

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CIVIL JURISDICTION**

Judicial Review No. HBJ 01 of 2017

**BETWEEN** : **MOHAMMED ASHIK ALI** of Naboutini, Sabeto, Nadi,  
Businessman.

**APPLICANT**

**AND** : **iTAUKEI LAND TRUST BOARD**, a corporate body established  
under the iTaukei Land Trust Act, Cap 134 of 431 Victoria Parade,  
Suva.

**RESPONDENT**

**Appearances** : Mr N. Nawaikula for the applicant  
: Mr T. Duanasali for the respondent

**Date of Hearing** : 30 January 2018

**Date of Oral Ruling** : 30 January 2018

**Date of Written Reasons** : 16 July 2018

## **REASONS FOR DECISIONS**

### **Introduction**

[01] Immediately after the conclusion of the hearing, I issued writ of certiorari quashing the decision of the respondent and mandamus and announced that I will give my reasons at a later date. These are my reasons for the decision.

[02] This is an application for judicial review with leave being granted by me pursuant to O 53, R 3 of the High Court Rules 1988, as amended (*HCR*). The application seeks to judicially review the decision of the respondent dated 1 January 2016, where the respondent issued an agreement for lease to Mr Narend Kumar and Ms Jasma Wati.

[03] At the hearing, both parties made oral submissions, and only the applicant filed written submissions.

## The application

[04] By his application filed 12 April 2017, the applicant seeks the following orders:

- i. *A DECLARATION that the Respondent granted the above named lease, namely Agreement for Lease No. 6/77/40841 in the name of Narend Kumar and Jasma Wati in error and by mistake in that the Respondent had granted that lease by error mistakenly believing there was in existence a court order that compelled it to do so.*
- ii. *A DECLARATION that the respondent in making the decision to grant the lease took into account irrelevant consideration and fail to take into account relevant consideration as follows:*
  - (a) *Narend Kumar had no interest at all in the subject land except for a court order dated 1<sup>st</sup> September 1982 that noted Narend Kumar can take out a sub-lease over the land subject to iTLTB consent.*
  - (b) *The Respondent had mistakenly and wrongly believed that it was compelled to follow the court order.*
  - (c) *The Respondent was fully aware that in 2007 Narend Kumar had sold to the Applicants the two houses that he had built on the land for \$3,000.00 and the third house he gave to the Applicant for free.*
  - (d) *The Respondent was fully aware that Narend Kumar sold his interest to the Applicants in 2007 he had vacated the land and the Applicants has been in continuous occupation of the land and all houses to date.*
  - (e) *The Respondent was fully aware and was fully informed by the Applicants that the land in fact was under lease to Vinod Kumar and Saten Kumar who had sold it to the Plaintiff in 2007 for \$1,500.00.*
  - (f) *The Respondent had received the Applicant Application to lease the land he occupies initially in 2014 and the Applicant had fully informed the Respondent the whole history of his occupation.*

- (g) *The respondent also received an application from Mr Narend Kumar and despite all the above relevant consideration it made the totally unreasonable decision to give a lease to Narend Kumar.*
- iii. *A DECLARATION* *that the Applicants had a legitimate expectation that the Respondent will grant a lease to him in that:*
- (a) *In that he had made an application over the same land initially on 19<sup>th</sup> May 2014.*
- (b) *After lodging the application he had fully informed the Respondent his status on the land and how he came to be on it since 2006, he explained how he paid Narend Kumar \$6,000.00 for two houses and how Narend Kumar gave him the third house for free.*
- (c) *He explained how Narend Kumar had vacated the land in 2006 and how he had another agreement with the Tenant at the time, Vinod Kumar and Saten Kumar and how they sold the land to him for \$1,500.00.*
- (d) *He explained how the Tui Sabeto had blessed and agreed on this occupation and how much he badly needs TLTB to formalise his occupation under a lease after the existing term expired in 2016.*
- (e) *He complained it to the Manager ITLTB, Mr Ela Manuku of the delay of process on 3<sup>rd</sup> August 2016 when Mr Ela Manuku promised him his offer of lease will be given to him within one week of payment of another application fee that he paid on 3<sup>rd</sup> August 2016.*
- iv. *CERTIORARI* *to issue quashing Agreement for Lease No. 6/77/40841 dated 1<sup>st</sup> January 2016.*
- v. *A MANDAMUS* *directing the Respondent to issue a lease to the Applicant over the same area as Lease No. 6/77/40841.*
- vi. *Costs on an indemnity basis.*

### **The grounds for judicial review**

[05] The grounds upon which the application is made are:

- (a) *The Applicant is a Businessman and Farmer who had applied to the Respondent to lease the same piece of land having lodged his application*

*initially in 2014 and paid his application fee on 19<sup>th</sup> May 2014 and again following advice from the Respondents to do so on 3<sup>rd</sup> August 2016.*

- (b) The Applicant has been occupying the subject land, that has built on it five houses but initially when the first went into occupation in 2006 there were three houses.*
- (c) The Applicant has been in continuous occupation from 2006 when he acquired the land from Narend Kumar.*
- (d) In 2006, Narend Kumar had initially sold to him 27 acres of Agricultural Land on Native Land under TLTB No. 4/10/5022 and he paid \$40,000.00 to Narend Kumar for the transfer.*
- (e) In addition to the Agricultural Land Narend Kumar sold to the Applicant two houses and one he gave free as part of the sale that were all located on a separate block that Narend Kumar advised the Applicant belong to his brother but that the houses were his. Narend Kumar demanded and obtained from the Applicant the sum of \$6,000.00 for the sales.*
- (f) From 2006 to the present day, the Applicant had housed his worker and Labourers in this area and he had built two additional houses to add on to the three that he acquired from Narend Kumar.*
- (g) Narend Kumar had left and vacated the land in 2006.*
- (h) That even though Narend Kumar owned the houses, the land was a native lease under the name of his brother Vinod Kumar and Saten Kumar and on 5<sup>th</sup> February 2007 they give to the Applicant a notice to vacate.*
- (i) On 25<sup>th</sup> February 2007 Vinod Kumar and Saten Kumar entered into an agreement with the applicant to sell to him the subject land for \$1,500.00 which the Applicant paid.*
- (j) On 12<sup>th</sup> March 2007 Vinod Kumar and Saten Kumar advised the Applicant that all future dealings on the land are to be conducted with them.*
- (k) In 2013 Narend Kumar attempted to retake one of the houses and took an occupant to the small claims tribunal to claim unpaid rent but his case was dismissed.*

- (l) *On 13<sup>th</sup> August 2013, the Applicant wrote to the Respondent to explain that he is occupying the subject land, that he has the blessing of the landowner and "Momo levu" the "Tui Sabeto" but that he is worried he does not have the title yet and he is asking the Respondent to help him secure a tenancy.*

### **The grounds of objection**

- [06] The respondent did file a notice of objection. However, with the consent of the applicant, they filed an affidavit of Mr Nemani Tamani in opposition.
- [07] The principal ground of objection of the respondent is that the Board has unfettered discretion to issue a lease to anyone that it has no obligation at all to the applicant.

### **The background**

- [08] The background facts that led to the judicial review application are as follows.
- [09] On 1 January 2016, the Respondent made a decision to grant a lease to one Mr Narend Kumar and Jasma Wati. The lease was granted over native land that has been occupied by the applicant through his tenants for many years. The decision was formalised on the same day under a Contract of Tenancy granted to Narend Kumar and Jasma Wati. The duo are neither occupants nor farmers.
- [10] Currently, Mohammed Ashik Ali, the applicant is in occupation through his labourers of the three houses on the subject land. He was unaware of the lease granted to Narend Kumar and Jasma Wati.
- [11] The first time the applicant came to know about the decision to lease by the respondent was when Mr Narend Kumar issued a quit notice dated 20 September 2016, against him to vacate the land.
- [12] According to the applicant, he was expecting that a leave would be given to him over the same area he has been occupying, pursuant to his application on 19 May 2014 and on the basis that Mr Narend Kumar had sold to him (*applicant*) all interest he (*NK*) ever had over the land.
- [13] Upon receiving the quit notice, the applicant went to the iTLTB office with a view to solving the issue. The following, according to the applicant, happened in the iTLTB office:

- i. On the very next day, Wednesday, after the Applicant received that notice he attended to TLTB and met Tevita who expressed great surprise and his actual words were "it can't be, there cannot be a lease there".
- ii. The applicant then went and filed a report to FICAC Lautoka, FICAC advised that he better engage a lawyer.
- iii. Then the Applicant went back to iTLTB office to ask if they say, "it can't be, there cannot be a lease there" then what went wrong. ITLTB officer searched on the computer and then advised him that it was officer Bill who made the lease wrongly. When the officer asked Bill, Bill said it was due to a court order. Then the Applicant managed to obtain a copy of the court order from iTLTB.
- iv. But the court order was made many years ago when the lease was still alive and it had no effect and consequence to the subject land as the lease expired.
- v. The Applicant then went to Suva iTLTB complaint section and met one Unaisi and filed with her a complaint. She advised he return to her after one month and by then his concern will be resolved.
- vi. Nothing happened and the Applicant kept going to Nadi office but they kept saying this and saying that.
- vii. The Applicant then met Ela and Unaisi of iTLTB officer Nadi, Ela directed he pay another application fee and they will give the offer, he paid and Unaisi of iTLTB inspected and surveyed but they never gave the offer.
- viii. The Applicant met Deputy General Manager, Mr Solo Nata, on 23 January 2017, who advised that they will give him the lease and for all parties to convene including Naren Kumar.
- ix. The Applicant met iTLTB officials again in Nadi with Mr Nata on 3 March 2017 and Nata advised iTLTB officials to get Narend Kumar's lease, consult him, and cancel the lease and whatever cost to be paid by the Applicant.
- x. Narend declined and iTLTB advised the Applicant on or about 15 March his only option then was to go to court.

## The law

- [14] The procedures for applying for judicial review is found in O 53, R 5 of the HCR, which provides:

*“Mode of applying for judicial review (O 53, R 5)*

*5.-(1) When leave has been granted to make an application for judicial review, the application shall be made either by originating motion or by originating summons.*

*(2) The notice of motion or summons must be served on all persons directly affected and where it relates to any proceedings in or before a Court and the object of the application is either to compel the Court or an officer of the Court to do any act in relation to the proceedings or to quash them or any order made therein, the notice or summons must also be served on the Court Officer or registrar of the Court and, where any objection to the conduct of the Judge is to be made, on the Judge.*

*(3) Unless the Judge granting leave has otherwise directed, there must be at least ten days between the service of the notice of motion or summons and the day named therein for the hearing.*

*(4) A motion must be entered for hearing within 14 days after the grant of leave.*

*(5) An affidavit giving the names and addresses of, and the places, and dates of service on, all persons who have been served with the notice of motion or summons must be filed before the motion or summons is entered for hearing and, if any person who ought to be served under this Rule has not been served, the affidavit must state that fact and the reason for it; and the affidavit shall be before the Court on the hearing of the motion or summons.*

*(6) If on the hearing of the motion or summons the Court is of opinion that any person who ought, whether under this Rule or otherwise, to have been served has not been served, the Court may adjourn the hearing on such terms (if any) as it may direct in order that the notice or summons may be served on that person.*

## The submissions

- [15] Mr Nawaikula, of counsel for the applicant contended that: the respondent had issued a lease in respect of the subject land to Narend Kumar (NK) and Jasma Wati (JW) mistakenly on the belief that there was a court order in fact the order was related to the lease which had expired. The respondent had admitted to having issued a lease to NK and JW mistakenly, and the consent

issue does not arise in the case of a new lease. He further submitted that the applicant has applied for a judicial review of the respondent's decision on the grounds of (1) Mistake, (2) unreasonableness and (3) reasonable expectation.

- [16] Counsel appearing for the respondent, Mr Duanasali in his submission confirmed that the lease has been issued to NK and JW mistakenly and therefore the respondent does not have serious issue concerning this application.

## Discussion

- [17] As I said, the applicant applies for judicial review of the respondent's decision of 1 January 2016. The decision granted a lease over a native land, the subject land to Narend Kumar and Jasma Wati. I would consider his application in light of the three grounds he has raised to challenge the decision, which includes (a) mistake (illegality), (b) unreasonableness (irrationality) and (c) reasonable expectation (legitimate expectation).

### *Procedures for judicial review*

- [18] Judicial review is now regulated by HCR, O 53, which provides the procedures for judicial review application.
- [19] Lord Diplock, in *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374, said:

*"Judicial review, now regulated by RSC, Ord. 53, provides the means by which judicial control administrative action is exercised. The subject matter of every judicial review is a decision made by some person (or body of persons) whom I will call the 'decision maker' or else a refusal by him to make a decision."*

- [20] The applicant has been granted leave to apply for judicial review of the respondent's decision. Thereafter, the applicant has complied with the entire procedural requirement of HCR, O 53. There was no dispute regarding procedural aspect of the application for judicial review, including the delay in making the application.



*Decision susceptible to judicial review*

[21] To review a decision judicially, the decision must be amenable to judicial review.

[22] In delivering the formal statement of judicial review, Lord Diplock said:

*“To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either:*

- (a) by altering rights or obligations of that person which are enforceable by or against him in private law; or*
- (b) by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. (I prefer to continue to call the kind of expectation that qualifies a decision for inclusion in class (b) a ‘legitimate expectation’ rather than a reasonable expectation’, in order thereby to indicate that it has consequences to which effect will be given in public law, whereas an expectation or hope that some benefit or advantage would continue to be enjoyed, although it might well be entertained by a ‘reasonable’ man, would not necessarily have such consequences. The recent decision of this House In re Findlay [1985] AC 318 presents an example of the latter kind of expectation. ‘Reasonable’ furthermore bears different meanings according to whether the context in which it is being used is that of private law or of public law. To eliminate confusion it is best avoided in the latter.)*

[23] In *Devo v iTaukei Land Trust Board* [2012] FJHC 1321; HBC64.2012 (7 September 2012), Master Amaratunga (as he was then) said (at para 13 of his judgment):

*“so the action of granting the lease of native land is empowered under the said Act, and if it is not done reasonably the matter is in the realms of judicial review as opposed to an action founded on a writ of summons. Since there is no duty case upon the board to consult individuals which grants the lease*

*relating to iTaukei Land, there cannot be a cause of action for the Plaintiff in the private capacity to sue the Defendants and only remedy is in the area of Public of Law..."*

[24] The respondent's (iTLTB) decision-making power derives from a statute, iTaukei Lands Trust Act 1940 ('iTLTA') and the decision it made alters the right or the benefit of the applicant which he had in the past been permitted by the respondent to enjoy and which he can legitimately expect to be permitted to do until he communicates some rational grounds for withdrawing it. The respondent is a public body and its source for decision-making power is a statute. Therefore, the respondent's impugned decision is amenable to judicial review.

*Standing (sufficient interest)*

[25] Judicial review is available to a person who has sufficient interest in the matter to which the application relates. HCR, O 53, R 3 (5), requires that the applicant to have sufficient interest in the matter to which the application relates.

[26] The leading case on the meaning of the 'sufficient interest' test is *R v Inland Revenue Commissioners, ex p. National Federation of Self-Employed and Small Business Ltd (the Fleet Street Casuals case)* [1982] AC 617. The points emerge from this case are that: (1) the question of what is a sufficient interest is partly a matter of legal principle, (2) the question of sufficient interest has to be judged in the light of relevant statutory provisions-what do they say or suggest about who is to be allowed to challenge decisions made under the statute? (3) sufficient interest has to be judged in the light of the substance of the claimant's complaint and (4) whether the claimant's interest is sufficient depends to some extent on the seriousness of the alleged breach of administrative law.

[27] Later, *R v Felixstowe Justices, ex p. Leigh* [1987] QB 582 clarified the sufficient interest point that standing is related to the claimant's interest and not to the remedy sought.

[28] Interestingly, *the Fleet Street Casuals case's* approach on the requirement of sufficient interest is a liberal standing rule in the sense that it makes access to the courts to challenge the administrative action easy.

[29] In the present case, the decision directly affects the applicant's rights or his benefit. Therefore, I find that the applicant has sufficient interest in the matter to which the application relates.

*Illegality*

[30] On behalf of the applicant, Mr Nawaikula submits that the important point for the court to consider is fairness or unfairness as a result of mistaken belief that the respondent was obliged by an order of the court to grant a lease to Narend Kumar and Jasma Wati. He further submits that it would be totally unfair to the applicant for the respondent to give a lease to Narend Kumar knowing that there was an error.

[31] The respondent has now admitted to having issued a lease to Narend Kumar and Jasma Wati. Having admitted the mistake, the respondent had failed to rectify their mistake. Instead, they had attempted to justify the mistake by saying that the Board has unfettered discretion to grant lease to the lessee of their choice.

[32] Having admitted their mistake, the respondent is not entitled to justify it under pretext of unfettered discretion. As a decision-maker, the respondent was under duty to act judicially, which they had failed to do so.

[33] Mr Narend Kumar left the subject land after entering into an agreement with the applicant in 2006. Since then the applicant has been in occupation of the land.

[34] The applicant has filed an affidavit sworn by Narend Kumar's brother who explains the circumstances under which the applicant came into occupation of the property. He in his affidavit states:

*"I am the brother of Narend Kumar, to whom ITLTB has given a lease with effect on the 1<sup>st</sup> day of January, 2016 containing 0.4803 Ha TLTB Ref: 4/77/40841.*

*Prior to the ILTB issuing lease No. TLTB 6/77/40841 on 1<sup>st</sup> January 2016, the subject land was leased out by TLTB in my name and my brother's name Saten Kumar.*

*There were then 3 houses on the land belonging to my brother Narend Kumar, 2 houses, and 1 for his daughter.*

*Sometime later on or about 2006 we (I and my brother Satend Kumar) heard that our brother Narend Kumar had sold the houses to Mohammed Ashik Ali who immediately moved his labourers to occupy and all without our knowledge.*

*We issued against Mohammed Ashik Ali a notice to vacate but the matter was resolved by him paying to us \$1,500.00 and agreeing to share with us the use of his labourers and in return we allow him to continue occupation and we continue to pay rent to TLTB and we supported his application to TLTB for a renewal after our lease expired.*

*When the lease expired I told Mohammed Ashik Ali to apply the renewal since he was occupying the land.*

*I am very surprised to know ITLTB has given a renewal to Narend Kumar when it is Narend Kumar who has acted illegally and deceived everyone by selling the land and the property without our knowledge, collecting the money, vacating the land and now he has suddenly appeared from nowhere to retake the land."*

[35] After the issuance of the lease to Mr Narend Kumar, the applicant enquired as to why the lease was issued to Mr Narend Kumar despite his occupation and the promise given by the respondent that a lease would be granted to the applicant. The respondent's response was that: the respondent was agreeable to the renewal of the lease of the area the applicant has been occupying, but the respondent's officer, Mr Bill had issued the lease to Mr Narend Kumar. The respondent subsequently found that the issue of the lease was not done in accordance with the standard procedure of the Board and to inspection, and consultation and for that Mr Bill's employment was terminated.

[36] It is apparent that the lease to Mr Narend Kumar has been issued without following the standard procedures and without an investigation into the occupation of the applicant. The respondent should have been consulted with the applicant as he has been in occupation of the property since 2006. Therefore, it was unfair to issue the lease for the subject land when there was no application from Mr Narend Kumar. The decision to issue the lease to Mr Narend Kumar was illegal and it can be quashed by writ of *certiorari* on the

ground of illegality. The application for judicial review of the decision of the respondent succeeds on that ground.

*Legitimate expectation*

- [37] The doctrine of legitimate expectation was authoritatively considered by the House of Lords in *Council of Civil Service Unions v Minister for Civil Service* (above). Lord Diplock put it thus:

*“(i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or*

*(ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.”*

- [38] In *Dewa v University of the South Pacific* [1996] FJHC 125, Pathik J said:

*“The doctrine of legitimate expectation, like the duty to give reasons, is considered as part of the duty to act fairly as discussed above (The Applicant’s Guide to Judicial Review by Lee Bridges and Ors. 1995 p.18). A person may have legitimate expectation “that they will be consulted if they have a history of being consulted by the decision-maker or if the decision maker has made promises or given undertakings which the decision in question will alter” (quoting Bridges (supra) p.18, R v SWALE BOROUGH COUNCIL and MIDWAY PORTS AUTHORITY ex p. R.S.P.B. (1990).*

- [39] Mr Nawaikula on behalf of the applicant invites me to consider the following facts that are applicable to the doctrine of legitimate expectation:

- (a) The applicant had made an application over the same initially on 19 May 2014.
- (b) After lodging the application, he had fully informed the respondent his status on the land and how he came to be on it since 2006, he explained how he paid Narend Kumar \$6,000.00 for two houses and how Narend Kumar gave him the third house for free.

(c) The applicant explained how Narend Kumar had vacated the land in 2006 and how he had another agreement with the tenant at that time, Vinod Kumar and Saten Kumar and how they sold the land to him for \$1,500.00.

(d) The applicant explained how the Tui Sabeto had blessed and agreed on his occupation and how much he badly needs TLTB to formalise his occupation under a lease after the existing terms expired in 2016.

(e) The applicant complained it to the Manager iTLTB, Mr Ela Manuku, of the delay of process on 3 August 2016 and Mr Ela Manuku promised him that his offer of lease will be given to him within one week of payment of another application fee that he paid on 3 August 2016.

[40] The applicant had informed the respondent that he has been in possession of the land in question since 2006 following an agreement he had with Mr Narend Kumar. The applicant applied for a lease over the land he was occupying on 19 May 2014. The applicant continued to occupy the land even after the lease granted to Mr Narend Kumar expired. The respondent did not take possession of the land after the expiration of the existing lease. By failing to repossess the land, the respondent impliedly authorised the applicant to continue with his occupation of the land. The respondent through their Manager, Mr Ela Manuku promised that an offer of lease would be given to the applicant within a week of payment of another application fee, which the applicant paid on 3 August 2016. The respondent, having regard to his long occupation of the land, should have consulted the applicant before issuing a lease to Mr Nrand Kumar. The respondent did not give any grounds why a lease would not be issued to the applicant. He was not given an opportunity to comment on the withdrawal of the implied permission given to the applicant. The respondent assured that the applicant would be given a lease for the area of the land he has been occupying. The applicant had legitimate expectation that he will be consulted before any adverse decision is taken despite his long possession of the land. On the facts and the evidence adduced, I find that a legitimate expectation is made out. Accordingly, the applicant is entitled to the relief. I allow his application.

## Conclusion

[41] For the reasons I have set out, I conclude that the applicant has made out a case for judicial review. I would, therefore, quash the decision of the respondent on 1 January 2016, granting a lease to Mr Narend Kumar and Jasma Wati on the ground of illegality and legitimate expectation. I accordingly grant the relief he is seeking with summarily assessed costs of \$1,000.00.

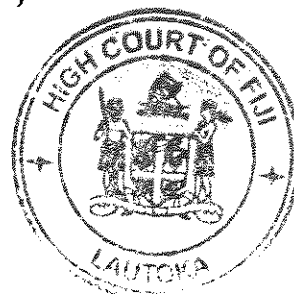
## The results

1. That the respondent granted the Agreement for Lease No. 6/77/40841, dated 1 January 2016, in the name of Narend Kumar and Jasma Wati, in error and by mistake in that the respondent had granted that Lease by error mistakenly believing there was in existence a court order that compelled it to do so.
2. That the Agreement for Lease No. 6/77/40841 dated 1 January 2016, is hereby granted.
3. That the respondent is directed to issue a Lease to the applicant over the same area as Lease No. 6/77/40841.
4. That there will be cost against the respondent in the sum of \$1,000.00 payable to the applicant.

*M.H. Mohamed Ajmeer*  
.....16/7/18

**M.H. Mohamed Ajmeer**

**JUDGE**



**At Lautoka  
16 July 2018**

### Solicitors:

For the applicant: M/s Nawaikula Esquire, Barristers & Solicitors

For the respondent: Legal Department iTaukei Land Trust Board