceptance of the offer by the Plaintiff.

4. The learned judge erred in fact and in law when he did not take into consideration that the Offer by the Defendant was made as a result of an application by the Plaintiff.

5. The learned trial judge erred in fact and in law when he took into account a Propose Master Land Use Plan that was not an Approved Master Land Use Plan.

6. The learned trial Judge erred in fact and in law and in fact when he took into consideration irrelevant issues of meetings and consultations and holding that.

7. The learned trial judge erred in law and in fact in holding that the 28 November letter was not an offer.

8. *The learned trial Judge erred in fact and in law in holding that that the principles of Promissory Estoppel does not apply in the instant case.*

9. *The learned trial judge failed to consider the principle of promissory estoppel enunciated in the case* ***China-Pacific SA v Food Corporation of India*** *[1980] 3 All ER 565,566.*

Consideration

Ground 1: Appellant's Membership of Mataqali Rara

[15] The appellant had claimed that he belongs to Mataqali (land-owning unit) Rara, that owns the land in question. He could not produce any proof such as a certificate from the Native Lands Commissioner to verify the claim.

[16] The respondent denied that the appellant belonged to Mataqali Rara and in answer to the questions posed by Counsel for the respondent he said (at page 71 of record):

"Q: You member of landowning unit Mataqali Rara?
A: Yes

Q: Any record from NLC to prove it?
A: No

Q: You and your family names were removed from registration record from Mataqali Rara at NLC?
A: Can't answer

Q: When this claim drafted according to your instructions to your lawyer
A: Yes

Q: Why did you tell your lawyer put in a claim you member of landowning unit Rara?
A: When I applied for lease – not for Mataqali."

[17] Subsequently, in his written submissions he personally filed on 21 April, 2023, the appellant, in support of his claim of belonging to Mataqali Rara, stated (at paragraphs 6.3 to 6.6)

> *"6.3 The Appellant, was born in July 23rd, 1964, birth registration no. 578369. He is one of the sons of Timoci Ramokosoi No. 16, birth registration no. 878067 who is registered in the Registrar of Native Land Owners commonly referred to as the I Vola ni Kawa Bula (VKB) and the grandson of one Timoci Ramokosoi No. 1 in the VKB, Tokatoka Savuikuku No 206 and Salanieta Takoinaliva No. 6 in the VKB, Tokatoka Savuikuku No. 206 as No. 31 in the VKB.*
>
> *6.4 He is registered, like his father in the VKB under the Yavusa Nailagolaba, Mataqali Rara, Tokatoka Savuikuku No 206 in the Native Land Commission, Naduru village in the Vanua of Kuku, in the Tikina of Nausori and Yasana of Tailevu. He is registered as No. 31 in the said register.*
>
> *6.5 By virtue of the registration in the VKB, the traditional owner of the native land owned by the Mataqali Rara herein described as Vunivaudamu No.2. It was on the basis of the registration that he continues to occupy in the said mataqali to date.*
>
> *6.6 We submit that the trial judge failed to consider the above information when during examination in chief of the plaintiff/appellant."*

[18] With respect, this Court has perused the record of the High Court proceedings and nowhere did the appellant present any detailed and/or documentary evidence of his claim of belonging to Mataqali Rara. All it gleans on the claim is his unhelpful information given during his cross-examination reproduced above and recorded at page 71 of the court record.

[19] From all the evidence available to it, the court concluded (at paragraph 38(i) of its judgment):

> *"(i) Plaintiff is not a member of Mataqali Rara, the LOU of the subject land which is contrary to his evidence stated at paragraph 25 (i) of the judgment."*

[20] This Court fails to understand why the appellant did not obtain the necessary certificate from the Commissioner of the Native Lands Commission to verify his belonging to the Mataqali Rara. This procedure is set out under section 66 (1) of the Interpretation Act.

> *"Questions in relation to proprietary units:*
>
> *66 (1) Where any question arises as to whether any person is a member of a proprietary unit, a certificate under the hand of the Commissioner that such a person is a member of any such unit shall be prima facie evidence thereof in any judicial proceedings.*

[21] While the question of the appellant belonging to the Mataqali Rara is important, it is not crucial to the central issue of whether he is entitled to the renewal of lease, but only to the exemption of payment of premium if he was a member, at the time of his being aware of the change of the zoning from agricultural to residential.

[22] The Court notes that in the follow-up offer to the appellant by the Board of a residential lot, he was charged a premium of $4,500.00 that would normally be demanded off a non-member of the landowning unit (Mataqali).

Grounds 2, 3, 4 and 7

[23] These four grounds deal with legal interpretation to be accorded to the so-called *"offer letter"* of 28 November 2012 sent to the appellant by the Board, informing:

> *"Re: New Lease Offer*
> *Land Name: Vunivaudamu No. 2*
> *District: Nausori*
> *Province: Tailevu*
>
> *Ni sa bula vinaka,*
>
> *After care consideration, the Board is prepared to approve your request provided that you pay this office the sum of One Thousand One Hundred Fifty Dollars ($1,150.00) being our lease processing fees, including consultation meetings with the customary landowners of Naduru village."*

[24] Counsel for the appellant contends that the letter, in response to the appellant's application for renewal of the agricultural lease (Instrument of Tenancy No. 1089) was tantamount to an offer that legally binds the Board to the issuance of a new agricultural lease to the appellant, the sitting lessee.

[25] The appellant further contends that by his payments of the $57.50 application fees and the $1,500.00 processing fees on 4 December, 2012, barely a week after receipt of the Board's letter, had affirmed his acceptance of the offer.

[26] The Board contends that its 28 November, 2012 letter was not an offer per se, but merely an intention to enter into an agreement after all the requirements of the iTaukei Land Trust Act and Regulations have been fully complied with.

[27] What are these pre-requisites to the prospective lessee entering into a lease arrangements with the Board, on behalf of a landowning unit?

[28] These are set down under sections 8 and 9 of the iTaukei Land Trust Act to whit:

> *"Alienation of native land by lease or licence*
>
> *8. (1) Subject to the provisions of section 9, it shall be lawful for the Board to grant leases or licences of portions of native land not included in a native reserve for such purposes and subject to such terms and conditions as to renewals or otherwise as may be prescribed.*
>
> *(2) Any lease of or licence in respect of land under the provisions of this Act shall be made out from and in the name of the Board and such lease or licence shall be executed under the seal of the Board.(Substituted by Ordinance 30 of 1945, s.6.)*
>
> *Conditions to be observed prior to land being dealt with by way of lease or licence*
>
> *9. No native land shall be dealt with by way of lease or licence under the provisions of this Act unless the Board is satisfied that the land proposed to be made the subject of such lease or licence is not being beneficially occupied by the Fijian owners, and is not likely during the currency of such lease or licence to be required by the Fijian owners for their use, maintenance or support."*

[29] Section 8 permits the Board on behalf of the landowners, to alienate native land by lease or licence. Section 9 set out the provisos to the section 8 alienation namely:

(i) that the Board must first be satisfied that the land to be leased or licenced is not being beneficially occupied by the landowners, and

(ii) that the land to be leased or licenced will not, during its currency will not be required by the native owners for their own use, maintenance or support.

[30] Implicit under proviso (ii) is the obligation on the Board to consult the landowners on the proposed alienation, guided by their needs of land use for the future. This explication is evident from Cullinan J's analysis in **Ratu No. 2 v Native Land Development Corporation** [1987] Fiji Law Rp 146 stating:

> *"The section quite clearly imposes a duty upon the Board of at least consultation in the matter certainly with respect to the second limb of the section. Indeed it seems to me that even with the first limb, in order to ensure that the land is not being beneficially occupied, the Board will need to consult with the native owners in the matter."*

[31] It is important to note that the Court in arriving at the interpretation of section 9 of the Act, held the view that *"Fijian owners"* meant the Fijian land owning unit as a whole, and that Parliament could not possibly intend for a single member of the landowning unit to satisfy the requirement of the land *"being beneficially occupied by the Fijian landowners".* Thus the Court explained, (at page 166, paragraph b to f),

> *"…a native Fijian, holding land under native custom cannot be described as an "owner", or indeed a number of them as "owners", that is unless they together constitute the particular proprietary unit, say, a Mataqali. It would be an odd state of affairs if, say, it could be said that where the particular land was beneficially occupied by one member of the three Yavusa, it was then "beneficially occupied by the Fijian owners". I cannot imagine Parliament ever intended that result.*
>
> *Instead, I consider that Parliament intended that where there was any occupation of the land the Board must approach the native owners, conscientiously placing all the advantages and disadvantages of the*

proposed lease or licence before them, and pointing out to the native owners the current occupation of the land by some members of the proprietary unit. Thereafter it seems to me that is a matter for the proprietary unit to decide whether their members in occupation of the particular lands could be accommodated elsewhere, perhaps seeking the assistance of the Board in the matter, should the proprietary unit decide to so accommodate their members. If the proprietary unit however decides that it does not wish to disturb any member of the unit on the particular land, then it seems to me that its wishes in the matter must be final. I wish to stress again as I did earlier, that the tenure of the lands is vested in the native owners, and not in the Board. Where the proprietary unit has indicated that it does not wish to move its people from the subject lands, then I do not see how it could be said that the Board was, objectively speaking, "satisfied that the land… is not being beneficially occupied by the Fijian owners". It seems that inherent in this situation is the aspect of agreement by the native owners."

[32] The interpretation of section 9 in Waisake Ratu No 2 (supra) was adopted by Stuart J in **Ratu Taito Nalukuya ITLT Board** CA No. HBC 105/2020.

[33] This Court is in total agreement with the conclusions reached by both Cullinan J and Stuart J. as to how section 9 is to be interpreted.

[34] The issue of the need for the Board to conduct consultations with the native land-owning units before alienation through lease or licence under section 8 of their land, is of paramount importance to achieving the objective of the iTaukei Land Trust Act 1940 namely, the protection, through the management and preservation, of native land for the present and future generations of iTaukei.

The Status of the 28 November 2012 Letter

[35] The High Court in its analysis of the contents and the circumstances of how the letter was conceived, found in its judgment (at paragraph 38 (iv) and (v):

"(iv) A*ccept DW1 and DW2's evidence that 28 November letter is not an offer letter but letter advising that the Application will be processed upon payment of $1,150.00 being processing fee including consultation with landowners.*

(v) Accept DW2's evidence that the processing of application needs vetting application, obtaining details such as bank statement, birth certificates, consulting landowners, consulting technical team in office to get confirmation on availability/zoning."

[36] The appellant argued that Kumar J was wrong in law in not finding that the 28 November 2013 letter which was headed: *"New Lease Offer"* was in fact an offer letter, which upon the appellant's acceptance by paying the application fees and the processing fees, bound the Board to issue a new lease to him.

[37] The Board for its part, referred to Regulation 12 of the iTaukei Land Trust (Leases and Licences) Regulations 1984 that say:

"Agreements for leases granted subjected to this regulation

12. (1) Where the Board has approved that grant of a lease of native land to any person subject to this regulation, the Board shall cause to be served on that person for execution by him ***an agreement for the lease of that land,*** *in duplicate, together with* ***a notice in writing stating that the Board has approved the grant of the lease subject to this regulation and requiring that person, before the date specified in the notice in that behalf-***

(a) to execute both copies of the agreement and to return one copy thereof to the Board, duly executed; and

(b) ***to pay to the Board all monies due and payable by that person on or before that date under and in respect of the agreement, whether by way of premium, rent, fees, stamp duty or otherwise.***

(2) ***No tenancy of native land shall be taken to subsist by virtue of any notice served in pursuance of paragraph (1) unless and until all the requirements of the notice as are mentioned in paragraphs (a) and (b) of that paragraph have been complied with,*** *notwithstanding that any person has entered into possession of that land, with or without the consent of the Board, and notwithstanding that any rent shall have been received by the Board in respect of that land."*

[38] In my view, the letter of 28 November, 2012 headed *"Re: New Lease Offer"* has to be read together with Regulation 12, where there are specific pre-conditions to be fulfilled by the appellant before a formal lease is offered and issued. One's reading of Regulation 12 (1) makes clear that following the receipt of an application for lease (or renewal of lease) a notice in writing stating the Board's approval, subject to other regulatory requirements, is sent to the applicant. An agreement for lease in duplicate is also sent for the applicant to execute and return a copy. There is no evidence from the record that the appellant as the applicant for a new lease, had received an agreement for lease, although the *"new lease offer"* letter does appear to meet the requirement of the notice from the Board of its approval for a new lease, but *"subject to this regulation…."*

[39] More important still is the effect of Regulation 12 (2). It makes it very clear that there can never be a tenancy or lease of the land, notwithstanding the issuance by the Board of a *"notice"* under Regulation 12 (1) until all the requirements under (a) and (b) have been complied with.

[40] Furthermore, the fact that the intending lessee is already on the land (*"has entered into possession of that land"*) does not guarantee the prospective tenant of the issuance of a lease.

[41] It is, in the end, unfortunate and possibly an incautious use of the term *"offer"* in the Board's letter of 28 November, 2012, given the pre-conditions under Regulation 12(1), which has brought some misunderstanding and ultimately, these proceedings to the court.

Grounds 5 and 6

[42] Briefly, ground 5, questions the validity of the Master Land-Use Plan and the appellant argued that the court should not have taken it into account. This is a question of fact.

[43] The Master Land-Use Plan is a creature of the Town and Country Planning Act 1946 and under it the iTLTB submits for the approval of the Director, plans of proposed use of native

land in the country. For land in the Nausori to Korovou districts, including the 6 acres 3 roods 19 perches, the subject of this proceedings, the Plan for the Greater Suva Area (extending from Pacific Harbour – Suva – Nausori – Korovou) according to the Board's Senior Land Use Planner, Epeli Nadraigara (DW1), was approved by the Board in 2003 and the Director of Town and Country Planning approved it in 2007.

[44] So at the time of the appellant being assigned the lease in 2011, the land use of the tenancy had already been changed from agricultural to residential. It is of some concern to the Court that at the time of the appellant's application for renewal of the lease to what he assumed was a new agricultural lease, the Board officials did not reveal the change in the land use. It could very well be, that the counter officials of the Board, were also not in a position to correctly advise him of the change, and the payment of the $1,150.00 processing fees may very well had been understood as representing the fees for a new agricultural lease. This court however, can only consider the evidence presented before it, and the fact that the offer of a new lease did not specify that it was a agricultural or residential does not assist the court one way or the other.

[45] Ground 5 has no merit and is dismissed.

[46] Ground 6 claims that the process of meeting and consultations between the Board and land owners, which the High Court took into consideration, were irrelevant and it erred in doing so.

[47] This Court has carefully analysed at paragraphs 29 to 33 above, why it believes, consultations between the Board and landowners are necessary pre-requisites before the Board decides to act pursuant to section 8 of the Act.

[48] Ground 6 is without merit and is dismissed.

Grounds 8 and 9 Promissory Estoppel

[49] The appellant under these grounds, submitted that promissory estoppel applied, contrary to the High Court's finding that the 28 November 2012 letter *"was not a representation by defendant to issue agricultural lease or renew lease over subject land to plaintiff"* and the appellant's reliance of it is misconceived. He referred to the English Court of Appeal decision in **China-Pacific SA v Food Corporation of India The Winston**, for support.

[50] The doctrine of estoppel at Common Law precludes one, from denying a state of affairs which had previously existed. The principle has been further refined, as stated in Snell's Equity (13th Edition) at page 631:

> *"... there would be an estoppel whereby words or conduct there has been a representation of existing facts (not of law) which was intended to be acted upon and was in fact acted upon to his prejudice by the person to whom it was made. The maker of the representation (even if a minor at the time of making it) will not be allowed to allege in proceedings against the person so acting that the facts are other than he represented them to be."*

[51] Counsel for the respondent referred to important case law, including **Ramsden v Dyson** [1865] CLR 1HL 129, (dissenting judgment of Lord Kingsdown), and our Court of Appeal decision in the **iTaukei Land Trust Board v Hughes** [2014] FJCA 191 as authorities of what constitute estoppel. For its part the appellant relied on **China-Pacific SA v Food Corporation of India The Winston** [1980] 3 All ER.

[52] All of these authorities agree that for estoppel to apply the nature of the representation relied upon must be clear. As Bowen LJ stated in **Low v Bouverie** [1891] 3 Ch 82 at page 86:

> *"Now, an estoppel, that is to say, the language upon which the estoppel is founded, must be precise and unambiguous." That does not necessarily mean that the language must be such that it cannot possibly be open to different constructions, but that it must be such as will be reasonably understood in a particular sense by the person to whom it is addressed."*

[53] In **China-Pacific SA** case (supra) relied upon by the appellant, the Court said that one of the essential attributes if one were to succeed on the issue of estoppel was *"the unequivocality of the promise of assurance relied on,"* and on the facts of the case, held that the representations were not unequivocal, but merely indications of possible cause of action that were available to be pursued.

[54] It is abundantly clear that from all the evidence before the High Court that the letter of 28th November, 2012, could not possibly be construed as an unambiguous or unequivocal offer which the appellant could convert, upon payment of the requisite processing fees, to a binding contract. At most, it was an invitation to treat requiring the appellant to comply with conditions and other regulatory provisions before a lease is formally offered.

[55] In any case, it has long been accepted that equity cannot be raised to defeat the exercise of statutory powers or discretion: **Chalmers v Pardoe** [1963] 3 All ER 552 and **Western Fish Products Ltd v Penwith DC** [1981] 2 All ER 204.

[56] In this instance, the appellant cannot rely on the *"offer"* letter to fetter the statutory discretion entrusted to the Board under Regulation 12 of the iTaukei Land Trust (Leases and Licences) Regulations 1984, and section 9 of the iTaukei Land Trust Act 1940.

Conclusions

[57] The Instrument of Tenancy assigned to the appellant from his brother has long expired on 31 December, 2012. He has unsuccessfully sought the intervention of the Court to grant him a new lease over the same portion of land that was the subject of the previous lease. He has instead been offered by the Board a 50 year residential lease over a reduced area of 1 rood 21 perches but he has refused to take up the offer.

[58] The appellant's status on the land, depends on whether he is a member of Mataqali Rara and his name is entered on the register of the Vola ni Kawa Bula (VKB) in the Native Lands Commission office. The land-owning unit Mataqali Rara, has consented to the

change in the land use to residential. If he is in fact a member of the Mataqali Rara, he has almost an insurmountable problem to overcome. If he is not, then he is a trespasser. Accordingly, even if he is to be regarded as a member of the Mataqali Rara, he was not entitled to a renewal of the agricultural lease which had expired on 31 December 2012

[59] The appeal is without merit and therefore is unsuccessful.

Dayaratne, JA

[60] I have read the judgment in draft of Jitoko VP and agree with his reasons and conclusion.

[61] **Orders:**

1. *Appeal is dismissed.*
2. *Each party to bear its own costs.*

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Hon. Justice Almeida Guneratne
PRESIDENT, COURT OF APPEAL

COURT OF APPEAL FIJI

.....
Hon. Justice Filimone Jitoko
VICE PRESIDENT, COURT OF APPEAL

.....
Hon. Justice Viraj Dayaratne
JUSTICE OF APPEAL

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