

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. HAA 006 & 007 OF 2024

BETWEEN : **EXOTIC FIJI (PTE) LIMITED**
Appellant

AND : **FIJI NATIONAL PROVIDENT FUND**
Respondent

Appearances : **Mr Kumar, Manager for Appellant**
Mr P Suguturaga for the Respondent

Hearing : **12 April 2024**

Judgment : **1 May 2024**

JUDGMENT

- [1] Exotic Fiji (Pte) Limited (hereinafter referred to as 'Exotic Fiji') appeals from decisions by the Magistrates Court dated 28 December 2023 sentencing the company in respect to offences for unpaid Fiji National Provident Fund contributions (hereinafter referred to as 'FNPF contributions') for its employees for the period from August 2020 to January 2023. The learned Magistrate fined the company as well as ordered it to pay the outstanding FNPF contributions, interest and prosecution costs.
- [2] The issue in this appeal is narrow. The company does not take issue with the payments ordered. Exotic Fiji challenges the timeframe within which the outstanding FNPF contributions are required to be paid. The learned Magistrate has ordered Exotic Fiji to pay the amounts of \$107,777.50 and \$36,761.75 within 24 months and 12 months, respectively. Exotic Fiji argues that this timeframe is unfair and oppressive and does not take account of its financial circumstances.

Background

- [3] Exotic Fiji is a limited liability company. It is also a registered employer with the Fiji National Provident Fund. It is required to make FNPF contributions for its employees under the Fiji National Provident Fund Act 2011.
- [4] Exotic Fiji's Manager, Mr. Kumar, attended the appeal hearing on behalf of the company. He stated that the company's main business activity up until COVID was selling DVD movies. COVID apparently had a huge impact on this business activity leading to significant losses for the company and, ultimately, diversification into whiteware, electrics, power tools and a variety of other items. Mr Kumar states that these same financial circumstances caused the company to default on its statutory obligations to make FNPF contributions for its employees from August 2020.
- [5] Initial charges were laid by the Respondent against Exotic Fiji in July 2022 for its FNPF defaults in respect to the period from August 2020 to March 2022 (hereinafter referred to as the '2022 charges'). Representative charges were brought in the name of one of the employees of Exotic Fiji, namely Jagdish, in the amount of \$387.70. The total amount unpaid for all of Exotic Fiji's employees for the almost two-year period was \$107,777.50. Further charges were laid by the Respondent in March 2023 for unpaid FNPF contributions in the period from April 2022 to January 2023 (hereinafter referred to as the '2023 charges'). This time, representative charges were brought in the name of Asheeta for the amount of \$253.52. The total amount payable for all employees for the eleven-month period was \$36,731.75.
- [6] Exotic Fiji had legal representation in the Magistrates Court up until late 2023. Whilst still represented by counsel, the company pleaded guilty to both sets of charges on 1 August 2023 and admitted a summary of facts later the same month. The matter was then adjourned for sentencing. Written submissions were filed for both parties. Again, Exotic Fiji's solicitors prepared and filed written submissions for the company. The company sought to make instalment payments for the outstanding FNPF contributions to take account of its poor, but improving, financial circumstances.
- [7] The matter was next called in the Magistrates Court on 19 December 2023, at which time it was noted by the learned Magistrate that the company had proposed, with respect to the outstanding FNPF contributions, monthly payments of \$1,000 with an increase after three

months to \$2,000 per month. The learned Magistrate issued two decisions on 28 December 2023 in respect to the 2022 and 2023 charges. The orders being:

- i. The company was fined \$300 on each of the two charges, payable within 30 days of the decision.
- ii. The outstanding contributions to Ashneeta and Jagdish of \$253.52 and \$387.70, respectively, were required to be paid within 3 months.
- iii. Prosecution costs of \$100 were payable for each of the two charges within 30 days.
- iv. With respect to the outstanding contributions of \$36,761.75 and \$107,777.50 these were payable by the company within 12 months and 24 months, respectively.
- v. The interest payable on the outstanding contributions in the amount of \$386.57 and \$6,602.22 were payable within 3 months and 6 months, respectively.
- vi. The learned Magistrate also made orders for seizure of property and committal in the event of any failure to make the payments within the periods ordered.

[8] Exotic Fiji filed appeals from both decisions by the learned Magistrate. The appeals, filed on 25 January 2024, were brought on the basis that the learned Magistrate allegedly erred by failing to consider the circumstances of the company, its financial difficulties and its mitigation. The company argued that the timeframes imposed for payment of the outstanding FNPF contributions were oppressive.

Appeal – law and principles

[9] Pursuant to s 248 of the Criminal Procedure Act 2009 a party must file an appeal within 28 days of the decision from which the appeal is brought. Exotic Fiji filed the appeals within this time.

[10] This Court's powers on an appeal are set out at s 256(2). It may confirm, reverse or vary the Magistrates Court's decision. It may remit the matter back to the Magistrates Court or make such order as it considers just, including exercising any power that the Magistrate might have exercised. It may quash the sentence of the Magistrates Court and impose another sentence

warranted in law. Finally, the Court may also receive additional evidence on appeal if considered necessary.¹

[11] The approach that a court must apply to appeals on sentence was set out as follows by the Supreme Court in *Naisua v State* [2013] FJSC 14 [20 November 2013]:

It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in House v The King [1936] HCA 40; [1936] 55 CLR 499 and adopted in Kim Nam Bae v The State Criminal Appeal number AAU 0015 at [2]. Appellate courts will interfere with a sentence if it is demonstrated that trial judge made one of the following errors:

- i. Acted upon a wrong principle;*
- ii. Allowed extraneous or irrelevant matters to guide or affect him;*
- iii. Mistook the facts;*
- iv. Failed to take into account some relevant consideration.*

Parties respective positions

[12] Exotic Fiji accepts that it must make the payments ordered by the learned Magistrate, including the outstanding FNPF contributions and interest. The narrow issue in this appeal concerns the time within which the company is required to pay the outstanding FNPF contributions.

[13] Mr. Kumar stated that Exotic Fiji cannot afford to make the payments within the timeframe ordered by the learned Magistrate. If the amounts in question were paid monthly over the 12 and 24 month period this would equate to \$8,614.37 per month.² Mr. Kumar stated that the company has recently received two winding up notices from creditors. It has negotiated a resolution with one creditor and is currently hoping to negotiate a resolution with the second creditor. When asked what information was placed before the Magistrates Court of the

¹ Section 257(1).

² Mr Kumar informed the Court on 8 February 2024 that this was the amount that the Respondent had been seeking from the company since the sentence was delivered by the Magistrates Court. Mr Kumar stated that the company hoped to pay \$3,000 a month instead.

company's financial circumstances Mr Kumar referred to a letter from the company's Director, Nitin Prasad, dated 22 December 2023.³ The letter is brief. It reads in its entirety:

In regard to the ongoing case with FNPF, I want to highlight that after COVID, the company has loss (sic) its major source of income, which was DVD Movies due to online streaming. Almost \$5 million income was loss (sic) annually which has put company in major difficulties, as the company has other loans based on the income loss.

We understand FNPF contribution is very important part, therefore we request to make payment of \$1,000 per month for the first 6 months and \$1,500 for the next 6 months. From 2025 we will pay \$2,000 per month, as we will be in better position as our other debts will be reducing.

[14] Mr. Kumar confirmed that no financial information was supplied to the learned Magistrate to support the assertion that Exotic Fiji was in financial difficulty. There have been discussions between the parties to ascertain whether they can arrive at an agreement over a payment plan. Mr. Kumar advised that he had a meeting with the Respondent shortly before the appeal hearing and that Exotic Fiji has offered to pay \$2,500 to \$3,000 per month. The Respondent has not yet indicated to the company its position on the offer. Mr. Kumar stated that the company has made some payments towards the outstanding FNPF contributions. Mr Kumar identified the payments as follows:

9 April 2023	-	\$1,799
12 September 2023	-	\$500
11 March 2024	-	\$300
12 March 2024	-	\$100
15 March 2024	-	\$200
22 March 2024	-	\$200
10 April 2024	-	\$700
Total	-	\$3,799

³ Page 29 of the Court Record for Criminal Appeal No HAA 006 of 2024.

[15] Mr Suguturaga confirmed the fact of the meeting between Exotic Fiji and the Respondent some days before the appeal hearing. He advised that the company's repayment proposal has been rejected by the Respondent. With respect to the appeal, Mr. Suguturaga submitted that the learned Magistrate's order permitting payment over a 12 and 24 month period is unreasonable in that it allows the company to delay making any payment for a 12 month period and simultaneously precludes the Respondent from taking any enforcement steps for the same period. The Respondent seeks an order, pursuant to s 256 (3) of the Criminal Procedure Act, that the outstanding contributions and interest are paid either immediately or no later than one month from this Court's decision on the appeal. Mr. Suguturaga argued that any delay by the employer paying the contribution and interest disadvantaged Exotic Fiji's employees and was contrary to the purpose of the FNPF Act.

Decision

[16] I begin with reference to the High Court decision of *Daumaka Limited v FNPF* and *Gao Zhong Lin v FNPF* [1998] FJHC 106 (20 July 1998). Both parties relied on this decision (albeit for different reasons) in their respective written submissions in the Magistrates Court. The parties placed some stock in the *Daumaka* decision. I, too, have found it helpful. The 1998 decision involved an appeal to the High Court from a Magistrate's decision ordering Daumaka Ltd and its Director, Mr Lin, to pay outstanding FNPF contributions of \$6,549.06 within 21 days. The company and its director appealed to the High Court on the basis that the Magistrates Court failed to properly consider their financial circumstances and that the timeframe within which payment was required to be made was harsh and excessive. The High Court was critical of the failure by the Magistrate to conduct an enquiry into the appellants' financial means. Pain J stated at page 5:

Finally, on the facts of the record, the learned Magistrate failed to take into account the means of the appellants (particularly the company) when fixing the monetary penalties and imposing a time limit of 21 days for payment. A court should consider the means of an offender when considering a monetary penalty. This principle was succinctly stated by the Learned Chief Justice in Regina v Saras Wati [1983] 29 FLR 168 at pages 168 and 169:

"It is well established that a Court should not usually impose a fine without first enquiring and satisfying itself as to the offender's ability or

means to pay. In the absence of such an inquiry it is more than possible that an offender will be unable to pay a fine in time or at all and will, in default, have to serve a sentence if the court originally decided not to impose, namely imprisonment...The question of allowing time to pay and the length of time to be given should invariably be the subject of representations by the offender.”

All these matters created difficulties for this Court in determining the merits of the appeal. I considered remitting the case back to the Magistrates Court for rehearing. However, I have received considerable assistance from both counsel, which enables me to give a decision.

[17] Pain J noted that the parties had, in fact, agreed an arrangement for repayment which involved the appellants providing a cheque for \$1,000 and paying the balance at a rate of \$700 per month. The Judge accepted this arrangement and made an order to this effect.

[18] Turning to the present appeals, Exotic Fiji informed the learned Magistrate of the fact of its financial difficulties during sentencing. Thus, the learned Magistrate was aware of the matter. It is apparent that the learned Magistrate took the circumstances into account when making the orders that the larger amounts were to be paid over a lengthier period. However, in my view the learned Magistrate erred in two respects. Firstly, the learned Magistrate had not conducted any enquiry into the company’s financial means and, thus, did not have adequate information to be satisfied of Exotic Fiji’s ability to comply with the timeframes. Secondly, the learned Magistrate ought to have stipulated a monthly instalment payment amount in order to monitor ongoing compliance by Exotic Fiji.

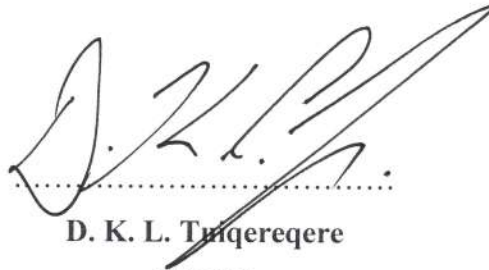
[19] In light of the failures, I allow the appeals and quash the sentences by the Magistrates Court of 28 December 2023 in respect, only, to the timeframe within which Exotic Fiji must pay the amounts of \$107,777.50 and \$36,761.75. The matter is remitted back to the Magistrates Court to again make an order in respect to the timeframe for payment of the outstanding FNPF contributions with the following directions:

- i. The Magistrates Court is to conduct an enquiry into the financial means of Exotic Fiji.

- ii. Upon conclusion of the said enquiry the Magistrates Court is to make an order fixing a monthly amount that Exotic Fiji is required to make to pay the outstanding FPNP contribution of \$36,761.75 and \$107,777.50.

[20] There is no order as to costs.




D. K. L. Tuiqereqere
JUDGE

Solicitors:

FNPF Legal Services Department for the Respondent