MATAQALI NAMATUA v NATIVE LANDS and FISHERIES COMMISSION and 3 Ors (ABU0020 of 2004S)

COURT OF APPEAL — CIVIL JURISDICTION

BAKER, KAPI JJA and SCOTT RJA

25 February, 4 March 2005

Administrative law — administrative tribunals — disputed land — boundaries of land which share common border — boundaries not surveyed according to National Lands Commission reports — agreement to lease disputed land — whether High Court has jurisdiction to deal with land dispute — Court of Appeal Rules (Cap 12) r 22(4) — Native Lands Act (Cap 133) ss 6, 6(5), 7, 9, 16, 16(1), 16(2) — Native Lands Trust Act.

The Native Lands Commission (NLC), now known as the Native Lands and Fisheries Commission (first Respondent) (R1), determined the boundaries of the respective land owned by the Appellant and the second Respondent (R2), which shared a common border. Such boundaries were not surveyed according to NLC records, which led to the land dispute. R1 took informal steps in an attempt to resolve the dispute by providing a report determining that the disputed land was owned by R2. Subsequently, the Native Land Trust Board (third Respondent) (R3) agreed to lease the disputed land to Reynella Ltd (fourth Respondent) (R4) for the construction of a hotel/resort.

The Appellant instituted an originating summons and an application for interlocutory injunction in the High Court. While the injunction was pending, the High Court issued a consent order between the Appellant and R1. The originating summons was transferred to another location. The High Court dismissed the injunction. At issue was whether the High Court has jurisdiction to deal with the land dispute.

Held — (1) The originating summons was misconceived since the High Court has no jurisdiction to deal with a dispute that may arise under s 16 or on appeal to an Appeals Tribunal under s 7 of the Native Lands Act (the NLA). A decision of the Appeals Tribunal is final unless the provisions under s 7 of the NLA are not complied with. The only lawful way to resolve this was for R1 to determine the issue under s 16 of the NLA.

(2) It would not be proper to permit the R3 to formally grant the lease to the R4 and for the R4 to resume construction. Dismissing the appeal without more does not in any way resolve the real dispute between the parties. The court has power to order that the real dispute should be determined by the R1, provided under subr (4) of the Court of Appeal Rules (Cap 12).

Appeal dismissed.

Case referred to

American Cyanamid Co v Ethicon Ltd [1975] AC 396; [1975] 1 All ER 504, applied.

S. Maharaj for the Appellant

S. Banuve for the first Respondent

K. Muaror and *L. Vauragi* for the second and fourth Respondents

T. Bukarau for the third Respondent

[1] Baker, Kapi JJA and Scott RJA. This appeal arises from a dismissal by the High Court of an application for interlocutory injunction which was sought by Mataqali Namatula (Appellant) against Mataqali Vunaitivi (second Respondent) (R2) and Reynella Ltd (fourth Respondent) (R4) from entering and

carrying out construction work of a resort on land known as Matanibeto on the island of Tokoriki, pending the determination of originating summons which seeks declaratory orders regarding the ownership of the said piece of land.

[2] It is necessary to set out the background and establish the true nature of the dispute between the parties. The island of Tokoriki is owned by four mataqalis, namely, Mataqali Namatula (Appellant), Mataqali Vunativi (third Respondent) (R3), Mataqali Vucunisai and Mataqali Vunaivi.

[3] The Native Lands Act (Cap 133) (the NLA) established the National Lands Commission (NLC) now known as Native Lands and Fisheries Commission (NLFC) and it has jurisdiction under s 6 of the NLA to institute inquiries into title of land claimed by mataqalis.

[4] It is not disputed that NLC determined the boundaries and ownership of land by the respective mataqalis at its meeting on Solevu village, Malolo Island on 7 November 1930. The NLC recorded the boundaries of the respective lands and the names of the respective mataqalis in accordance with s 9 of the NLA.

[5] The NLC Record No 683 records Appellant's land as *Liku* and describes the boundaries:

> The boundaries of lands belonging to Mataqali commences from land known as Betonavula and proceeds to land known as Dogodogo right up to Mataqali Vunativi's boundary on the foreshore and continues along the beach right up to the high water mark and proceeds right up to land known as Matuku and right up to Mataqali Vucunisai's boundary and then proceeds back to land known as Betonavula where it originally commenced.

[6] The NLC Record No 684 records R2's land as *Matanibeto* and describes the boundary:

> The boundaries of lands belonging to Mataqali Vunativi commences from land known as Navandra and proceeds to land known as Betonavula right up to Mataqali Vunaivi's boundary and proceeds to Mataqali Namatua's boundary and to land known as Matuku on the foreshore and continues along the foreshore right up to the high water mark until it reaches Navandra where it originally commenced.

[7] However, the boundaries of the respective lands as described in NLC records were not surveyed in accordance with s 9 of the NLA and consequently this has led to the dispute between the Appellant and the R2.

[8] The Appellant and the R2 share common borders in their respective lands. The dispute relates to the location of land described as *Matuku* in the description of the boundaries. The piece of land which is the subject of the dispute consists of about 3 hectares.

[9] Where there is a dispute in relation to ownership of land which has already been ascertained by NLC, as in the present case, the Minister may delegate the powers to a commissioner or some other person to inquire into the dispute (s 16(1) of the NLA). The Minister shall appoint one or more persons being native Fijians to sit as assessors to determine the dispute (s 16(2) of the NLA).

[10] As far as we can work out (and this is confirmed by counsel for the first Respondent (R1)) the boundary dispute between the two mataqalis has yet to be resolved in accordance with s 16 of the NLA. We were informed that counsel for the Appellant wrote to the R1 to resolve the issue in accordance with the provisions of NLA some 9 months ago but, according to him, there has been no response.

[11] However, the office of NLFC has taken some informal steps in an attempt to resolve the dispute. Special Technical Officer, S M Leweniqila of NLFC inquired into the dispute and provided a report dated 27 February 2003. This report determined that the disputed land appears within land owned by R2. As we have indicated previously, this is not a determination in accordance with s 16 of the NLA.

[12] Subsequently, Native Lands Trust Board (NTLB) (third Respondent) (R3) entered into an agreement to lease Matanitebo owned by R2 to R4 on 13 August 2003 under the Native Lands Trust Act (the NLTA) for the purpose of constructing a hotel/resort. This land consists of 14.98 hectares and includes the disputed portion of land.

[13] The Appellant instituted originating summons (Action HBC0331 of 2003) on 29 September 2003 in the High Court, Lautoka for the following orders:

1. For a Declaration Order that the 1st Defendant's decision on ownership of part of the land known as Matanibeto on Tokoriki Island in the year 2003 as belonging to Mataqali Vunativi, the 2nd Defendant herein is unlawful, irregular, arbitrary, unreasonable and is tantamount to unjust enrichment at the expense of the Plaintiff and contrary to the provisions of Native Lands Act, Cap 133.
2. That the 1st Defendant's decision of 2003 allocating part of land known as Matanibeto to the 2nd Respondent be set aside and declared null and void.
3. For a Declaration Order that the rights and interest of the four (4) Mataqalis remain as determined by the First Defendant in 1930 pursuant to which said decision four (4) respective Leases were issued and registered with the Registrar of Native Lands.
4. Order of Declaration that the 1st Defendant had no jurisdiction to alter, hear or re-determine the ownership of the land known as Matanibeto under the provisions of the Native Lands Act, Cap 133 and that the Plaintiff's title is indefeasible thereof.
5. That an Injunctive Order restraining the 3rd Defendant namely Native Land Trust Board, its servants, agents and/or its Solicitors from issuing and or processing any Lease application allocating part of the land known as Matanbeto to the 2nd Defendant and as to its nominee or to any other person/persons duly nominated by the 2nd Respondent to be the Lessee over the subject land until the final determination of this action.

[14] The originating summons was fixed for hearing on 28 November 2003. We observe that an originating summons is not the proper procedural vehicle for the obtaining of an injunction. An originating summons is usually for the determination of a legal issue without contested evidence. An injunction should be sought by means of a statement of claim seeking injunctive relief and damages accompanied by an interlocutory application and affidavits in support.

[15] The Appellant also filed an application on 29 September 2003 for orders restraining the R3 from processing and issuing any lease in respect of Matanibeto to the R4. The formal issue of the lease to the R4 was made subject to survey of the land and formal approval by the Surveyor-General.

[16] While this was pending, a consent order between the Appellant and the R1 was obtained in the High Court at Lautoka on 29 October 2003 that no lease would be issued over the disputed land until the substantive action in originating summons over the land has been determined. No application has been made to set aside this order.

[17] The originating summons was transferred to Suva in view of the heavy case load in Lautoka and given the Action No HBC0487 of 2003.

[18] On 17 December 2003 in Suva High Court, the Appellant filed application for order to restrain the R2 and its members and any assignee from entering, remaining and having possession and building a resort or any other developments on the disputed land.

[19] It was this application which came before the High Court in Suva from which decision this appeal has been brought before us.

[20] The dispute as to the boundaries of the land continues.

[21] The record shows that Special Project Officer, S M Leweniqila of NLFC was again requested by High Court to conduct a field inspection of the land in question. This report is dated 11 February 2004. We can find no record of the order by the High Court nor is there any record of the proceedings in which the order for an inspection was made. We were advised by counsel that this order was made in connection with another related action brought by the other two Mataqalis, Mataqali Vunaivi and Mataqali Vacunisai. We were informed that these proceedings have been discontinued. This inspection further confirms the claim by the R2. Again this report was not conducted in accordance with s 16 of the NLA and we do not see under what provision the High Court in Lautoka could have directed such an inspection.

[22] At the hearing before us, counsel for the R3 sought to file an affidavit by Torika Rakatabu, a legal clerk from the office of the R3. In this affidavit he refers to an affidavit by the Chairman of NLFC in another proceeding (Civil Action No 187 of 2004) in which the Chairman refers to an inquiry on the island and makes findings on the disputed land in question.

[23] Counsel for the Appellant objected to the admission of this affidavit on the basis that no prior notice was given. We upheld the objection in the circumstances.

[24] The visit and the report referred to by the Chairman of the R1 in the attached affidavit was not conducted in accordance with s 16 of the NLA. This was confirmed by counsel for the R1. In this regard, it is no different to the other two reports we have seen.

[25] We have concluded that the real dispute between the parties relates to the extent of the boundaries described in the determination by NLC in 1930. The dispute remains to be resolved and it can only be resolved by R1 in accordance with s 16 of the NLA.

[26] We have taken the trouble to identify the real dispute between the parties because it is relevant in considering the decision appealed against to which we now turn.

[27] The principles for granting interlocutory injunctions are set out in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396; [1975] 1 All ER 504 which have been applied in Fiji are:

(a) The Plaintiff must establish that there is a serious question to be tried.
(b) The inadequacy of damages to compensate the Plaintiff by the Defendant
(c) If the Plaintiff satisfies the tests, the grant or refusal of an injunction is a matter for the exercise of the court's discretion on the balance of convenience.

[28] Is there a serious question to be tried in the present case? It appears from the ruling by the trial judge that the parties misunderstood the nature of the dispute. While it was common ground that NLC made a valid decision in 1930 under s 6(5) of the NLA, any subsequent dispute with regard to the extent of boundaries can only be resolved by the R1 under s 16 of the NLA.

[29] A determination under this provision may be appealed to an Appeals Tribunal and its decision is final under s 7 of the NLA.

[30] If the decision made by NLFC in 2003 was validly made under s 16 of the NLA, the Appellant could only have had recourse to an appeal to the Appeals Tribunal under s 7 of the NLA.

[31] In our view, the originating summons is misconceived because the High Court has no jurisdiction to deal with a dispute that may arise under s 16 or on appeal to an Appeals Tribunal under s 7 of the NLA. A decision of the Appeals Tribunal is final unless the provisions under s 7 of the NLA are not complied with. That is not the complaint in this case.

[32] The High Court has no jurisdiction to deal with the dispute.

[33] Consequently, there can be no cause of action to be tried in the High Court.

[34] In view of this conclusion, it is not necessary to consider the other considerations relevant in granting an interlocutory injunction.

[35] The trial judge recognised that the High Court had no jurisdiction when he stated:

> In the Court's view, what it has been asked of is to decide upon as contained in the Plaintiff's Originating Summons, goes to the issue of whether this Court has jurisdiction and therefore the competence to delve into and review the processes and procedures including the decisions of the NLC involving native customs and traditions, that are governed by its own laws and conventions. Under these circumstances, while it deliberates upon these jurisdictional issues, it would not, this Court believes, be advisable and in fact unwise, to prematurely intervene and act in any manner that would prove prejudicial to the exercise of the powers and discretion of such body.

[36] The trial judge was correct in this regard and ought to have ruled that there was no cause of action to be tried in the High Court. That would have been the end of the matter.

[37] The practical result of this reasoning is that the decision not to grant an interlocutory injunction would be upheld on the basis of the conclusion we have reached.

[38] In our view, such a result is not a satisfactory one. The fact remains that the real question in controversy between the parties remains unresolved as to the boundaries. The only lawful way to resolve this is for the R1 to determine the issue under s 16 of the NLA.

[39] In our view, it would not be proper to permit the R3 to formally grant the lease to the R4 and for the R4 to resume construction in the face of the conclusion we have reached that the real dispute between the parties can only be resolved by R1 under s 16 of the NLA.

[40] The court urged the parties that it was in their best interest to consider preserving the status quo now and fast track the dispute to the R1 to determine the dispute in accordance with s 16 of the NLA. Unfortunately, the parties were unable to agree to such a course of action.

[41] We are convinced that by simply dismissing the appeal without more does not in any way resolve the real dispute between the parties.

[42] The question is whether we have any power to give directions for the real dispute to be resolved in accordance with the law we have set out in this decision.

[43] We consider that this court has power to order that the real dispute should be determined by the R1. The power to make such an order is provided under r 22(4) of Court of Appeal Rules (Cap 12):

> … the Court of Appeal may make any order, on such terms as the Court thinks just, to ensure the determination on the merits of the real question in controversy between the parties.

[44] In the circumstances, we make the following order:

> That the 2nd and 4th Respondents be restrained from further dealing with the disputed land until the issue is resolved by the 1st Respondent under s 16 of NLA or by an Appeals Tribunal if there is an appeal under s 7 of NLA.

[45] We are not in a position to direct a time schedule for the R1 to deal with this matter. It is in the interest of all parties that they should cooperate in enabling the R1 to resolve the dispute as quickly as it can. As part of that co-operation, they should decide what is to happen to the consent injunction issued by Byrne J.

[46] In view of the manner in which we have resolved this matter, we consider that each party should pay their own costs of this appeal.

Appeal dismissed.