

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 271 of 2019

BETWEEN: **FIJI PORTS CORPORATION LIMITED** a Company having its registered office at Muaiwalu House, Lot 1 Tofua Street, Walu Bay, Suva, in the Republic of Fiji.

PLAINTIFF

AND: **FIJI DEVELOPMENT BANK** a body corporate duly constituted under the Fiji Development Bank Act, Cap 214, having its registered office at 360 Victoria Parade, Suva in Fiji.

DEFENDANT

BEFORE: **Justice Vishwa Datt Sharma**

COUNSEL: **Mr Narayan E. for the Plaintiff**
 Mr Raitivi A. for the Defendant

Date of Judgment: **25th April, 2024 @ 9.30am**

JUDGMENT

[Removal of Vessel MV TUNATUKI from Port of Suva]

A. INTRODUCTION

- (1) The Plaintiff instituted the Writ action and Statement of Claim and sought for the following orders against the Defendant:-
 - (a) Order that the vessel **MV TUNATUKI** be removed forthwith by the Defendant;
 - (b) Order that the Defendants pay all costs incurred by the Plaintiff to date and any further costs to be incurred;
 - (c) Order that the Defendant pay fine of \$250,000.00 to the Defendant and a term of imprisonment not exceeding 3 years.
 - (d) Damages for and to the environment;
 - (e) Interest and costs of this action on an indemnity basis; and
 - (f) Such further and/or other relief as this Honourable Court deems just in the circumstances.
- (2) The Plaintiff Company owns and operates the major ports in Fiji, namely Ports in Suva, Lautoka and Levuka by virtue of the **Sea Port Management Act**. The Plaintiff has control and responsibility for the said Ports and boundaries surrounding them over which it has jurisdiction.
- (3) The Defendant, Fiji Development Bank is the authorised and alleged Lawful owner of vessel '**MV TUNATUKI**.'
- (4) That on or about 08th April 2010, the vessel was sighted half submerged within the vicinity of the North Anchorage where the vessel '**MV TUNATUKI**' later sank at the same position due to the ingress of water through the hull and engine room and the vessel was not manned.
- (5) There was no action taken by the Defendant regarding the grounded vessel "**MV TUNATUKI**", the Plaintiff on 15th April 2010 issued a **Removal Order** on the Defendant for the **Removal of Vessel, "MV TUNATUKI"**.
- (6) The Defendant failed to remove the said vessel "**MV TUNATUKI**" even after service of the notice.
- (7) The Defendant filed its **Statement of Defence** on 04th October 2019. It denied being '**the authorised and lawful owner of motor vessel "MV TUNATAKI"**' as alleged by the Plaintiff.
- (8) The Defendant **registered a mortgage** against the vessel to secure repayment of debt.
- (9) The Defendant had executed and lodged all the documents with the Maritime Safety

Authority of Fiji [MSAF] as was required to transfer the vessel "MV TUNATUKI" to Japtec Hire to salvage and take ownership of the vessel "MV TUNATUKI".

- (10) The Plaintiff subsequently filed a Reply to the Defendant's Statement of Defence, the Plaintiff says that the Defendant is the authorised lawful owner of the vessel "MV TUNATUKI."
- (11) The Plaintiff stated that the Defendant has a statutory Registered Mortgage No 15151 duly registered with the Registrar of ships on 07th July 2000.
- (12) There may have been attempts to transfer the ownership of the vessel to Japtec Hire, the said transfer was incomplete, endorsed and/or registered with the Maritime Safety Authority of Fiji [MSAF]. The Defendant's defence discloses no reasonable Cause of action, is scandalous or vexatious and/or otherwise is an abuse of Court process.

B. THE LAW

- (13) *Section 26 (1) (b) of the Sea Ports Management Act 2005 provides:*

26.-(1) With the authority of the Chief Executive Officer, employees of a port management company may -

(b) direct the removal of any vessel from any berth, station or anchorage to another berth, station or anchorage;

- (14) *Section 27 of the Sea Ports Management Act 2005 provides:*

27.-(1) With the approval of the Board of Directors, the Chief Executive Officer may order the removal of any derelict or dangerous vessel from a port or the approaches to a port.

(2) An order made under subsection (1) shall be in writing and shall -

- (a) state a time by which the vessel shall be removed;*
- (b) state any restrictions as to places where the vessel may be re-located;*
- (c) be delivered to the owner or master of the vessel, if their identity and whereabouts are known; and*
- (d) be attached to the vessel in a conspicuous place.*

(3) If no action is taken in relation to a vessel in respect of which notice has been given under subsection (2) within the time stated in the notice, the Chief Executive Officer may arrange for the removal of the vessel and for its sale by auction or its destruction, as he or she sees fit.

(4) The cost of removing a vessel and of its destruction shall be a debt payable to the port management company by the owner of the vessel.

- (5) *Any owner or master of any vessel who refuses or fails to comply with the order given under this section commits an offence and is liable upon conviction to a fine not exceeding \$250,000 or a term of imprisonment not exceeding 3 years or both.*
- (15) The parties to the proceedings admitted the following facts within the Pre-Trial conference minutes filed into court:
- (1) The Plaintiff Company owns and operates the major ports in Fiji. The Plaintiff has control and responsibility for the said Ports at Suva, Lautoka and Levuka and boundaries surrounding them over which it has jurisdiction.
 - (2) The Defendant **Fiji Development Bank is authorized and lawful owner of the vessel "MV TUNATUKI"**
 - (3) On or about 08th April 2010 the vessel was sighted **half submerged and later sank at the same position.**
 - (4) The Defendant, **Fiji Development Bank has a Statutory Registered Mortgage No 15151 Registered with the Registrar of ships on 07th July 2020.**
- (16) According to the Plaintiff, Fiji Ports Corporation Limited, **there may have been an attempt to transfer the ownership of the vessel "MV TUNATUKI" to Japtec Hire, the transfer was neither complete, endorsed and/or registered with Maritime Safety Authority of Fiji [MSAF].**

C. DETERMINATION

- (17) The substantive issue for Court's determination hinges on the Question **"Whether the Defendant, Fiji Development Bank, is the owner and/or in custody and control of the vessel "MV TUNATUKI" at the time the Removal Order dated 15th April 2010 was issued and served by the Plaintiff, Fiji Ports Authority Limited?"**
- (18) In order to determine the ownership of the vessel "MV TUNATUKI", this Court needs to take into account the following:
- (i) Oral Evidence of the witnesses;
 - (ii) Documentary evidence; and
 - (iii) Laws relating to Sea Port Management Act 2005 and Maritime Act 1986.
- (19) In Pre-Trial Conference Minutes dated 31st January 2020 and filed into Court on 03rd February, 2020, **the Defendant, Fiji Development Bank confirms that it is the authorised and lawful owner of the vessel "MV TUNATUKI".**

- (20) However, subsequently in its written submission filed into Court on 28th September 2020, the Defendant submitted that it has the current registered mortgage over vessel "**MV TUNATUKI**" and that the Plaintiff on this assumption is pursuing the current case against the Defendant as "the owner of the vessel "**MV TUNATUKI**". The assumption of the Plaintiff according to the Defendant is baseless.
- (21) **The Plaintiff's witness [PW1] – Pauliasi Vakaloloma** in his capacity as the Harbour Master gave evidence in terms of the Contents of the "Incident Report" dated 24th June 2019 which was tendered into evidence as Exhibit P-24.
- (22) His summary of evidence was as follows:
- On 15th March 2010 Fiji Ports Corporation Ltd issued the first Removal Order to Fiji Development Bank under the provision of a Section 27 of the Sea Port Management Act.
- 08th April 2010 the vessel was sighted held submerged within the vicinity of North Anchorage. The vessel later sank at the same position due to the ingress of water through the hull and engine room.
- The vessel sank due to the water leaking through the hull and engine room, the vessel was also not manned as required under the sea Port Management Act.
- (23) In cross examination by Defence Counsel, as to paragraph 6 of the Incident Report - "13th April 2011, Minister for Works, Transport & Public Utilities issued a Removal notice to FDB after FIMSA confirmed that the transfer of ownership was incomplete, and the vessel is still registered under FDB.
- (24) PW1's Reply was - The vessel was not removed so Fiji Development Bank is the owner. Legal ownership is with Fiji Development Bank.
- (25) Further PW1 stated that, he cannot say whether the vessel was a derelict or not, it was not operating. Whether it had a valid certificate?
- (26) His evidence further was that the vessel according to the documents is registered with Fiji Island Maritime Safety administration [FIMSA] now MSAF. MSAF has clarified that the vessel is registered under Fiji Development Bank, so Fiji Development Bank is the owner.
- (27) Document No. 11 [Exhibit - P12] - Bill of Sale executed between Japtec Hire and FDB was not registered.
- (28) **The Plaintiff's Second witness [PW2] – Tomasi Cama Kete**, Manager qualification, licencing for MSAF and officer-in-charge of all services testified was shown document No. 26 (letter) tendered into evidence as - Exhibit P22 showing clarification of the status of the vessel '**MV TUNATUKI**' dated 26th February 2017. The letter stated and read as '**that the transfer of the ownership of the vessel 'MV TUNATUKI' from Fiji Development Bank to**

Japtec Hire was incomplete. Therefore, according to MSAF records, Fiji Development Bank is the last registered owner of the ship 'MV TUNATUKI'. Witness was also shown document tendered as Exhibit - P23 written by MSAF to the Senior Legal Officer of Fiji Development Bank. Witness confirmed that 'MSAF had no record of the transfer documents on file, however, it has received the documentations provided by Fiji Development Bank; **Copy of Agreement for Salvage and transfer, Bill of Sale and official receipt no. 966786.** Under the **Maritime Legislation, the documentations aforementioned to effect transfer, was incomplete. Section 34 of the Maritime Act 1986 required Fiji Development Bank when a registered ship is transferred,** the transferee is not entitled to be registered as owner of the ship until, he, or in the case of a corporation, a person is authorised by the corporation to make declarations on its behalf, has made and signed a declarations of transfer in the prescribed form. In the instance, Japtec Hire was to submit a declaration of transfer. Therefore, according to MSAF Records, Fiji Development Bank is the last registered owners of the ship TUNATUKI II."

- (29) **The Defence called the only witness [DW1] Asinate Tieri** who gave evidence in her capacity as the Bank Officer of the Fiji Development Bank. In essence she told the Court that Salia Basaga shipping is the owner of the ship. Took Loan from Fiji Development Bank to purchase ship Tunatuki II. Bank took the ship as mortgagee. Fiji Development Bank advertised for tender to Salvage Wrecked Ship. Japtec Hire was given the tender. Fiji Development Bank registered its transfer documents with Fiji Maritime Safety Authority [FMSA]. MSAF informed Fiji Development Bank that transfer of vessel to Japtec Hire was incomplete, since Japtec Hire was supposed to sign a documentation which was not done. Salvaging work was in the hands of Japtec Hire.
- (30) The evidence of the First Plaintiff's witness [PW1] in essence reveals that the Bill of Sale executed between Japtec Hire and Fiji Development Bank on 18th June 2010, (Document no. 11 within the Bundle of Documents) tendered into evidence as Exhibit - P12 showing transfer of vessel MV TUNATUKI is neither endorsed or stamped with the Registrar of Ships and therefore Fiji Development Bank is still the current registered owner of vessel 'MV TUNATUKI.'
- (31) Second Plaintiff's witnesses [PW2] evidence is very straight forward. He referred to document No. 26 within the Bundle of Documents - Tendered into evidence as Exhibit P-22, a letter written by the Chief Executive Officer of MSAF on 28th February 2017 to him clarifying the status of the ship "TUNATUKI II."
- (32) The Chief Executive officer of MSAF at paragraph 2 of his correspondence stated that **the transfer of ownership of the vessel "TUNATUKI II" from Fiji Development Bank (FDB) to Japtec Hire was incomplete.** Therefore, according to MSAF Records, Fiji Development Bank is the last registered owner of the ship 'TUNATUKI II'.
- (33) However, the only witness of the Defence DW1 was the Fiji Development Bank's Bank officer whose evidence reveals that Salia Basaga Shipping took two (2) Bank loans and had a mortgage over the vessel MV TUNATUKI. Therefore, Salia Basaga Shipping is the owner of the vessel 'MV TUNATUKI'. However, there was no documentary evidence produced

and/or tendered into Court to establish the fact that Salia Basaga Shipping is the owner of the vessel 'MV TUNATUKI'.

- (34) Subsequently, her evidence is that when Fiji Development Bank advertised the tender to salvage the wrecked ship 'MV TUNUTUKI', Japtec Hire was awarded the tender and Fiji Development Bank registered its transfer documents with MSAF. Since no declaration accompanied the transfer, the vessel 'MV TUNATUKI' could not be registered into the name of Japtec Hire. Hence, the transfer remained incomplete and impending registration of the vessel MV TUNATUKI to Japtec Hire.
- (35) *Section 27 of the Sea Ports Management Act 2007* sets out the procedure to be followed by the Ports Authority when dealing with the removal of the derelict vessels, if no action is taken after the issuing of a removal notice, the Chief Executive Officer may arrange for the removal of the vessel and for its sale by auction or destruction. The costs of the removal will be a debt payable by the owner of the vessel.
- (36) The Plaintiff issued a Removal Order on the Defendant (FDB) on 15th April 2010 pursuant to *Section 27 of the Sea Ports Management Act 2007* since no action was taken by the Defendant regarding the sunken vessel [Document No. 1 within the Agreed Bundle of Documents refers].
- (37) The Defendant (FDB) on 22nd April 2010 acknowledged the Removal Order and sought for further time [Document No. 2 of the Agreed Bundle of Documents refers].
- (38) The Defendant (FDB) informed the Plaintiff on 12th May 2010 that they have engaged Malycha Marine Services Ltd to remove the sunken vessel. (Document No. 6 within Agreed Bundle of Document refers).
- (39) The Defendants sought for further extensions of time until 16th June 2010, when the Defendant (FDB) Re-assigned the salvage operations to Japtec Hire [Document No. 9 of Agreed Bundle of Documents].
- (40) An executed Bill of Sale dated 18th June 2010 showing transfer of the vessel 'MV TUNATUKI' to Japtec Hire, however, the same is neither endorsed and stamped nor filed with the Registrar of Ships (Document No. 11 of Agreed Bundle of Documents refers).
- (41) On 13th April 2011, the Minister for Works, Transport and Public Utilities issued a Notice to the Defendant (FDB) to resume the vessel [Document No. 20 and 23 Agreed Bundle of Documents refers].
- (42) On 13th February 2017 the Plaintiff wrote to MSAF and sought for clarification and confirmation on the legal ownership of the vessel 'MV TUNATUKI' or company responsible for the removal of the vessel. [Document No. 25 of Agreed Bundle of Documents refers].
- (43) MSAF on 28th February 2017 wrote back to Plaintiff confirming that Defendant (FDB) is the last registered owner of the vessel 'MV TUNATUKI'. [Document No. 26 of Agreed

Bundle of Documents refers] and letter of 17th January 2017 from MSAF to Defendant (FDB) confirms Legal ownership with the Defendant (FDB) [Documents No. 37 of Agreed Bundle of Documents refers).

- (44) However, according to the Defendant, Fiji Development Bank, the transfer and mortgage discharge documents were prepared by the Fiji Development Bank and lodged at MSAF but were not accepted for processing and registration by MSAF since the documents were incomplete, i.e. the Declaration of transfer was not lodged with the transfer and registration documents. Therefore, since the transfer was not completed the Defendant, Fiji Development Bank's contention is that the transfer was not completed, the last registered owner Salia Basaga Shipping remains the vessel owner.
- (45) I make reference to **Section 54 of the Ship Registration Decree 2013** which states that:-

'the mortgage of a ship [in this case with the Defendant, Fiji Development Bank] shall not have the effect of the mortgagee becoming; or the mortgage ceasing to be, the owner of the ship, except to the extent necessary to make the ship available as security under the mortgage.

- (46) However, **Section 55 (1)** goes further to add that the 'mortgagee shall have the power to dispose of the ship and to give effectual receipts in respect of the disposal. In the instant case the Defendant, Fiji Development Bank is the Mortgagee and have the power of disposition of the vessel MV TUNATUKI.

- (47) **Section 41 (1) of the Maritime Act 1986** states that -

41.-(1) Except as may be necessary for making a registered vessel in respect of which a mortgage has been registered under this Act available as a security under that mortgage, a mortgagee is not by reason of the mortgage deemed to be the owner of the vessel nor is a mortgagor deemed to have ceased to be the owner of the vessel.

- (48) **Section 41 (2)** states that:

(2) Subject to this Act, a person registered under this Act as mortgagee in respect of a registered vessel has absolute power to dispose of that vessel and to give effectual receipts for the purchase money.

- (49) **Section 34 of the Maritime Act 1986** states that:

'Where a registered vessel is transferred, the transferee is not entitled to be registered as owner of the vessel until he, or in the case of a corporation, a person authorised by the corporation to make declaration on its behalf, has made and signed a declaration of transfer in the prescribed form.'

- (50) The question that arises in the current proceedings is **'what transpired here with regards to the status of the Registered ownership and/or custody and control of the vessel in question MV Tunataki at the time of the Removal Order of 15th April 2010 issued by the Plaintiff?'**
- (51) The initial owner of the vessel MV TUNATUKI was Salia Basaga Shipping Limited. The Defendant Fiji Development Bank had provided Salia Basaga Shipping Limited with certain loan facilities and in return **the Defendant, Fiji Development Bank registered a mortgage against the vessel MV TUNATUKi to secure the repayment of the debt.**
- (52) On 08th April 2010, the vessel MV TUNATUKI was sighted half submerged within the vicinity of the North Anchorage where the vessel later sank.
- (53) There was no action taken by the Defendant, Fiji Development Bank regarding the sunken vessel, the Plaintiff on 15th April 2010 issued a Removal Order against the Defendant, Fiji Development Bank for the removal of the vessel pursuant to **Section 27 of the Sea Ports Management Act 2007.**
- (54) In terms of **Section 41 (2) of the Marine Act 1986**, the Defendant, Fiji Development Bank as the Registered Mortgagee having the absolute power of disposition of the vessel MV TUNATUKI, prepared and lodged the necessary executed Bill of Sale dated 18th June 2020 showing transfer of vessel MV TUNATUKI to Japtec Hire to MSAF. However, the documents were neither stamped nor filed with the Registrar of Ships [Document No. 11 of the Agreed Bundle of Documents refers].
- (55) In absence of any signed declaration of Transfer accompanying the lodged documentation by the Defendant, Fiji Development Bank [Section 34 of the Marine Act 1986 refers], the transferee, Japtec Hire could not be registered as the owner of the said vessel MV TUNATUKI.
- (56) Therefore, since the Defendant, Fiji Development Bank held the vessel MV TUNATUKI as the Mortgagee at the time of the Removal Order dated 15th April 2010, the Defendant, Fiji Development Bank was and is the owner and/in custody and control of the vessel MV TUNATUKI to the current time accordingly.
- (57) On the Balance of probability, I find that for the aforesaid rational that the Defendant, Fiji Development Bank is the owner and/or in custody and control of the vessel MV TUNATUKI and at the time the Removal Order dated 15th April 2010 was issued by the Plaintiff, the Defendant, Fiji Development Bank has failed to remove the vessel MV TUNATUKI from the Port boundary within 21 days as per the issuance of the Removal Orders therein.
- (58) In support of my above findings, the **'Declaration of Transfer'** [Section 34 of the Maritime Act 1986 refers] was the main documents that advised the Registrar of Ships of transfer of ownership and/or of the new owner of the ship. In the, current case this critical document, **'Declaration of Transfer'** that was required for transfer of vessel MV

TUNATUKI was neither prepared nor lodged and accompanied the transfer documents. Therefore, in the absence of the '**Declaration of Transfer**' Document it rendered the Registration of the new owner of the ship of the vessel MV TUNATAKI as incomplete and invalid.

- (59) MSAF, Maritime Safety Authority of Fiji who are Registrar of Ships, has clarified the status as to the ownership and advised and confirmed in evidence that the ownership of the vessel MV TUNATUKI is currently with the Defendant, Fiji Development Bank.
- (60) The Defendant, Fiji Development Bank in its evidence had confirmed that the transfer and/or ship registration to Japtec Hire was not completed. Even if liability was to be transferred to Japtec Hire by the Defendant, the Defendant, Fiji Development Bank has not filed any formal application to join and make Japtec Hire a party to this proceedings.
- (61) The Defendant, Fiji Development Bank in its Statement of Defence has not made out the Defence that all documents required to transfer the vessel MV TUNATUKI to Japtec Hire with MSAF was completed, however, in the Defendant's, Fiji Development Bank's written submission furnished to this Court at paragraph 4 submitted that-

'The transfer and discharge documents were not accepted for processing and registration by MSAF since the Documents were incomplete i.e. the 'Declaration of Transfer' was not lodged along with the documents.'

- (62) Pursuant to **section 27 (5) of the Sea Ports Management Act 2005** the Defendant, Fiji Development Bank as the owner of the sunken vessel MV TUNATUKI failed to comply with the Removal Order of 15th April 2010.
- (63) The fact of the matter is that the vessel MV TUNATUKI, 14 years ago, on 08th April 2020 was sighted half submerged within the vicinity of the North Anchorage and subsequently sank. Pursuant to **section 27 of the Sea Ports Management Act 2005**, the Board of Directors gave the approval to the Chief Executive Officer to order the removal of the vessel from the port. On 15th April 2010, Patel Sharma Lawyers were instructed to act accordingly and serve the order for the removal of the vessel MV TUNATAKI from the sunken position from the port against the Defendant, Fiji Development Bank. No action was taken by the Defendant, Fiji Development Bank [section 27 (5) of the Sea Port Management Act 2005 refers], although Fiji Development Bank sought for the extension of time on a couple of occasions and again failed to comply with the respective order of Removal.
- (64) Thus, whilst failing to comply with the Removal Order of the vessel MV TUNATUKI from the port; the Defendant, Fiji Development Bank committed an offence under the Sea Port Management Act 2005 and in accordance with **section 27(5) of the Sea Port Management Act 2005** is liable upon conviction to a fine not exceeding \$250,000.
- (65) The vessel 'MV TUNATUKI' still sits submerged and sunk in the Suva Port boundary since 08th April 2010 and not removed by the Defendant Fiji Development Bank even though a Removal Order was served onto them on 15th April 2010. However, instead of the vessel MV

TUNATUKI being removed, the Defendant, Fiji Development Bank on a couple of occasions sought for the extension of time to make arrangements with Japtec to remove the vessel. To date the Defendant, Fiji Development Bank has failed to have the vessel removed. The sunken vessel is causing environmental damage and is a hazard to other port users and navigations, to ships going to shipway operations including hazard to incoming ships which would want to birth which will result in substantial loss of revenue to the Plaintiff.

- (66) The Sunken vessel 'MV TUNATUKI' therefore since 2010 under the principle of '*Res ipsa loquitor*' where the action of the Defendant speaks for itself has ultimately and continues to cause damage to the Suva Port Boundary, the Suva Harbour and the environment as a whole.
- (67) Bearing all above in mind, I grant the following orders against the Defendant, Fiji Development Bank, accordingly.

D. ORDERS

- (a) The Declaration is made against the Defendant to remove the sunken vessel 'MV TUNATUKI' forthwith;
- (b) The Defendant to pay all costs incurred by the Plaintiff until the complete removal of the vessel 'MV TUNATUKI' from the Suva Port.
- (c) Any damages caused to the environment and its surrounding by the vessel 'MV TUNATUKI' is to be paid to the Plaintiff by the Defendant, Fiji Development Bank.
- (d) The Defendant, Fiji Development Bank is Ordered to pay a fine of \$100,000 to be paid within 14 days timeframe;
- (e) The Defendant, Fiji Development Bank is ordered to pay the Plaintiff any interests accrued and costs summarily assessed at \$20,000.

Dated at Suva this 25th day of April, 2024.




Vishwa Datt Sharma
PUISNE JUDGE

cc: Patel Sharma Lawyers, Suva
Fiji Development Bank.