

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court of Fiji]

CIVIL APPEAL NO. ABU 0059 OF 2015
[High Court Civil Action No. HBJ 003 of 2015L]

BETWEEN : **İTAUKEI LAND TRUST BOARD** a statutory body registered
under the provisions of the Native Land Trust Act, Cap.134 with
its Head Office at 431 Victoria Parade, Suva.

Appellant

AND : **LUSIANA RADUA** of Rabulu Village, Tavua, Ba

First Respondent

: **SAMUELA RATU** of Naseyani Village, Vatukaloka, Ra.

Second Respondent

: **İTAUKEI LANDS AND FISHERIES COMMISSION** a body
duly constituted under the iTaukei Lands Act.

Third Respondent

Coram : **Calanchini, P**
Dr. Guneratne, JA
Prematilaka, JA

Counsel : **Ms. L. Komaitai** for the Appellant
Mr. K. Vuataki for the first Respondent
Mr. K. Tunidau for the second Respondent
Mr. J. Pickering for the third Respondent

Date of Hearing : **09 November 2017**

Date of Judgment : **30 November 2017**

JUDGMENT

Calanchini P

- [1] I have read the draft judgment of Prematilaka JA and agree that the appeal should be allowed on the terms proposed in his judgment.

Dr. Guneratne JA

- [2] I agree with the reasoning, conclusions and the Orders proposed by Prematilaka JA.

Prematilaka JA

- [3] The Appellant by Fiji Government Gazette dated 23 April 2004 had allotted *inter alia* Lot 8 of 908.00 acres depicted in Plan H/5,4; J/1, 3; H/10, 2; J/6, 1 in the Province of Ba to Yavusa Mali describing it as an 'Allotment of Former Crown Schedule A and B Lands and Extinct Mataqali Lands'. The 01st Respondent initiated proceedings on 21 January 2015 by seeking leave in terms of Order 53 Rule 3(2) of the High Court Rules for judicial review of the decision of the Appellant given on 01 December 2014 that, Mataqali Natogo remain gazetted as extinct and its lands allotted to Yavusa Mali of Naseyani Village and prayed for several consequential reliefs.
- [4] The High Court had granted leave on 09 April 2015 and the 01st Respondent had filed Originating Summons on 10 April 2015. The Appellant had not filed any affidavit in reply but the 03rd Respondent had *inter alia* taken up the position in its affidavit in reply that, it had no knowledge that the Mataqali Natogo was gazetted as extinct by the Appellant. The 02nd Respondent had at the leave stage informed court that he did not oppose leave for judicial review.
- [5] At the hearing of the Originating Summons, the counsel for the Appellant had admitted that there had been a procedural error and the 02nd and 03rd Respondents had informed court that they were not objecting to allowing the 01st Respondent's application.

[6] The High Court Judge had delivered the Judgment on 04 June 2015 granting the 01st Respondent all the reliefs prayed for. They, as appearing in the Judgment are as follows.

- (1) *That, Mataqali Natogo has not ceased to exist.*
- (2) *That the Respondent had exceeded its powers under section 19(1) of the iTaukei Lands Trust Act, in vesting lands of Mataqali Natogo in itself and allotting NLC Lot 8 to Yavusa Mali.*
- (3) *That, the Respondent failed to consider the relevant consideration that Luciana Radua was still registered as a member of Mataqali Natogo as at 23 April 2004 and that the said Mataqali was not extinct when it did cause a gazette notice to be published on that date giving notice that such Mataqali was extinct and Lot 8 of its lands allotted to Yavusa Mali.*
- (4) *That, the Respondent had exceeded jurisdiction, in not receiving a Report from the Chairman of the iTaukei Lands and Fisheries Commission or the Reserves Commissioner that Mataqali Natogo was extinct before it deprived Mataqali Natogo of ownership of its lands and allotting such lands to Yavusa Mali.*
- (5) *That the Respondent had acted on a mistake of fact that Mataqali Natogo was extinct as at 23 April 2004 when it did gazette that such Mataqali was extinct when in fact Lusiana Radua was alive on that date and was a member of said Mataqali.*
- (6) *That, sub-sections 19(2) to (6) of the iTaukei Lands Trust Act are unconstitutional under section 27(1) of the Constitution in arbitrarily depriving Mataqali Natogo of its lands under the procedures set out therein.*
- (7) *Hereby issue a writ of Certiorari to remove the decision of the Respondent of that Mataqali Natogo is extinct and lot 8 of Mataqali Natogo lands be allotted to Yavusa Mali of Naseyani Village and such decision and orders, vesting and allotments made therein be quashed.*
- (8) *Hereby issue a Writ of Mandamus directing the Respondent by itself, its servants and employees to issue a notice to be published in the Fiji Government Gazette and a local newspaper in vernacular iTaukei and English revoking notice number 2 claim number 56A published 23 April 2004 and issue notice that Mataqali Natogo was not extinct from 23 April 2004.*
- (9) *Hereby issue a Writ of Mandamus directing the Respondent by itself, its servants and employees to revoke any Order made by it under section 19(1) of the iTaukei Lands Trust Act vesting Mataqali Natogo lands in itself and or allotting Lot 8 of Mataqali Natogo lands to Yavusa Mali and such revocation and cancellation of registration of Yavusa Mali as owner of NLC Lot 8 Sheet Reference number H/54, H10/2, J6/1 in the Register of iTaukei Lands.*

(10) *Hereby permanently stay of further allotments of Mataqali Natogo lands NLC Lot 6 on Map Reference H/54, H10/2, J6/1, L1/3.*

(11) *Indemnity Cost of FJD\$ 12,075.00 to be paid to the Applicant by the Respondent*

- [7] The Appellant filed summons for leave to appeal out of time dated 19 August 2015 against the said Judgment supported by an affidavit from the Reserves Commissioner along with the proposed notice and grounds of appeal indicating among other things that leave of court to adduce further evidence in the form of the Gazette Notice of Extinction of Mataqali Natogo dated 28 April 1972 would be sought. Upon an extension of time having been granted by a single judge of the Court of Appeal, the Appellant had filed a Notice of Appeal dated 20 December 2016 containing seven grounds of appeal and stated that leave of court to adduce further evidence in the form of the said Gazette Notice of Extinction would be sought. Thereafter, the Appellant had filed summons dated 21 March 2017 along with an affidavit from the Reserves Commissioner seeking permission of the Court of Appeal to adduce fresh evidence namely the Gazette Notice of Extinction of Mataqali Natogo dated 28 April 1972.
- [8] An affidavit dated 05 October 2017 in reply on behalf of the 01st Respondent had been filed challenging the effect of the said the Gazette Notice of Extinction of Mataqali Natogo. Thereafter, the 01st Respondent herself had filed summons dated 24 October 2017 to adduce further evidence in the form of some documents in appeal supported by her affidavit. The Chairman of the 03rd Respondent had filed an affidavit dated 20 October 2017 in reply and had urged the Court to dismiss the Appellant's application to adduce fresh evidence. However, the Acting Chairman of the 03rd Respondent had filed an affidavit dated 26 October 2017 where he had not specifically opposed or resisted the Appellant's said application.
- [9] The basis of the impugned judgment of the High Court could be summarised as follows:
- (i) Mataqali Natoga (of Yavusa Nadokana) is the proprietary unit owning Lot 8 depicted in Plan H/5,4; J/1, 3; H/10, 2; J/6, 1, the members of which are enumerated in the Register of Native Landowners/VKB and the 01st Respondent as being the sole surviving member of the said Mataqali.

- (ii) The evidence of these facts is provided by the letter dated 20 August 2014 issued by the 03rd Respondent, the Register of Native Lands (Folio 151) dated 22 April 1926, the relevant page of the Vola ni Kawa Bula (VKB/Book of Living Decedents/Register of Native Landowners) and the Brief /Memorandum of Lot 8 – Mataqali Natogo, Yavusa Mali prepared by the Reserves Commission in August 2014.
- (iii) Therefore, Mataqali Natoga had not ceased to exist and the Appellant had acted under a mistake of fact that it had become extinct and therefore, the allotment of Lot 8 to Yavusa Mali was in excess of its jurisdiction and had no basis in law.
- [10] However, it is pertinent at this juncture to mention that the said Brief/Memorandum also has stated that the 01st Respondent was born (on 02 December 1933) when her alleged mother, Wakesa Kurimai, born on 01 March 1924 was 09 years old, the father was unknown and her registration in the VKB of Mataqali Natoga had needed clarification. This position is corroborated by the entries in the VKB. The 01st Respondent's birth certificate shows that her birth had been registered only on 06 November 1978. According to the affidavit filed in the High Court on behalf of the 03rd Respondent, the 01st Respondent had been registered in the VKB only in 1986.
- [11] The 03rd Respondent had taken up the position in the High Court that it had no knowledge that Mataqali Natoga had been gazetted as extinct by the Appellant and no report had been sent to the Appellant by the 03rd Respondent of such extinction, as a member of the Mataqali had been still alive.
- [12] The Appellant had not resisted the 01st Respondent's application before the High Court and its position had been that there had been a procedural error on its part. However, an affidavit dated 20 January 2015 on behalf of the 01st Respondent had been filed along with a letter dated 01 December 2014 sent to the 01st Respondent's solicitors by the Appellant in response to their letter dated 31 October 2014 requesting the Appellant to revoke the Gazette dated 23 April 2014, where the Appellant had specifically informed the solicitors concerned that, it had exhausted all its internal processes prior to the

gazetting of the extinction of the Mataqali and therefore the allotment of Former Crown Schedule A and B Lands and extinct Mataqali lands gazetted on 23 April 2014 would remain.

[13] In the circumstances, the High Court Judge, *inter alia*, had concluded that,

- (i) the appellant had not followed the law and procedure set out in section 19 of the iTaukei Land Trust Act,
- (ii) Mataqali Natoga had not ceased to exist and the Appellant had acted under a mistake of fact that it had become extinct and
- (iii) the allotment of Lot 8 to Yavusa Mali was in excess of its jurisdiction and had no basis in law.

[14] Based on the principles of law applicable to judicial review the High Court Judge had granted declarations and issued orders and prerogative writs as prayed for by the 01st Respondent. He had usefully referred to Satala v Bouwala Civil Appeal No.005 of 2006S:13 October [2008] FJSC 20 where it had been held, *inter alia*, that

'The petitioner seeks judicial review of the decision of the Commission evidenced in its letter of 5 November 1999. Broadly speaking, judicial review is available on one or more of three general grounds: illegality (such as absence of power), irrationality, and procedural impropriety (usually a denial of natural justice): Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, 410 per Lord Diplock.'

'The courts have no power to review the merits of such decisions, and must not usurp the proper role of the decision maker'

[15] The impugned judgment also had referred to State v Arbitration Tribunal, Ex parte Land Transport Authority HBJ0011J of 2002S: 15 September 2004 [2004] FJHC 152 where D. Pathik J had said :

'It is important to bear in mind that judicial review is not an appeal from a decision but is a review of the manner in which the decision was made. It is concerned, "not with the decision but with decision-making process. Unless that restriction on the power of the Court is observed, the Court will, in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power" (Lord Brightman in Chief Constable of the North Wales Police v Evans [1982] 1 W.L.R. 1155 at 1173]. Further in that case Lord Hailsham at 1160 commented on the purpose of the remedy under Order 53 as follows, which is apt:

“This remedy, vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for a declaration, is intended to protect the individual, judicial quasi-judicial, and, as would originally have been thought when I first practiced at the Bar, administrative. It is not intended to take away from those authorities the powers and discretion properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner.”

Furthermore, it should be noted that in a judicial review the Court is “not as much concerned with the merits of the decision as with the way in which it was reached”

(Evans, supra at 1174). Also, as put by Lord Templeman in Reg. v Inland Revenue Commissioners, Ex parte Preston (1985) A.C. 835 at 862:

“Judicial review is available where a decision-making authority exceeds its powers, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached, or abuses its powers.”

- [16] Therefore, it is clear that the impugned judgment is founded on the factual conclusion reached that Mataqali Natoga had not become extinct and therefore, as a necessary consequence the Appellant had no power or authority under iTaukei Land Trust Act to allot Lot 8 to Yavusa Mali.
- [17] It is in this context that the Appellant’s application to lead fresh or additional evidence in the form of the Gazette Notice of Extinction of Mataqali Natogo dated 28 April 1972 has to be considered. I also propose to consider at the same time the similar application of the 01st Respondent to lead additional evidence in the form of her affidavit dated 22 October 2017 along with two annexures namely Index to the Registers of Native Lands and two copies of the Register of Native Lands Folio 151 issued by the 03rd Respondent and the Registrar of Lands respectively.
- [18] It must also be mentioned that at the hearing of the appeal, the 02nd Respondent was absent and unrepresented despite notices having been served on his solicitors upon the orders made earlier by Court.

- [19] The Appellant's counsel informed this Court at the commencement of the hearing that she intended to include the Gazette dated 01 December 2000 and State Schedule A & B in her application to lead fresh evidence and handed over copies of the same to court and counsel for the other parties who had no objection to the Court considering them as well.
- [20] It became very clear at the hearing that the fresh or additional evidence sought to be adduced by the Appellant to a great extent was decisive in determining the appeal before this Court. Therefore, in my view it is nothing but logical to first deal with the applications for fresh and or additional evidence.
- [21] The main statutes that have to be considered in this matter are the iTaukei Land Trust Act 1940 and the iTaukei Lands Act 1905. It is pertinent to remember that the iTaukei Land Trust Act had been earlier cited as the Native Land Trust Act while iTaukei Lands Act 1905 had been cited as Native Lands Act 1905. The word 'native', wherever appearing, was replaced by 'iTaukei' by Native Land Trust (Amendment) Decree 2011 and Native Lands (Amendment) Decree 2011.
- [22] Section 19(1) of the Native Land Trust Act is as follows.

Crown ultimus haeres of extinct mataqali

19.-(1) If any mataqali shall cease to exist by the extinction of its members its land shall fall to the Crown as ultimus haeres to be allotted to the qali of which it was a part or other division of the people which may apply for the same or to be retained by the Crown or dealt with otherwise upon such terms as the Board may deem expedient.

(2) A report to the Board under the hand of the Chairman of the Native Lands Commission appointed under the Native Lands Act or of the Commissioner that a mataqali has ceased to exist by the extinction of its members and describing the lands which in consequence of such extinction fall to the Crown under subsection (1) shall be evidence that the mataqali is extinct.

(Cap. 133.)

(3) At any time after a report referred to in subsection (2) has been received the Board shall direct a notice in the form prescribed to be published in the Gazette and in a newspaper published in the Fijian language and circulating in Fiji, and a copy of such notice shall be sent as soon as possible by the Board through the Commissioner to the roko tui of the province in which any part of the land is situated.

(Amended by Act 1 of 1978, ss. 2 and 3.)

(4) *If any person desires to show that the mataqali has not ceased to exist by reason of the extinction of its members, he may, within three months of the date of publication of the notice in the Gazette and in a newspaper published in the Fijian language and circulating in Fiji, give notice of objection in writing to the Board setting out particulars of any members of the mataqali alleged to be still surviving. Upon receipt of such notice of objection the Board shall cause such investigation to be made as it may consider necessary.*

(Amended by Act 1 of 1978, s. 2.)

(5) *If the Board after such investigation is of the opinion that the objection to declaring the mataqali extinct is not well founded, the Board shall cause the Commissioner to send notice by post to the person who has given notice of objection in writing and also to the roko tui of the province in which any part of the land is situated informing them that the objection is disallowed.*

(Amended by Act 1 of 1978, s. 3.)

(6) *If no notice of objection as provided for in subsection (4) is received by the Board, or if such objection having been duly made is disallowed, the Board may make an order in the form prescribed and such order shall on presentation to the Registrar of Titles be filed by him and the land shall be deemed to be Crown land for all purposes.*

- [23] The Native Land Trust Act (Amendment) Decree 2000 [and Native Land Trust (Amendment) Act 2002] brought about some important amendments. A new definition of 'native land' was introduced to include 'all land owned by extinct mataqali and allotted or dealt with by the Board in accordance with section 19'. In section 19 'fall to the Crown as ultimus haeres' was substituted by 'vest in the Board', 'by the Crown' was substituted by 'by the Board', 'fall to the Crown' became 'vest in the Board' and 'Crown land' was substituted by 'native land'. It also introduced section 19A which as amended subsequently is as follows.

Allotment of extinct mataqali lands

19A. (1) *A copy of the order by the Board under section 19(1) allotting or otherwise dealing with land vested in the Board under that section must be sent by the Board to the iTaukei Land Commission which must register the allotment or dealing in the Register of iTaukei Lands.*

(2) *Until an allotment of or other dealing with extinct mataqali land is made under section 19(1), all income arising from leases and other dealings with unallotted extinct mataqali land (less not more than 15% for administration costs of the iTaukei Affairs Board), must be paid to the iTaukei Affairs Board and*

used exclusively for the benefit of iTaukei in a manner and for purposes approved by the Minister on the advice of the iTaukei Affairs Board.

(3) In exercising its powers under this section or section 19(1), the Board must comply with any procedures prescribed in the iTaukei Land (iTaukei Reserves) Regulations 1940.

[24] I would now proceed to consider the Notice of Extinction of Mataqali Natogo published in Fiji Royal Gazette dated 28 April 1972. There is no challenge to the authenticity of the Gazette though the 01st Respondent has sought to challenge its validity on several other grounds. The counsel for the 03rd Respondent virtually conceded the effect of the Notice of Extinction at the hearing. The Notice of Extinction of Mataqali Natogo had been signed on 19 April 1972 and published under section 19(2) of the Native Land Trust Ordinance in the Fiji Royal Gazette dated 28 April 1972. It states that the Commissioner of Native Land Commission had reported under section 19(2) that Mataqali Natogo had ceased to exist by the extinction of its members. The Notice had further requested anybody desirous of showing that the said Mataqali had not ceased to give notice of objection within 03 months to the Native Land Trust Board. The land in issue namely Lot 8 of 908 acres had also been listed in the Notice.

[25] The other document submitted by the Appellant as fresh evidence to be adduced is the report dated 11 April 1972 sent to the Native Land Trust Board from the Commissioner of Native Lands where it had been recorded that Roko Tui Ra had reported and confirmed the extinction of Mataqali Natogo, Yavusa Nadokana and requested the Board to take action to have Lot 8 containing 908 acres and Lot 4 recorded as property of the Crown as 'ultimus haeres'. There is another document sought to be adduced by the Appellant dated 24 August 1977 signed by the Reserve Officer confirming that several mataqalies including Mataqali Natogo have been gazetted and due for transmission to the Crown as 'ultimate haeras'.

[26] Therefore, these documents show that as far back as in 1972 the Native Land Trust Board had received a report from the Commissioner of Native Lands that Mataqali Natogo had ceased to exist by the extinction of its members and the said Board had published a Notice of Extinction in the Gazette in compliance with section 19(3) of the Native Land

Trust Ordinance that was in force at that time. The Reserve Officer's letter dated 24 August 1977 does not show that any objections had been received.

- [27] In my view, in terms of section 19(2) the report dated 11 April 1972 received by the Board must be treated as evidence without any further proof that Mataqali Natogo had become extinct and by operation of law namely section 19(1), Lot 8 owned by the proprietary unit namely Mataqali Natogo had fallen to the Crown.
- [28] The Appellant has not explained to Court whether the Board had received any objection to the Notice of Extinction and if so, any investigation had been carried out as required by section 19(4) and 19 (5). However, the counsel for the 01st Respondent stated to Court at the hearing that his client had not filed objections to the Notice of Objection as she was unaware of it. Nor had the Appellant produced any order in the prescribed form presented to the Registrar of Titles in terms of section 19(6).
- [29] But to my mind, it appears that as the word 'may' suggests, section 19(6) does not necessarily compel the Board to present an order to the Registrar of Titles but the Board has a discretion in the matter. The legislature had used the word 'shall' in all other sub-sections of section 19, where relevant, to make such steps to be taken by the Board mandatory. Even under section 19(6), once the Board presents such an order the Registrar of Titles is obliged to file it. I am conscious that the word 'may' has been judicially interpreted to mean 'shall' or 'must' and *vice versa* depending on the legislative context. However, I do not think that the legislature had intended to mean 'shall' when it had used 'may' in section 19(6).
- [30] It is clear from the letter dated 20 August 2014 issued by the 03rd Respondent, Register of Native Lands (Folio 151) dated 22 April 1926, the relevant page of the Vola ni Kawa Bula (VKB/Book of Living Decedents/ Register of Native Landowners) and the Brief of Lot 8 – Mataqali Natogo, Yavusa Mali prepared by the Reserves Commissioner in August 2014 that Crown (as 'ultimus haeres') had not been registered as owning Lot 8 depicted in Plan H/5,4; J/1, 3; H/10, 2; J/6, 1 instead of Mataqali Natogo. Thus, the Board may not have acted under section 19(6) in this instance.

[31] The Appellant also seeks to adduce fresh evidence of Fiji Government Gazette dated 01 December 2000 along with State Schedule A & B. In terms of section 2 of Native Land Trust Act (Amendment) Decree 2000 that came into effect on 30 November 2000, the definition of native land included *inter alia* all land owned by extinct mataqali and allotted or dealt with by the Board in accordance with section 19. There was no room for such land to be treated as Crown land or land falling to the Crown as ultimus haeres any longer. However, the amendment had no retrospective effect. Therefore, it was necessary for all extinct mataqali lands that had fallen to the Crown under section 19(1) and retained by the Crown up to then to transfer them to the Board to be dealt with as the Board deemed expedient. The purpose of the Fiji Government Gazette dated 01 December 2000 along with State Schedule A & B appears to be that whereby the ownership, management and administration of all hitherto Crown Lands (State Lands) in State Schedule A & B were transferred to the Board. Lot 8 with the relevant Plan, its extent and RNL Folio number is listed on page 563 of State Schedule A.

[32] Therefore, the said Fiji Government Gazette dated 01 December 2000 along with State Schedule A provides further evidence that Lot 8 had become Crown land following the Notice of Extinction.

[33] In the light of the above discussion, I now proceed to consider the legal effect of Notice of Extinction of Mataqali Natogo published in Fiji Royal Gazette dated 28 April 1972 and Fiji Government Gazette dated 01 December 2000 along with State Schedule A & B.

[34] Section 63 of the Interpretation Act 1967 is as follows

'All printed copies of the Gazette, purporting to be printed by the Government Printer, shall be admitted in evidence by all court and in all legal proceedings whatsoever without any proof being given that such copies were so published and printed and shall be taken and accepted as evidence of the written law, appointments, notices and other publications, therein printed and of the matters and things contained in such written law, appointments, notices and publications respectively'

[35] "Court" means any court of Fiji of competent jurisdiction [vide section 2(1) of Interpretation Act] which includes the Court of Appeal as well.

- [36] Thus, in terms of section 63 of the Interpretation Act, the Notice of Extinction of Mataqali Natogo published in Fiji Royal Gazette dated 28 April 1972 should be admitted in evidence without any further proof and should be taken and accepted as evidence of the Notice of Extinction of Mataqali Natogo printed therein and also of the fact that the Commissioner of Native Lands had reported under section 19(2) of the Native Land Trust Ordinance that Mataqali Natogo had ceased to exist by extinction of its members.
- [37] In addition, according to section 19(2) the said report of the Commissioner of Native Lands that Mataqali Natogo had ceased to exist by extinction of its members should be evidence that Mataqali Natogo is extinct.
- [38] Similarly, the Fiji Government Gazette dated 01 December 2000 along with State Schedule A & B should be admitted in evidence without any further proof and should be taken and accepted as evidence of the fact that ownership of Lot 8, then a Crown land had been transferred to the Board.
- [39] In the circumstances, it has to be concluded that
- (i) Mataqali Natogo had ceased to exist by extinction of its members.
 - (ii) Mataqali Natogo had become extinct.
 - (iii) Lot 8 owned by Mataqali Natogo had fallen to the Crown as ultimus haeres and retained by the Crown.
 - (iv) The ownership of Lot 8 had been transferred to the Board.
 - (v) The Board therefore had power and authority to deal with Lot 8 as it deemed expedient.
 - (vi) The Board, therefore, was entitled to allot Lot 8 of 908.00 acres depicted in Plan H/5,4; J/1, 3; H/10, 2; J/6, 1 in the Province of Ba to Yavusa Mali describing it as an 'Allotment of Former Crown Schedule A and B Lands and Extinct Mataqali Lands' as shown in the Fiji Government Gazette dated 23 April 2004.

[40] Based on the above conclusions reached upon the Notice of Extinction of Mataqali Natogo published in Fiji Royal Gazette dated 28 April 1972 and Fiji Government Gazette dated 01 December 2000 along with State Schedule A & B submitted by the Appellant, I hold that they cannot be challenged and displaced by 01st Respondent's evidence namely the letter dated 20 August 2014 issued by the 03rd Respondent, Register of Native Lands (Folio 151) dated 22 April 1926, the relevant page of the Vola ni Kawa Bula (VKB/Book of Living Decedents/ Register of Native Land Owners) and the Brief of Lot 8 – Mataqali Natogo, Yavusa Mali prepared by the Reserves Commission in August 2014.

[41] On the other hand, the High Court Judge had *inter alia* relied on the following to hold with the 01st Respondent.

- (i) the letter dated 20 August 2014 issued by the 03rd Respondent, Register of Native Lands (Folio 151) dated 22 April 1926 which states that Lot 8 is owned by Mataqali Natogo and the 01st Respondent is the lone surviving member of Mataqali Natogo.
- (ii) the Register of Native Lands (Folio 151) dated 22 April 1926 which records Mataqali Natogo as the proprietary unit owning Lot 8.
- (iv) the relevant page of the Vola ni Kawa Bula (VKB/Book of Living Decedents/ Register of Native Land Owners) where the 01st Respondent's name is recorded under Mataqali Natogo and
- (iii) the Brief of Lot 8 – Mataqali Natogo, Yavusa Mali, an internal memorandum from the Reserves Commissioner to the General Manager in August 2014 stating *inter alia* that it cannot find a confirmation of extinction from the TLC nor a gazette notice of extinction in the file.

[42] However, section 66(1) of the Interpretation Act states that

'Where any question arises as to whether any person is a member of a proprietary unit, a certificate under the hand of a commissioner that such person is a member of any such unit, shall be prima facie evidence thereof in any judicial proceedings.'

'(2) For the purposes of this section, "commissioner" means a commissioner of native lands appointed under the Native Lands Act or a person authorised by him in writing by notice in the Gazette. (Cap. 133)'

- [43] No such certificate under section 66(1) had been produced by the 01st Respondent or the 03rd Respondent at the trial. Nor is one sought to be adduced before this Court. Therefore, in my view none of the documents produced by the 01st Respondent has the legal force to dispel the legal effect of section 66 upon Notice of Extinction of Mataqali Natogo published in Fiji Royal Gazette dated 28 April 1972 and Fiji Government Gazette dated 01 December 2000 along with State Schedule A & B which prevail over the evidence of the 01st Respondent's membership in Mataqali Natogo.
- [44] However, the Learned High Court Judge did not have the benefit of considering the Notice of Extinction of Mataqali Natogo published in Fiji Royal Gazette dated 28 April 1972 and Fiji Government Gazette dated 01 December 2000 along with State Schedule A & B. Thus, the Learned Judge had no occasion to consider and apply section 63 of the Interpretation Act. All that he had before him was Fiji Government Gazette dated 23 April 2004 concerning the allotment of Lot 8 to Yavusa Mali describing it as 'Allotment of Former Crown Schedule A and B Lands and Extinct Mataqali Lands'. The Appellant had not drawn the attention of the High Court Judge to section 63 of the Interpretation Act in respect of Fiji Government Gazette dated 23 April 2004. Had the Appellant done so the Learned Judge may have upheld the decision of the Board to allot Lot 8 to Yavusa Mali applying section 63. In the circumstances, given the material and the submissions made before him the High Court Judge cannot be faulted for coming to the conclusion he came except his decision that section 19(2) to 19(6) of iTaukei Lands Trust Act are unconstitutional under section 27(1) of the Constitution.
- [45] However, only to the extent that the High Court Judge made his decision in ignorance of section 63 of the Interpretation Act in the light of Notice of Extinction of Mataqali Natogo published in Fiji Royal Gazette dated 28 April 1972 and Fiji Government Gazette dated 01 December 2000 along with State Schedule A & B, the impugned judgment is one made *per incurium*. The Court of Appeal in Morelle Ltd v Wakeling [1955] 2 QB 379 stated that as a general rule the only cases in which decisions

should be held to have been given *per incuriam* are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. Lord Godard, C.J. in Huddersfield Police Authority v. Watson (1947) 2 All ER 193 observed "*Where a case or statute had not been brought to the court's attention and the court gave the decision in ignorance or forgetfulness of the existence of the case or statute, it would be a decision rendered in per incuriam.*"

[46] Therefore, I would set aside the Judgment of the learned High Court Judge dated 04 June 2015.

[47] Although the above reasoning is sufficient to dispose of this appeal and it may not have been necessary to consider the question of fresh evidence under Rule 22(2) of the Court of Appeal Rules, yet, I consider it appropriate in fairness to all parties to deal with the applications by the Appellant and the 01st Respondent to lead fresh evidence in appeal under Rule 22(2) of the Court of Appeal Rules (read with Section 13 of the Court of Appeal Act) in order to consider whether the evidence proposed to be so adduced would reach the thresholds prescribed by previous judicial pronouncements. I consider this aspect in the alternative to the legal basis relied upon to set aside the impugned Judgment.

[48] Rule 22(2) is as follows:

"The Court of Appeal shall have full discretionary power to receive further evidence upon questions of fact, either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner;

Provided that in the case of an appeal from a judgment after trial or hearing of any cause or matter upon the merits, no such further evidence (other than the evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except upon special grounds."

[49] The Court of Appeal in Chand v Chand Civil Appeal No. ABU 0033 of 2008: 23 March 2012 [2012] FJCA 22 applied the criteria set out in Ladd v. Marshall [1954] 3 All ER 745 to admit fresh evidence in appeal. These conditions are as follows:

"(1) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.

(2) The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive.

(3) The evidence must be such as is presumably to be believed, or, in other words, it must be apparently credible though it need not be incontrovertible".

- [50] The Court of Appeal followed the same principles in Western Marine Ltd v Levakarua Civil Appeal No ABU90 of 2010:30 May 2013 [2013] FJCA 52 and K. Naidu Investment Proprietary Ltd v Fiji Pine Ltd Civil Appeal No ABU0016 of 2016: 14 September 2017 [2017] FJCA 115.
- [51] The Appellant has stated that the Fiji Royal Gazette dated 28 April 1972 containing Notice of Extinction of Mataqali Natogo was not its possession at the time of the hearing in the High Court and only discovered later after the Judgment was delivered. According to the Appellant, the reference to the said Gazette had been found in a file unrelated to Mataqali Natogo and a search at the National Achieves had yielded the said Gazette. This explains why the person who had prepared the internal memorandum 'Brief on Lot 8 – Mataqali Natogo, Yavusa Mali' states that 'I cannot find a confirmation of extinction from TLC nor a gazette notice of extinction in the file'. Fiji Government Gazette dated 01 December 2000 along with State Schedule A & B had been found even later.
- [52] This position looks credible in as much as even the 03rd Respondent that should have had a copy of the report under section 19(2) of the Native Trust Land Act dated 11 April 1972 in its possession could not obviously trace it and therefore did not object to the 01st Respondent's application for judicial review.
- [53] Therefore, I think that the first threshold for adducing fresh evidence has been passed.
- [54] Secondly, I also agree with the Appellant that the fresh evidence sought to be led does not only have an important influence on the outcome but decisive as explained above. I hold that the fresh evidence has passed the second threshold for adducing fresh evidence.

[55] Finally, I have no doubt of the credibility of the items of fresh evidence and the 01st Respondent had also not challenge the authenticity of Fiji Royal Gazette dated 28 April 1972 or the Notice of Extinction of Mataqali Natogo published therein in her reply affidavit and her counsel did not do so at the hearing in respect of that Gazette as well as Fiji Government Gazette dated 01 December 2000 along with State Schedule A & B. However, such evidence is not incontrovertible in that the 01st Respondent had challenged it on some grounds which I will deal with later. Thus, I am inclined to hold that the fresh evidence has passed the third threshold as well.

[56] I do not have to satisfy myself that there are special grounds for the fresh evidence proposed to be adduced by the Appellant to be allowed under the proviso to section 22(2) of the Court of Appeal Act in as much as the proposed evidence does not relate to matters which have occurred after the date of the hearing in the High Court (vide *Western Marine Ltd case*). In the aforesaid circumstances, I would, in the alternative, allow the Appellant's application to adduce fresh evidence of the following.

- (i) The Fiji Royal Gazette dated 28 April 1972 containing the Notice of Extinction of Mataqali Natogo,
- (ii) the report dated 11 April 1972 sent to the Native Land Trust Board from the Commissioner of Native Lands where it had been recorded that Roko Tui Ra had reported and confirmed the extinction of Mataqali Natogo, Yavusa Nadokana and requested the Board to take action to have Lot 8 containing 908 acres and Lot 4 recorded as property of the Crown as 'ultimus haeres'.
- (iii) The document dated 24 August 1977 signed by the Reserve Officer confirming that several mataqualies including Mataqali Natogo have been gazetted and due for transmission to the Crown as 'ultimate haeras'.
- (iv) Fiji Government Gazette dated 01 December 2000 along with State Schedule A & B.

[57] With regard to the 01st Respondent's application to lead fresh evidence, it could be observed that one of the documents sought to be produced is Folio 151 of the Register of Native Lands which was already before the High Court and considered by the High Court Judge. The 01st Respondent had obtained two more copies from both the Registrar of Lands and the 03rd Respondent for the application for fresh evidence. The other document treated as fresh evidence is the Index to Registers of Native Lands where Lot 8 had been registered in the name of Mataqali Natogo which does not really add or prove anything more than what Folio 151 of the Register of Native Lands demonstrates.

[58] Therefore, applying the same judicial tests that I applied earlier I cannot say that the 01st Respondent's proposed evidence passes the three Ladd thresholds (supra) in order to be allowed under Rule 22(2) of the Court of Appeal Rules. Since this evidence also does not relate to matters which have occurred after the date of hearing in the High Court, I do not have to look for special grounds for the 01st Respondent's proposed fresh evidence to be allowed under the proviso to section 22(2) of the Court of Appeal Act.

[59] I shall now consider the 03rd Respondent's challenge to the Fiji Royal Gazette dated 28 April 1972 containing the Notice of Extinction of Mataqali Natogo based on several grounds. They could be summarised as follows:

- (i) A Notice of Extinction could be published only on a report to the Appellant received under the hand of the Chairman or Commissioner of the 03rd Respondent. In this instance, the report dated 11 April 1972 had been signed by one Mr. L V Batiri 'for Commissioner of Native Lands'. Thus, it is not a report under section 19(2) of iTaukei Land Trust Act.
- (ii) The report itself states that Roko Tui Ra has reported and confirmed the extinction of the Mataqali Natogo and thus, it is a report by Roko Tui and not by the Chairman or a Commissioner. Even the mention of the province of Ra is wrong as Mataqali Natogo was part of Tavua district coming under the province of Ba.

- (iii) The report had not been based on the cancellation of the 01st Respondent's name in the Registrar of Landowners/VBK by a certificate of death from the Registrar of Death and the VBK has not recorded a death certificate number of the 01st Respondent. Therefore, there is no evidence that the last surviving member of Mataqali Natogo had died for Mataqali Natogo to become extinct.
- (iv) Due to the aforesaid reasons, the Notice of Extinction of Mataqali Natogo is not credible.
- (v) Even if the Appellant had correctly published the Notice of Extinction of Mataqali Natogo, it had not taken all the steps enumerated in section 19(1) and 19A of the iTaukei Lands Trust Act to have Lot 8 to call it 'former Crown land'.
- (vi) For Mataqali Natogo to vest in the Appellant it must have issued an Order in Form 4 under Regulation 5 of the Native Land (Miscellaneous Forms) Regulations) to the Registrar of Titles that it enters a memorial on Register of Native Lands Folio 151.

[60] I would like to make some observations on the above matters without, however, in any way causing prejudice to the 01st Respondent's right to impeach the fresh evidence of the Appellant in separate proceedings if she so desires.

- (i) The report/memorandum dated 11 April 1972 on the extinction of Mataqali Natogo had been from the Commissioner of Native Lands to the Native Land Trust Board.
- (ii) Roko Tui is not a stranger or an outsider of the statutory scheme in that the Board under section 19(2) of the iTaukei Land Trust Act is obliged to send a copy of the Notice of Extinction published in the Gazette through the Native Lands Commissioner to the roko tui and under section 19(5) the Board also has to send a notice informing him of the rejection of any objection to the notice of extinction after investigation.

- (iii) According to her Birth Certificate, the 01st Respondent's birth had been registered only on 06 November 1978, after more than 06 years since the publication of the Notice of Objection. According to the 03rd Respondent, the 01st Respondent's name had been entered in the Register of Landowners /VKB/Book of Living Decedents only in 1986, 14 years after the Notice of Extinction. Thus, there appear to have been no evidence of any surviving member of Mataqali Natogo at the time the report under section 19(1) was compiled and the Notice of Extinction was published.
- (iv) Thus, the 03rd Respondent obviously had not recorded the 01st Respondent as a member of Mataqali Natogo under section 9(1) of the iTaukei Lands Act (then Native Lands Act) 1905 prior to the date of Report dated 11 April 1972 and publication of Notice of Extinction dated 19 April 1972. The Registrar of Births, Deaths and Marriages under section 8 of the Births, Deaths and Marriage Act had also not recorded the birth of the 01st Respondent until 02 November 1978. Thus, the 03rd Respondent could not register her as a member of Mataqali Natogo on the Register of Landowners/VKB/Book of Living Decedents. Therefore, there was no non-compliance with the Executive Order of Governor Eyre Hutchinson under Reference MP 4089/26 which *inter alia* prescribes that entries on the Register of Native Landowners could only be taken from the Register of Births, Deaths and Marriages and from no other sources. This Order is referred to in **State v Native Lands Commission** HBJ No. 002 of 2010: 08 December 2010 [2010] FHH555.
- (v) The 03rd Respondent had acted under section 19(1) of the Native Land Trust Act and the Appellant had taken steps under section 19(2) and the 01st Respondent had admittedly not given notice of objection to the Notice of Extinction in 1972. Given the fact that she had not been registered as a member of Mataqali Natogo on the Register of Landowners/VKB/Book of Living Decedents it is doubtful whether her objection, even if presented to the Board would have been upheld.

- (vi) The Appellant was not bound to make an order under section 19(6) but had the discretion to do so. The Board does not appear to have done it in this instance. Hence no change of ownership of Lot 8 recorded by the Registrar of Titles. But it does not alter the legal status of Lot 8 that had fallen to the Crown as ultimus haeres.
- (vii) There was no section 19A in iTaukei Land Trust Act in the year 1972 which was introduced only in November 2000. Thus, there was no obligation at that time on the part of the Appellant to have acted according to section 19A. Lot 8 appears to have been retained by the Crown following the Notice of Extinction until it was transferred to the Appellant in December 2000. The counsel for the Appellant stated that there has been a backlog and steps are now being taken to act under section 19A in respect of all lands vested in the Board including Lot 8 as well. Once the Appellant take steps under section 19A the 03rd Respondent would register Lot 8 in the Register of iTaukei Lands. Similarly, once the Appellant take steps under section 19(6), the Registrar of Titles would make necessary entries in respect of Lot 8 in terms of section 19D.
- [61] Therefore, I do not think that the 01st Respondent is entitled to challenge the Fiji Royal Gazette dated 28 April 1972 containing the Notice of Extinction of Mataqali Natogo, the 03rd Respondent's report dated 11 April 1972 and the Fiji Government Gazette dated 01 December 2000 along with State Schedule A & B before this Court or in the same proceedings in the High Court, for it would amount to a collateral attack of the same. She could only mount such a challenge directly in separate proceedings for judicial review. I believe that the 01st Respondent would not be too late in doing that, if she so decides, for the reason that those documents had been discovered by the Appellant only after the High Court Judgment which was in appeal. In any such proceedings, my observations above should not be taken to be ruling upon any of the grounds the 01st Respondent has raised in this appeal in challenging the Appellant's fresh evidence. In the circumstances, therefore, I do not propose to send the case back to the High Court for a rehearing.

- [62] In my view, the validity of any publication in the Gazette and matters therein contained could be challenged directly in proceedings for judicial review on any ground where judicial review is available despite section 63 of the Interpretation Act. To me, section 63 on the face of it, seems to prevent only a collateral challenge. However, no hard and fast rule could be laid down as to when a collateral challenge would be allowed or disallowed. It depends on the subject matter, statute involved etc. Administrative Law Eleventh Edition by H. W. R. Wade & C. F. Forsyth at pages 235-238 deals with this topic in detail. Commission of Inquiry Report by Commissioner G P Lala v Emperor Gold Mining Co Ltd Civil Appeal No. ABU 0051 of 2004: 24 March 2006 [2006] FJCA 18 could be regarded as a relevant authority in this regard where the Court of Appeal held that an extension of time of the Commission of Inquiry purportedly under section 2 of the Commission of Inquiry Act published in the Government Gazette was invalid because *inter alia* the Notice of extension had been signed by the Official Secretary to the President who was not included in the persons who could sign subsidiary powers or duties.
- [63] Before parting with this appeal, I may also mention that I find that that the 1st Respondent had stated in one of her affidavits that she had spent most of her married life in her husband's village in Laucala Village in Wailevu West in the province of Cakaudrove which is not Lot 8 in issue. The Reserves Commissioner of the Appellant in his affidavit dated 19 August 2015 had stated that impugned Judgment affect the entire land owing Unit (Yavusa Mali) and its future generations, the validity of Cabinet decisions, traditional practices and records of iTaukei Land Trust Board and iTaukei Land and Fisheries Commission whereas the 01st Respondent represents a single person. The Brief /Memorandum on Lot 8 dated 26 August 2014 shows that the land concerned had originally belonged to Mataqali Tawa of Yavusa Mali but had been given to a woman who had married Joseva Sadulu of Mataqali Natoga. In the first sitting of the Native Land Commission Joseva Sadulu had claimed the land and therefore, it had been registered under Mataqali Natogo. Joseva Sadulu's name appears in the VKB. In 1965, the people of Yavusa Mali had given traditional gifts to Yavusa Nadokana (Mataqali Natogo belongs to Yavusa Nadokana) to get the land back and Yavusa Nadokana had consented but full implementation of the change had not been done through TLC. Yet, the members


of Yavusa Mali had come to live on the land after Joseva Sadulu handed over part of Lot 8.

[64] Therefore, I conclude that the Appellant's application to adduce fresh evidence should be allowed, the 01st Respondent's application to adduce fresh evidence should be disallowed and the impugned judgment of the High Court should be set aside.


[65] I would not award any cost of these proceedings to the Appellant as the appeal is allowed primarily on the fresh evidence presented to this Court by the Appellant and the matters of law involved arising therefrom.

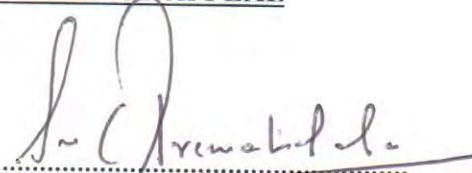
The ~~Proposed~~ Orders of the Court are:

1. *The appeal is allowed.*
2. *The judgment of the High Court is set aside.*
3. *The Appellant's application to adduce fresh evidence is allowed.*
4. *The 01st Respondent's application to adduce fresh evidence is disallowed*
5. *The parties shall bear their own cost in this appeal..*


.....
Hon. Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL




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Hon. Justice Dr. Guneratne
JUSTICE OF APPEAL


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Hon. Justice C. Prematilaka
JUSTICE OF APPEAL