

IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

CASE NUMBER: HBC 117 OF 2024

BETWEEN: **SABIR HUSSAIN**

APPELLANT

AND: **FIJI NATIONAL PROVIDENT FUND**

RESPONDENT

Appearances: Mr. V. Kumar for the Appellant.

Mr. Suguturaga for the Defendant.

Date/Place of Judgment: Monday 21 July 2025 at Suva.

Coram: Hon. Madam Justice Anjala Wati.

JUDGMENT

A. **Catchwords:**

APPEAL – DECISION OF MASTER - whether the FNPF could issue a DPO and continue the same against the appellant without filing a civil claim for recovery of alleged unpaid contributions on the facts of this case – is a civil proceeding the only way to recover unpaid contributions or can a charge be laid, and if the alleged defaulter found guilty or convicted, an order for recovery of the unpaid contributions could be made in the criminal proceedings - does the FNPF have to use s. 108 procedure in any event, even if there is a criminal charge and the defaulter found guilty and convicted - whether a DPO breaches a person's constitutional right to freedom of movement – whether a DPO should only be issued against persons who are in Fiji and about to leave or could it extend to persons who have already left the country to prevent a person from leaving Fiji if he ever enters Fiji again after the issuance of the DPO – should the FNPF have issued lien over the property of the appellant instead of a DPO.

B. **Legislation:**

1. Constitution of Fiji: s.21.
 2. Criminal Procedure Act 2009 (“CPA”): s.187.
 3. Fiji National Provident Fund Act 2011 (“FNPF Act”): ss. 37; 104; 108; and 112.
 4. High Court Rules 1988 (“HCR”): Order 59 Rule 17.
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Cause and Background

1. This is an appeal against the decision of the Master of the Court when he dismissed the appellant's originating summons challenging the Departure Prohibition Order ("**DPO**") issued against him by the Fiji National Provident Fund ("**FNPF**") on 4 October 2018.
2. The appellant is the Director of Sabir Builders. He says that he discovered in his deceased father's belongings a DPO of 4 October 2018 and a letter dated 27 December 2017 to Sabir Builders. By that letter the defendant had claimed unpaid FNPF contributions in respect of one Krishneel Rao and Mohammed Shariff.
3. On 8 January 2024, the appellant's solicitors wrote to the FNPF and informed that:
 - *The DPO and the letter by FNPF claiming unpaid contributions was discovered by the appellant after the demise of the appellant's father Khalil Hussain who represented himself as the owner of Sabir Builders.*
 - *Khalil Hussain solely operated Sabir Builders and overtook the day to day operations including hiring and firing of staff without a hint of communication with the appellant.*
 - *The appellant has been therefore forced to deal with the contribution issues in respect of Krishneel Rao and Mohammed Shariff.*
 - *In the appellant's view, the said employees were both casual laborers whose wages were not on a fixed term basis but dependent on work done. It was said that in construction business, casual workers are commonly on flexible wage rate. This was reflected in the weekly wage slip of both employees which was attached to the letter.*
 - *The records of the business which the appellant had in his possession was inconclusive of the two person's employment. The pay slip that has been provided is also inconclusive as to who issued that. The pay slip also does not contain any identifying or connecting writing or evidence that would legitimize it as belonging to Sabir Builders. Some pay slips have Sabir Builders stamp which makes it as belonging to Sabir Builders and most do not.*
 - *The unpaid claims starting from 2011 to 2017 is statute barred.*

4. On 20 February 2024, the appellant himself attended a meeting at the office of the FNPF. Without admitting liability, he offered to pay \$2,000 per employee in exchange of uplifting of the DPO. A letter was subsequently issued to the FNPF on 22 February 2024 confirming the appellant's willingness to settle.
5. The matter was not settled and the DPO remained. The appellant then filed a claim challenging the DPO and sought an order for it to be uplifted by the court.

Master's Findings

6. The Master carefully addressed all the pertinent issues raised by the appellant. On whether the claim for unpaid contributions was time barred under s. 108 (2) (b) of the FNPF Act, the Master reflected that the appellant's position was that the unpaid contributions should only be recovered as a civil debt pursuant to s.108 of the FNPF Act. The FNPF's position was that recovering unpaid FNPF contributions as a civil debt was one option. The other option was to pursue criminal proceedings under s. 37 of the FNPF Act.
7. The Master found that recovering unpaid contributions as a civil debt was one way to proceed under the law. The FNPF could also pursue other remedies available to it such as recovering the debt in the criminal proceedings if the alleged defaulter was found guilty or convicted.
8. The Master found that it was not mandatory for FNPF to have commenced proceedings for recovery under s.108. He also found that there was no time limit to commence criminal proceedings.
9. The Master then referred to the appellant's argument that he was not involved in hiring the two employees but his father did and that his father represented himself as the director of the company and was running all the affairs.
10. It was found that the appellant was the director of the company Sabir Builders. The entity was a sole trader. The appellant therefore could not escape liability by saying that his father was running the affairs of the company without his knowledge. The court found that as a sole trader, the business entity was the sole responsibility of the appellant. The court found that the argument did not have merit and was just a vague attempt to escape liability.

11. On the issue of lack of proper documentations based on which the DPO was issued and on how the claim for unpaid contributions could be from 2011 when the company was registered with FNPF in 2014, the court stated that these aspects would be relevant and determined if there are legal proceedings against the appellant regarding such contributions.
12. The Master continued and said that it was essential to consider whether such matters would affect the discretion of the FNPF to issue DPO against the appellant. For that, the court considered s.104 of the FNPF Act and found that disputes on the proof of the claim and/or disputes regarding the amount shall not prevent the exercise of the discretion of the FNPF under s.104 of the Act to issue a DPO. The Master outlined s.104 of the FNPF Act which reads as follows.

“S.104 1) If-

- (a) a person is liable to pay an amount as, or on account of, mandated contributions or additional contributions required to be paid by section 38(3);*
- (b) the amount is due and payable but has not been paid; and*
- (c) the Chief Executive Officer believes on reasonable grounds that it is desirable to prevent the person from departing from Fiji to another country without –*
 - (i) fully satisfying the liability; or*
 - (ii) making arrangements satisfactory to the Board for the liability to be fully satisfied;*

the Chief Executive Officer may, by written order, prohibit the departure of the person from Fiji.

- (2) A departure prohibition order remains in force until revoked or set aside by a court.*
- (3) A departure prohibition order in respect of a person does not prevent the deportation of the person under the Immigration Act 2003.*
- (4) The Chief Executive Officer must, as soon as practicable after making a departure prohibition order in respect of a person –*
 - (a) send a copy of the order to the person at the address of the person last known to the Board; and*
 - (b) give a copy of the order, and such information as the Chief Executive Officer considers is likely to help facilitate the identification of the person, to the Permanent Secretary or the Director of the Department of Immigration.*

(5) *The Chief Executive Officer may give a copy of the order and information described in subsection (4)(b) to any other department of the civil service if, in the Chief Executive Officer's opinion, to do so will assist in giving effect to the order."*

13. The court found that what the FNPF had to consider before exercising its discretion to issue a DPO was outlined in s.104 (1) (a), (b) and (c) of the FNPF Act. It was found that the FNPF had considered the requirements prior to exercising its powers.
14. It was found that if there were any discrepancies regarding the amount due as mandatory contributions and/or any related issues, such matters could be brought to the attention of the FNPF to recalculate the said amount. Such disputes does not annul the exercise of the discretion by the FNPF to issue a DPO.
15. The court said that it was clear that the FNPF acted on the information provided by the 2 employees of the appellant's company. The necessary information and the relevant calculations of the unpaid contributions had been duly communicated to the appellant by way of a letter served on his last known address. The court said that the father of the appellant even responded to the letter. The appellant cannot just deny any knowledge of the same. The appellant, without taking any progressive steps whatsoever to resolve these issues relating to the affairs of the company, left Fiji and has kept silent over the years without any attempt to check the status of his own company.
16. The court found that the conduct of the appellant should necessarily be considered as victimizing the employees of the company rather than what the appellant says as being victimized by the FNPF.
17. On the issue of violation of his personal liberty under s.9(2) of the Constitution, the Master found that on the plain reading of this section, it applies to a court making an order depriving a person of personal liberty. This section therefore did not extend to the appellant.
18. The appellant had also raised that the DPO violated his constitutional right to freedom of movement under s. 21(1) and (3) of the Constitution of Fiji. The court found that the Constitution of Fiji indeed guaranteed that right but that was not an absolute right. Limitations could be placed on this right and s. 21(7) (d) of the Constitution indeed placed a limitation on this right. S.21(7)(d) states that:

"to the extent that it is necessary, a law may limit, or may authorize the limitation of, the rights mentioned in this section ...for the purpose of imposing a restriction on the person that is reasonably required to secure the fulfilment of an obligation imposed on the person by law; or..."

19. The Master said after being notified of the unpaid mandatory contributions, the appellant left the country without making any attempts whatsoever to resolve the issue. For over 7 years, he had remained silent on the matter, whereas it was his duty to resolve any issue relating to unpaid mandatory contributions pursuant to the FNPF Act. He appears to be currently residing abroad and as such is clearly a flight risk. The Master therefore did not find any violation of principles enshrined in the Constitution. The Master also noted that the appellant had no obstruction in coming to Fiji. Upon his arrival in Fiji, he has the opportunity to duly attend to his statutory obligations on payment of unpaid mandatory contributions and then accordingly to have the DPO uplifted.
20. The Master also found it necessary to address the submission of the appellant that pursuant to the CPA, the FNPF is barred from bringing a summary charge before the Magistrates' Court "*where the charge or complaint was not laid within 12 months from the time when the matter of the charge or complaint arose*". The Master said that the relevant section in the CPA which had prompted the argument, is s. 187.
21. The Master concluded that s. 187 only applies to offences which carries a maximum penalty not exceeding 12 months imprisonment and/or a fine of \$1000.00. An offence under s.37 of the FNPF Act carries a penalty of \$5000.00 and so s. 187 had no application. The Master reproduced s.187 of the CPA for clarity in his judgment:

"187 (1) This section applies to all offences the maximum punishment for which does not exceed imprisonment for 12 months or a fine of \$1,000 unless a longer time is allowed by any law for the laying of any charge for an offence under that law;

(2) No offence shall be triable by a Magistrates Court, unless the charge or complaint relating to it is laid within 12 months from the time when the matter of the charge or complaint arose.

(3) The Magistrates Court shall order the dismissal of any proceedings which are in breach of this section."

22. Since all the arguments raised by the appellant failed, the originating summons was dismissed with costs.

The Appeal, Law and Analysis

23. Having raised several grounds of appeal, the appellant has, in his written submissions, addressed all the grounds under the following 4 heads:

- (i) *Masters error in not considering the appellant's supplementary submissions;*
- (ii) *Unpaid contributions must be recovered vide s.108 of the FNPF Act;*
- (iii) *Other remedies available to the Board; and*
- (iv) *Legality of continuing with the DPO.*

24. I will address the issues under the same heads:

A. Appellant's Supplementary Submissions: Why was it not considered by the Master?

25. Mr. Kumar, counsel for the appellant submitted that at paragraph 24 of the judgment, the Master said:

"Both parties have filed comprehensive written submissions in support of their respective positions and after completion of the Hearing, court allowed both parties to file any supplementary written submissions, if they wished to do so. Accordingly, the defendant had filed a supplementary written submission as well."

26. It was argued that the appellant had filed a supplementary submission on 15 October 2024. The appellant submits that the way paragraph 4 is worded, it is taken that the appellant had not filed any supplementary submission. He says that this indicates that the appellant's supplementary submission was not considered.

27. I find it outrageous for the appellant to not identify the orders of the court properly and accept the fault in not filing the supplementary submissions on time. On 6 September 2024, the Court had ordered that the parties had 14 days from 18 September to file any further written submissions. The due date for filing further written submissions was 2 October 2024. The FNPF filed its supplementary submissions on time. The plaintiff did not. The file was sent to the Master for judgment.

28. Somehow, without the consent of the respondent and the permission from the Master, the plaintiff was able to file his supplementary submission outside the time prescribed by the Master. That submission did not make its way to the Master at all. The Civil Registry had kept it and later placed it in the file.

29. The Master had no knowledge of the supplementary submissions. All this is very clear from the file jacket. The file jacket does not note the filing of the supplementary submissions by the appellant. If it

was out of time, the Master ought to have been asked for his directions. No such directions were sought from the Master.

30. If the Master gave directions to file the submissions then the file jacket would have been updated as well. The lack of Master's directions and the lack of information regarding filing in the file jacket confirms that someone in the Registry placed the supplementary submissions in the file later after accepting it erroneously. This is not the first time for me to see such an incident occurring but I should confine my views to this case for now.
31. The appellant is to accept the blame for not taking Master's permission before filing late submissions. The appellant's supplementary submissions should therefore not even be part of the records.
32. In any event, if one compares the supplementary submissions with the substantive one, it can be seen that it is a reflection of what is in the appellant's affidavits and is an extension of the substantive submissions.
33. Further, in the appeal hearing before me, the appellant had a chance to ask me to consider the issues arising in the supplementary submission which he says has not been considered by the Master. No such issues were identified and brought to my attention and as such the appellant's argument on this aspect fails.

B. Unpaid Contributions – How is it to be recovered?

34. Mr. Kumar submitted that pursuant to s. 108(1) of the FNPF Act, unpaid contributions must be recovered as a civil debt. He submitted that the claim for unpaid contribution must commence within 6 years after the date when the contribution or penalty became due. Mr. Kumar argued that it is already 6 years since the issuance of the demand letter and as such the FNPF cannot make a claim for the unpaid contributions and when that cannot be done, maintaining a DPO is not justified.
35. The appellant also argues that he had raised matters in his affidavit which gave rise to the issue of whether the two individuals were employed by the appellant and whether any contribution was due and unpaid.
36. It was also raised that Sabir Builders was registered with the FNPF on 16 June 2014 whereas the amount being claimed is from 2011. The appellant says that by making a claim from before the

appellant's registration with FNPF, the FNPF is insinuating that the appellant has committed some illegal activity.

37. Let me identify s.108. It reads:

Recovery of unpaid contributions

"108(1) Contributions, additional contributions and penalty amounts due under this Act, and amounts due under the former law as contributions or surcharge may, without affecting any other remedy, be recovered by the Board as a civil debt from a person liable to pay them.

(1A) If payment of any contribution, additional contribution or penalty has not been made on or before the due date, a lien shall arise over the property of the person liable to pay such amounts to secure the payment of the amount of the contribution, additional contribution or penalty, and the Board or any officer or agent authorised by the Board may file a notice of such lien in the registry established under the Personal Property Securities Act 2017 to establish the priority date and time of such lien.

(2) Proceedings for the recovery of the amounts in subsection (1) as a civil debt –

(a) are to be commenced and continued by the Chief Executive Officer in the name of the Board; and

(b) may, despite anything in any other written law to the contrary, be commenced at any time within 6 years after the date when the contribution or penalty amount became due."

38. I cannot understand how the appellant says that unpaid contributions can only be recovered vide civil proceedings under s.108 within 6 years from the time the contribution becomes due.

39. Section 108 of the FNPF Act 2011 does not limit the ways in which the defendant can recover the unpaid contributions. S. 108 gives the FNPF the discretion to pursue recovery through civil proceedings. That provision of the law clearly states that proceeding under this section does not prejudice the rights of the Board from pursuing any other remedy available under the Act.

40. Under s. 37 (1) (a) of the FNPF Act, non- payment of mandatory contributions constitutes an offence. S. 37 reads:

"37 (1) No later than the last day of each following month, an employer must –

(a) Pay the Board, for each person who was an employee of the employer for all or part of the month, the amount of contributions calculated in accordance with this section.

(b) ...

Penalty - \$5,000

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(2) Strict liability applies to subsection (1).

(3) It is a defence to a prosecution for an offence against subsection (1) in respect of an employee that the employee was an exempt employee of the employer.

(4) The amount of contributions for an employee for a month is the amount equal to 18% of the total wages payable to the employee by the employer for the month. The amount must be rounded up to the nearest cent."

41. There is no time limit for prosecution under s. 37 of the FNPF Act. The amount of unpaid contributions can also be recovered after a person is convicted. S. 108A, which is a section that appears after s. 108, clearly states that upon conviction, the court which convicts, shall, without prejudice to any right under the provisions of s. 108(1), order for the payment of the unpaid contributions as at the date of the trial. This is reinforced by s. 112 of the FNPF Act.

42. I can perhaps understand why the appellant wishes to confine the FNPF to s. 108 only. It is obvious that FNPF cannot proceed to recover unpaid contributions through civil remedy if the claims are more than 6 years old. This line of argument suits the appellant but is not supported by the law.

43. By a letter dated 7 December 2017 from the appellant's father and also by a letter from the appellant's counsel on 8 January 2024, it is accepted that the two individuals were casual labourers. Even the appellant accepts that by paragraph 5 of the letter by his counsel, which reads.

"As to our understanding Krishneel Rao & Mohammed Shariff were both casual labourers whose take home wages were never on a fixed term basis but was rather dependent on work done and or attendance. We must emphasize that for some construction business casual labourers are commonly employed at a flexible wage rate. This flexible wage system was reflected in the weekly wage slip of both Krishneel Rao and Mohammed Shariff which we hereby attach for your reference."

44. Since there was acceptance that 2 individuals were employees albeit casual, the appellant ought to have paid the amount of the mandatory contributions. Nothing was paid on behalf of these employees. What

is the actual amount is a matter now for the criminal court to decide. There is a charge pending against the appellant. He should go and resolve the issue in that action.

45. It was not for the Master to decide the actual amount due and owing. The Master had to decide whether there was any legal basis for the FNPF to issue the DPO and it correctly found that the FNPF had the legal basis under s.104 of the FNPF Act.
46. I find that there was justification for the issue of the DPO under section 104 of the FNPF Act on the grounds that the appellant was a registered employer with FNPF, the appellant owes unpaid FNPF contributions, and is clearly a flight risk as he has moved overseas before any action for recovery could be done.
47. The appellant raises the concern that the FNPF is making claims for unpaid contributions from 2011 when the appellant only registered with the FNPF in 2014.
48. The appellant does not dispute that its business was in operation since 2011. It is another matter that it erroneously registered with the FNPF only in 2014. There is nothing in the FNPF Act that prevents the FNPF from pursuing the unpaid contributions owed from before the appellant registered as an employer with the FNPF.
49. On the issue of conflict of evidence, I must reiterate that the appellant has now been charged and he can raise all these issues in the criminal charge for a decision to be made on the contested evidence. The action before the Master was not for recovery of outstanding contributions for the Master to hear oral evidence to resolve the concerns of the appellant which he says needed assessment and a finding of fact.
50. Like the Master stated in the judgment, he needed to be only satisfied that the pre-conditions of the DPO enshrined in s.104 of the FNPF Act had been met as the appellant's application was challenging the validity of the DPO.

C. Other Remedies

51. The appellant argues that s.112 cannot be used in isolation under the criminal proceedings for recovery of unpaid contributions. S.108 has to be used to recover the debt. It was argued that if s.112 is to be used alone then it may go against the employees if the employer's action are criminalized as there could be danger of the employees being victimized.

52. I find that s.108 and s.112 identifies two clear and distinct methods of collection of unpaid contributions. S.108 outlines collection by way of civil proceedings and s.112 outlines collection by way of criminal proceedings if a person is found guilty or convicted of the offence of not paying contributions in respect of an FNPF member. If an order for payment of unpaid contributions is made under s.112 then there is no need to use of s.108 procedure for recovery of unpaid contributions otherwise there will double jeopardy for the employer.

D. Legality of the DPO

53. The appellant also argued that the DPO was not necessary as a lien could have been placed on the appellant's properties in Fiji as he has properties in Fiji.

54. It was argued that a DPO procedure is harsh and excessive since it affects the appellant's personal liberty under 21 (1) and (3) of the Constitution of Fiji which states as follows:

"21. (1) *Every person has a right to freedom of movement.*

(3) *Every citizen, and every other person lawfully in Fiji, has the right to move freely throughout Fiji and the right to leave Fiji".*

55. It was also asserted that s. 104 of the FNPF required the following to be fulfilled before a DPO is issued:

a. that the appellant was departing Fiji;

b. without fully satisfying the liability; or

c. making arrangements satisfactory to the Board for the liability to be fully satisfied.

56. The appellant says that these conditions were never satisfied given that the appellant was disputing the employer –employee relationship and the amount as well. The appellant was also residing overseas and there was no likelihood of him absconding as he was already away.

57. It was also argued that the DPO was in fact never signed by the Chief Executive Officer which is contrary to s. 104 of the FNPF Act. Mr. Kumar raised that although s. 22 allows the CEO to delegate its powers, it also lays down the manner in which the CEO can legally delegate such powers which was not complied with.

58. The appellant further submitted that s. 104(4) of the FNPF Act requires certain actions to be performed upon the issuance of a DPO. In this case the CEO should have, as soon as practicable after issuance of the DPO, sent a copy of the order to him at his address known to the Board.
59. The appellant denies being notified of the existence of the DPO against him. He says that he discovered its existence in his father's belonging by accident.
60. I find that the appellant's argument that since he had left the shores, there was no basis for a DPO, is made in ignorance of the purpose of the DPO. The purpose of the DPO is to ensure that any person liable to pay unpaid FNPF contributions is not able to leave the country without paying or making arrangements. If a person has left the shores, it does not mean that a DPO cannot be effective when issued. It is still effective in serving the purpose because it will compel those who have already left and wishing to come back to pay the unpaid contributions or make arrangements. The issuance of a DPO after a person has left will ensure that when that person ever enters the country again, he or she will not be able to leave without paying the debt or making arrangements for the payment.
61. It may be difficult for FNPF to monitor the defaulters in respect of their movements in and out of the country. The safest way therefore is to issue the DPO so that when that person enters, he or she will not be able to leave and is bound to address the issues of concerns.
62. The appellant has already left the country and is now a person of flight risk. He lives in Australia now and has a business there. The DPO is to protect the interest of the vulnerable employees. The appellant needs to come to this country and resolve his affairs of unpaid contributions. He cannot continue to assert his constitutional right without fulfilling his statutory obligations.
63. I also find that the Master is correct in his finding that the appellant's constitutional right of freedom of movement is not an absolute right and can be limited by law. In this case, his right has been limited under the FNPF Act.
64. On the issue of whether the FNPF should have issued a lien over his property instead of a DPO, I find that the FNPF has a right to issue lien over the defaulter's property but that does not prejudice its powers to issue a DPO. Further, there is no specific details of any property given by the appellant over which any lien could be issued. I therefore take it that this argument is flimsy and does not hold substance.

65. In respect of the issue that the CEO did not sign the DPO, I find the argument one that was not raised before the Master to deal with. If this issue was raised in the affidavit of the appellant, the FNPF would have had a chance of explaining who signed the DPO and whether it had the authority of the CEO to do so. No such findings could be made by the Master. I cannot thus entertain this argument.
66. The appellant says that the DPO was not sent to him and as such the continuation of the DPO is contrary to law. If the law was not complied with, the appellant would not have found it in his father's belongings. I find that the DPO was sent to the appellant's last known address. He does not deny that.

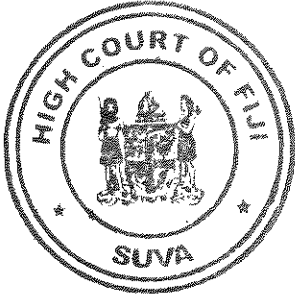
E. Preliminary Objections on Appeal

67. The respondent has raised a preliminary objection to the appeal. It was argued that Order 59 Rule 17(2) of the HCR requires that within 21 days of the filing of the notice of appeal, the appellant must file and serve a summons returnable before a judge for directions and a date of hearing of the appeal.
68. The appellant's appeal was filed on 26 November 2024. The appeal was filed within time. The appellant's summons for direction was filed on time on 10 December 2024 and was served on the respondent on 23 January 2025.
69. I should reflect the status from the court records. The summons for direction was filed on 10 December 2024. The Registry sent it across to my chambers on 13 December 2024. I gave directions on the same day to list the summons for 3 February 2024 at 10.30am.
70. 13 February 2024 was a Friday and the last working day for High Court before the judicial vacation started on 16 December 2024. It is therefore acceptable that the summons for directions could not be collected and served on the respondent during the judicial vacation. It could have been done but the judicial vacation period is not to be counted in determining the time for compliance. I find the summons for directions to be filed and served within time.

Final Orders

71. In the final analysis, I do not find any merits in any of the grounds of appeal and as such I dismiss the same.

72. I order the appellant to pay costs of the proceedings to the respondent in the sum of 5,000 within 21 days.



.....
Hon. Madam Justice Anjala Wati

Judge

21.7.2025

To:

1. *Sunil Kumar Esquire for the Appellant.*
2. *FNPF Legal Services Department for the Respondent.*
3. *File: Suva HBC 117 of 2024.*

