

ATUNAIISA TIVA v NATIVE LAND TRUST BOARD (HBC81 of 2006)

HIGH COURT — CIVIL JURISDICTION

5 SINGH J

18 January 2007

10 **Leases and tenancies — leases — native title — lease was voided for exceeding the 50-year limit — application to a licence to log — whether the refusal to grant a licence breached statutory duties — Forest Decree 1992 ss 9, 10(3), 13(1), 13(2), 14 — Native Land Trust Act s 4(1).**

15 The Plaintiff owned acres of native land. The land was leased by the Defendant to the Director of Lands which was then assigned to Fiji Hardwood Corporation Ltd (FHCL), a state-owned commercial company. The lease was declared void as the Defendant had no power to grant leases in excess of 50 years over unplanned rural areas. The land was vested back in the Defendant. The state had planted mahogany forest before the lease was declared invalid and the mahogany was now ready to harvest. The Plaintiff applied for a licence to log the mahogany. The Defendant had neither granted the licence nor refused the application. The Plaintiff filed an originating summons seeking a declaration that he was entitled to a licence to log mahogany growing on the land. He also sought a declaration that the Defendant's decision refusing to grant a licence to the Plaintiff to log was unlawful, or was in breach of the Defendant's fiduciary or statutory duties. At the time of the filing of the application, the Defendant had not refused to grant the application so theoretically this prayer was premature. By the time the case ended, the Defendant informed the Plaintiff in writing that his application was unsuccessful. The Defendant further alleged that the government via FHCL had invested public moneys in planting and caring for the mahogany forest. It also paid rent during the period of the lease.

20 **Held** — (1) Section 9 of the Forest Decree 1992 (Decree) provides that the logging licence is issued by a licensing officer. Since the present application related to forest grown on native land, the prior consent of the Defendant was necessary before a licence to fell or extract timber could be issued under s 10(3) of the Decree. The licence-issuing authority to issue timber right licences or forestry right licences is therefore not the Defendant but a licensing officer authorised to issue licences in accordance with regulations under the Decree.

25 (2) The Defendant cannot grant a lease or a licence unless it is satisfied that the land is neither beneficially occupied by Fijian owners nor is it likely to be required by Fijian owners for their own upkeep during the currency of lease. The court agreed with the Plaintiff's submission that the provisions of the Native Land Trust Act mandate that the Defendant place the interest of the landowners ahead of that of any third party including the state.

30 (3) The concerns of the Defendant can adequately be protected by attaching conditions to the licence. The financial benefits to the landowners are far superior if they log the mahogany themselves than if the land is leased to FHCL. Accordingly, the Plaintiff is entitled to a licence to harvest mahogany growing on land owned by him. The Plaintiff is allowed to obtain log deposit from its buyer wherein such deposit is to be held by the Defendant and to distribute the proceeds of sale of timber among the members of the Mataqali according to law. In the event of devaluation of Fiji dollar, the deposit is to be increased by a corresponding percentage.

Application allowed.

No cases referred to.

50 *I. Fa* for the Plaintiff*A. Vakatale* for the Defendant

[1] **Singh J.** Atunaisa Tivi, the Plaintiff, represents Mataqali Naua from Serua. Mataqali Naua owns about 392 acres of native land in Serua. The Defendant is a statutory body entrusted with the control and administration of native land for the benefit of native owners. The NLTB had granted a lease for 99 years to the
5 Director of Lands which was then assigned to the Fiji Hardwood Corporation Ltd. In granting the 99-year lease, the board had exceeded its powers as it had no powers to grant a lease in excess of 50 years over unplanned rural areas. The lease was declared void by the Court of Appeal (Civ App ABU 015 of 2004) so the land vested back in the board.

10 [2] The state had planted mahogany forest before the lease was declared invalid. The mahogany is now ready for harvest. The Mataqali Naua applied to the board for a licence to log the mahogany in September 2005. A map of the area to be logged together with the necessary application fee was paid to the board.
15 As at 1 March 2006, the board had neither granted the licence nor refused the application so the Plaintiff filed an originating summons seeking a declaration that he is entitled to a licence to log mahogany growing on land owned by his Mataqali Naua. He also seeks a declaration that the Defendant's decision refusing to grant licence to the Plaintiff to log is unlawful, or is in breach of Defendant's fiduciary or statutory duties.

20 [3] At the time of the filing of the application the Defendant had not refused to grant the application so theoretically this prayer was premature. However by the time the case ended the board informed the Plaintiff in writing that his application was unsuccessful. The evidence by the board also proceeded on the basis that the
25 license was going to be refused.

Plaintiff's submissions

[4] The Plaintiff submitted that the NLTB is required by law to administer native land for benefit of native owners. The ownership of the land remains with native owners. The NLTB he submits is in the position of a fiduciary and hence
30 should place the interests of those for whom it acts above its own interests or interests of third parties. He added that the board should not therefore place the interests of the Fiji Hardwood Corporation Ltd or that of the state ahead of the landowners. It submits that financial returns to the landowners will be superior if the landowners log the mahogany themselves than if Fiji Hardwood Corporation
35 Ltd is granted the license to harvest the mahogany forest.

Defendant's submissions

[5] The Defendant on the other hand submitted that it has the absolute discretion to grant or refuse consent. It submitted that the board has a way
40 forward approach for landowners. That approach considers not only the immediate financial returns to the present generation but also has to consider the welfare of future generations. It therefore considers long term arrangements including environment and replanting of forests. Further in its submissions the board states that the government via Fiji Hardwood Corporation Ltd had invested
45 public moneys in planting and caring for the mahogany forest. It also paid rent during the period of the lease.

The Forest Decree 1992

[6] The Plaintiff applied to NLTB for logging license. The logging license is
50 issued by a licensing officer under the Forest Decree 1992 — s 9 of the Decree. Since the present application related to forest grown on native land, the prior

consent of NLTB is necessary before a license to fell or extract timber could be issued under s 10(3) of the Decree. The license issuing authority to issue timber right licence or a forestry right licence is therefore not the NLTB but a licensing officer authorised to issue license in accordance with regulations under the
5 Decree.

[7] Section 13(1) empowers the licensing officer to impose conditions in accordance with good logging practice. Section 13(2) imposes certain mandatory requirements to be included in the license including the amount and form of bond to ensure due performance under the license, and compensation to be paid by the
10 licensee in case of failure to fulfill the conditions of the license.

[8] Section 14 requires the Applicant to lodge a logging plan. This plan has to be approved by the licensing officer. Subsection 2 requires the logging plan to state the annual cuts, the trees to be left in place, specify the minimum usable
15 sizes of timber to be felled. Of significance to this case is the plan requires reforestation or post harvest operations.

Board's concerns

[9] DW2 Netava Bakaniceva, the board secretary stated that the board wanted a guarantee of replanting programme so future generations of landowners can benefit. This concern is understandable and indeed laudable. However this concern of the board can easily be taken care of as the board in granting its consent can spell out its concerns in the form of conditions. One of those
20 conditions could be a replanting programme and it could be incorporated as part of the licence. It is noteworthy that the Conservator of Forests has the powers to both revoke or suspend a license if there is a breach of terms or conditions of the licence. If the licensee therefore does not adhere to replanting programme, this section can be invoked.
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[10] There appear to be adequate environmental and sustainability protective measures in our statute to safeguard the future concerns of the board.
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Section 4 of NLTB

[11] Section 4(1) of the Native Land Trust Act states:

35 The control of all native land shall be vested in the Board and all such land shall be administered by the Board for the benefit of the Fijian owners or for the benefit of native Fijians.

The paramount objective of this section is to ensure proper administration of native land for benefit of native owners. Benefit can accrue to the native owners if they use the land themselves or if it is leased out, then they receive premium and rent. The board has to decide on the maximum benefit for native owners.
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[12] The board cannot grant a lease or a licence unless it is satisfied that the land is not beneficially occupied by Fijian owners nor is it likely to be required by Fijian owners for their own upkeep during the currency of lease. I agree with the Plaintiff's submission that the provisions of the Native Land Trust Act mandate that the board place the interest of the landowners ahead of that of any third party including the state. There is significant amount of timber on the concerned land and also on lands of adjacent mataqalis. Given the extent of such
45 timber, one would expect the board to act with financial acumen and invite expressions of interest or tenders by advertising to see from what source it could yet the best deal for the landowners. From whatever evidence there is, the board
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has simply decided to grant licence to Fiji Hardwood to log. In the absence of any invitation for tenders how can the board say the FHCL would best protect the interests of native owners.

5 [13] The state may well have planted the mahogany but that was the result of neither the board nor the state, which had access to Solicitor-General's advice, having checked what powers NLTB had in granting leases.

10 [14] In considering what is best for the native owners, the board is obliged to listen to their views. The Native Land Trust Act was passed in 1940 to protect the native Fijians from alienating too much of their land and probably for low prices to unscrupulous prospective purchasers. The Act ensured through the board paternalistic protective measures so that the indigenous Fijians did not find themselves virtually landless in the long run. However more than 60 years later, there has been marked development in Fijian education and commercial expertise. There would be a lot of native owners who are just as educated as the decision makers in the board. Hence there is no need for suffocating protection of the native owners. There needs to be more involvement of the native owners in considering what is in their best interests.

20 [15] The board proposes to grant a 50-year lease to Fiji Hardwood at an annual rental of \$1729.91 for the 192 ha of land. Additionally the native owners will receive \$21,942.40 compensation — see para 29 of the affidavit of Netava Bakaniceva. Whether this compensation is given annually or once only, is not clear. Further it appears from a proposed specimen lease offered to Fiji Hardwood Company Ltd over Korovono (which is adjacent to Plaintiff's area) after the first harvest, 50% the area will revert to the native owners but managed by FHCL so parties would get 50% of proceeds each.

25 [16] Opposed to this is the proposal put forth by the Plaintiff. The Plaintiff has a purchaser for logs. The purchase price offered is \$300 per m³ for grade one logs. This offer is made by Wood Products International Ltd (WPI). It has been trading in Fiji mahogany primarily selling to the USA market. The problem the company is facing is unreliable supply of mahogany in Fiji.

30 [17] The company has proposed to do selective logging so immature plants are left to mature. There are also plans to replant trees. It also offered to pay \$100,000 into a trust fund in advance. The landowners would earn about \$1.8 million after costs of extraction under this scheme, a significantly larger sum than if FHCL was granted the lease.

35 [18] The mere fact that FHCL is a state-owned commercial company does not give it any advantage over others. It still has to compete. In fact FHCL had no application with NLTB to log this particular land at the time of trial. It is not in dispute that the state had planted the mahogany and taken care of it and expected to harvest it. That has come undone because the NLTB acted ultra vires in granting the 99-year lease.

40 [19] Whether the state has a claim, be it in restitution or otherwise is not for me to comment upon and in fact would be unwise to do so, in this case.

45 **Conclusions**

[20] It is quite clear from the facts of this case that the concerns of the board can adequately be protected by attaching conditions to the licence. The financial benefits to the landowners are far superior if they log the mahogany themselves than if the land is leased to FHCL. Accordingly I declare that the Plaintiff is entitled to a licence to harvest mahogany growing on land owned by the Mataqali

Naua in Serua. I also order that the Plaintiff obtain from its buyer namely Woodproduct International Ltd or Sustainable Forest Industries a deposit of \$100,000 to be used for payment of logs as and when they are harvested. This log deposit is not to fall below \$100,000. Such deposit is to be held by the NLTB
5 which is to distribute the proceeds of sale of timber among the members of the mataqali according to law. In the event of devaluation of Fiji dollar, the deposit is to be increased by corresponding percentage.

[21] I also order costs summarily fixed in the sum of \$3000 to be paid in
10 21 days.

Application allowed.

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