

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBM 51 of 2017

IN THE MATTER of an application for an order under section 45(4)(e) of the 2013 Fijian Constitution and section 28(1) of the Human Rights and Anti-Discrimination Act 2009.

BETWEEN : **THE PROCEEDINGS COMMISSIONER** on behalf of **USENIA MAITAWACA MANAKIWAI** of Lot 22 Flat 4, Kings Road, Nakasi, Suva, Fiji Islands.

1ST APPLICANT

AND : **THE PROCEEDINGS COMMISSIONER** on behalf of the **HUMAN RIGHTS AND ANTI-DISCRIMINATION COMMISSION** of Naibati House, Goodenough Street, Suva, Fiji.

2ND APPLICANT

AND : **SURESH KANT** of Lot 1, Matanikorovatu Road, Makoi, Suva, Fiji Islands.

RESPONDENT

Counsel : **Mr. Tokalau W for the Applicant**
Mr. Singh S for the Respondent
Date of Hearing : **26th May, 2017**
Date of Judgment : **2nd June, 2017**

Catch Words

Constitutional Redress- Section 39 (1) and (2) and Section 41 of the Constitution of Republic of Fiji- Right not to evict arbitrary –tenant- arrears of rent- Distress of Rent- Right to Re-entry-Rule 3 and 4 of the High court (Constitutional Redress) Rules 2015- Measure of Damages for breach-aggravating factors – exercise.

JUDGMENT

INTRODUCTION

1. This proceeding is instituted by Human Rights and Anti-Discrimination Commission (2nd Applicant), on behalf of the 1st Applicant, who was a tenant under a purported agreement

of tenancy with the Respondent-landlord. Admittedly there was an arrears of rent to the value of \$2,200. The tenancy had commenced in May, 2015, according to the purported 'Memorandum of Agreement to Lease'. 1st Applicant, her husband, their 5 children and here elderly parents totaling 9 persons lived in the said premises, since May, 2015. Though the period stated in the said memorandum, was for one year the tenancy continued after that period and the Respondent had accepted \$500 as rental, even as late as 20th April, 2017. (See annexed WT1 to affidavit in response)

2. On 7th of April, 2017 between 5-6 pm, while only one child was in the premises the Respondent through an agent had locked the house, and the child was left alone outside the house at dusk without any form of supervision, completely disregarding the safety of the child. The Respondent in the affidavit in opposition stated that premises subject to purported tenancy agreement was a Crown Lease No 1859 and no consent was obtained from the Director of Lands, but in the letter written to the 2nd Applicant, on 21st April, 2017 he had admitted that the 1st Applicant was a tenant in Wainibuku Flats in Nakasi.

3. The issue of the validity of the 'Memorandum of Agreement to Lease' will be irrelevant as it had lapsed more than a year ago and Respondent had accepted rental payments after expiration of said period, and had also expressly admitted tenancy of the 2nd Applicant. According to his own statement of accounts provided to the 1st Applicant, by the Respondent had provided details of payments as well as the arrears this statement was annexed to the affidavit in support as UMM2. 1st Applicant had complained to 2nd Applicant about the eviction of her family of 9 including 5 children and two elderly parents. The 2nd Applicant had informed the Respondent that he had breached Section 39 (1) and 39(2) of the Constitution of Republic of Fiji (the constitution) through an arbitrary eviction and had also breached Section 41 of the Constitution as children's rights are also infringed by the actions of the Respondent. He had replied to the said letter and stated that he had lawfully exercised distress of rent and 'Under Distress of Rent their caretaker' had closed the flat in issue and had stated that the landlord has nothing to do 'to tenant's family being deprived of food, clothes and shelter', due to the said action. So, in other words the Respondent is admitting that he had exercised distress of rent

through the caretaker. It is not clear whether the caretaker was a bailiff appointed generally or specifically under the law. No evidence of such appointment was attached to the affidavit in opposition.

4. When this matter came up before on the first day on 5th May, 2017 more than a month had lapsed from the eviction of the 1st Applicant. So considering the urgency of the interim orders sought, an oral hearing was conducted though there was no affidavit in opposition filed at that time. Interim orders were granted and the 1st Applicant was restored to the possession and a stay was ordered regarding the execution of purported distress by the agents of the Respondent.
5. At the hearing it was revealed that 1st Applicant's all the household items were removed before she was given possession, and this was done after interim order for possession was granted. Despite the order for stay of process of distress and not to change the *status quo* till the conclusion of this matter, it was revealed and the goods were removed to unknown location and even a list of items under distress was not given . When this was inquired, counsel for the Respondent said there was no intention to violate the orders of the court and assured return of all the items forthwith. Since the 1st Applicant was given possession of the premises without her household items, it cannot be considered as restoring possession specially considering that she was a person who could not afford to pay rent and would not be in a position to purchase new household items. So even at the time of the hearing 1st Applicant was denied 'actual' possession of her household items for more than 50 days, despite interim order stalling all the proceedings of distress.
6. It was also revealed that the Respondent had instituted an action in the Small Claims Tribunal for the recovery of the arrears of rent at the time of the exercise of the distress. The counsel for the Respondent said that after interim orders were made, the claim before the Small Claims Tribunal was withdrawn.

ANALYSIS

7. The legality of the purported 'Memorandum of Agreement to Lease' due to absence of consent from the Director of Land, is irrelevant as the time period for that lease had lapsed. So I would not deal with the initial objection raised regarding the illegality of the purported contract between the parties without the consent of the Director of Land.
8. The counsel for the Respondent raised another preliminary issue as to the mode of this application. He stated that it had not complied with Rule 3(1) of the High court (Constitutional Redress) Rules 2015.
9. Rule 3 of the High court (Constitutional Redress) Rules 2015 states as follows;

'3(1) An application to the High Court for redress under section 44(1) of the Constitution may be made by a motion supported by affidavit.....'
(emphasis added)
10. The Applicants had filed this action by way of 'Originating Summons for Constitutional Redress'. In terms of Rule 3(1) of the High Court (Constitutional Redress) Rules 2015, a party is not precluded from seeking Constitutional Redress by way of Originating Summons as the words used are '*May be made*' which is not a mandatory or exclusive method. It may be the preferred or widely used way to institute Constitutional Redress, but there can be more than one method, and courts should not reject an application for Constitutional Redress on technicalities such as this, as they are of paramount importance for the subjects. In my mind the Rule 3(1) of the High Court (Constitutional Redress) Rules 2015 is flexible enough to allow this application for Constitutional Redress by way of Originating Summons.
11. The counsel said that Rule 3(1) of the High Court (Constitutional Redress) Rules 2015 has to be read with Rule 4(1) of the High Court (Constitutional Redress) Rules 2015 where words '*shall not be made without at least 3 clear days' previous notice to the parties*' used. Hence contented that said provision is mandatory. I agree with that submission but the said mandatory provision applies only to the time period and not the method. In the Rule 4(1) of the High Court (Constitutional Redress) Rules 2015 is not in conflict with Rule 3(1) of

the High Court (Constitutional Redress) Rules 2015 and it in no way restricts the Rule 3(1) of the High Court (Constitutional Redress) Rules 2015. It is always preferred way that interpretation will not allow conflicts, instead it would be in harmony with other provisions.

12. So I reject the said objection. It should also be noted if this application rejected on technicality, since 60 day time period for Constitutional Redress had lapsed the Applicant is needed to establish 'exceptional circumstances' to seek Constitutional Redress. This will make this application, lacking *locus standi* until exceptional circumstances are established. Under the present condition there is no such threshold as the Applicants have sought redress within stipulated time.
13. The counsel for the Respondent raised another preliminary objection that the Applicants had not complied with Rule 4(3) of the High Court (Constitutional Redress) Rules 2015. Again I am not inclined to reject this application on such a technicality, considering the circumstances of the case. The Originating Summons for Constitutional Redress filed by the Applicants had not included 'Concisely the nature of the claim' in terms of Rule 4(3)(a) of the High Court (Constitutional Redress) Rules 2015. The Applicants could have included such a statement in the Originating Summons, instead they had included a detailed description of the claim in the affidavit in support of their application, so there was no prejudice to the Respondent and he had replied to the said affidavit, too. There was no misapprehension of the claim or an element of surprise, as 2nd Respondent had on 20th April, 2017 had indicated that he had violated Section 39(1) and Section 39(2) of the Constitution and also Section 41 of the Constitution and if the 1st Applicant was not restored to the possession, it would seek legal action. The present action was filed because of Respondent's failure to comply with that request.
14. The Applicants in their Originating Summons had indicated all the reliefs sought including the claim for damages. They are as follow;

1. *That the 1st Applicant be allowed to return and enter to her flat located at Lot 22, Flat 4, Kings Road, Nakasi, Suva, Fiji Islands.*

2. *That the time for the service of the summons and the supporting affidavit to be abridged to two days by the High Court Civil Registry as this is an urgent matter.*
 3. *That the Respondent be stopped from further interfering, preventing or in any way hinders the use and access of the flat located at Lot 22, Flat 4, Kings Road, Nakasi, Suva, Fiji Islands by the 1st applicant from the flat located at Lot 22, Flat 4, Kings Road, Nakasi, Suva, Fiji Islands.*
 4. *That the Respondent pay damages to the 1st Applicant for the humiliation, Injury to feelings and the inhumane treatment as a result of the Respondent's actions in preventing the 1st Applicant from using their flat since April 7, 2017 which is located at Lot 22, Flat 4, Kings Road, Nakasi, Suva, Fiji Islands.*
 5. *That the costs for this matter to be paid by the Respondent.'*
15. The 2nd Applicant is constitutionally empowered to investigate, take appropriate steps including to seek constitutional redress from court against infringements of Human Rights contained in the Bill of Rights in the Constitution in terms of Section 45(4)(e) of the Constitution. In the circumstances this application cannot be considered in manner of watertight compartment, but all the previous correspondences annexed to application and conduct of the parties are relevant to this application.
 16. As a first measure, the 2nd Applicant had informed the Respondent that he had violated Sections 39(1) and 39(2) and 41(1) and indicated that if it is not solved within 7 days that legal redress would be sought. (See Annexed UMM4 of the affidavit in support).
 17. The Respondent had replied to said letter by his letters dated 20th and 21st April, 2017 which are annexed as UMM5. What can be deduced from the said annexed are
 - a. 1st Applicant is a tenant of the Respondent.
 - b. She had arrears of rent amounting to \$2,200 on or around 6th April, 2017.
 - c. Under Distress of Rent the Respondent's '*caretaker had closed the flat*'.
 - d. Respondent admitted that there was a child on the premises, but stated that the child was outside the house, when it was locked by the caretaker for purported redress.

- e. Notice of Distress was pasted on the premises on or about the time of exercise of the distress in terms of Section 3(1) of the Distress for Rent Act.

18. Section 29 of the Constitution state as follows

“Freedom from arbitrary evictions

39(1) Every person has the right to freedom from arbitrary evictions from his or home or to have his or her home demolished, without an order of a court made after considering all the relevant circumstances.

(2) No law may permit arbitrary evictions.”

19. The important issue before the court is whether there was ‘arbitrary eviction’. From the admitted facts by the Respondent his caretaker had locked the premises in pursuant to alleged exercise of distress of rent. (See annexed UMM5 to the affidavit in support which are admitted by paragraph 14 of the affidavit in opposition). In order to determine breach of above provision in the constitution, it is imperative that there should be

- i. An eviction of a person from home; and,
- ii. It was done arbitrary manner.

Eviction

20. The Respondent had admitted that the premises was locked by the caretaker after pasting Notice of Distress for Rent and had also admitted that there was a child, but stated that child was already outside the house which was locked by the caretaker on the instructions of the Respondent.

21. When a house is locked from outside, without concurrence of the occupants, it is an eviction of the occupants. Whether it is an exercise of Distress of Rent or not, such an act of locking a house while the occupants are away would lead to eviction.

22. It should also be noted that distress can only be exercised by the Landlord or a bailiff and not any ‘caretaker’ authorized by the Respondent.

23. It should also be noted that no where in the Distress for Rent Act authorizes any person to lock a house so as to effect eviction of the occupants.

24. There is clearly an eviction of the 1st Applicant her 5 children, including the child who was in the premises at that time, her husband and all other occupants of that house occurred on 6th April, 2017 on or around 6 pm.
25. The time of the eviction is not material at this juncture as there was no allegation that the distress was exercised after sunset, but this time of eviction becomes relevant later as regard to the violation of Section 41 of the Constitution, as well.

Arbitrary

26. Since there is an eviction of all the occupants by locking the home, next issue is whether it was done arbitrarily manner. The legal definition of 'arbitrary' is stated as follows in the 2017 Fiji Court of Appeal matter of *Devo v Fiji Independent Commission Against Corruption* [2017] FJCA 11. AAU12.2012:

"In law, an arbitrary act is an unreasonable act, a despotic act, act which is not guided by rules and regulations but by the wishes of the accused. Let me give an example. In a government, he accounts officers are supposed to follow financial rules and regulations when it comes to raising payments on behalf of the government. If one accounts officer decided to ignore the financial rules and regulations when raising payments that would be an arbitrary act. That is because the act is guided by the wishes of the accounts officer and not by proper financial regulations" (pg 137 of RHC)"

27. The contention of the Respondent was that the eviction was lawful as it was done in the exercise of distress.
28. At the outset it should be borne in mind there is no provision contained in the Distress for Rent Act that empowers a landlord or a bailiff to lock the house, so as to evict them from entering home or depriving them of the occupation. When the distress is exercised. So, the contention of the eviction through distress is not tenable as the home was locked by the 'caretaker' after pasting Notice of Distress. (See annexed UMM5).

29. It should be noted that above facts are slightly varied in the affidavit in opposition, where Respondent stated that premises was locked on 11th April, 2017. Irrespective of the date of locking, if the locking was done in pursuant to exercise of alleged distress for rent is not an act allowed in terms of Distress for Rent Act, hence it was illegal.
30. The Respondent had admitted that 1st Applicant was a tenant of his premises which was locked for arrears of rent. The 1st Applicant had admitted entering into a lease agreement for one year from May, 2015. This had not been renewed and had lapsed. So there was no agreement for lease, but tenancy continued and monthly rentals were paid. In such an instance termination of tenancy is possible only after giving notice as stated in Section 89 of the Property Act.

Section 89 of the Property Act states as follows

89.-(1) No tenancy from year to year is implied by payment of rent.

(2) In the absence of express agreement between the parties, a tenancy of no fixed duration in respect of which the rent is payable weekly, monthly, yearly or for any other recurring period may be terminated by either party giving to the other written notice as follows:-

(a) where the rent is payable yearly or for any recurring period exceeding one year, at least six months' notice expiring at the end of any year of the tenancy; or

(b) where the rent is payable for any recurring period of less than one year, notice for at least a period equal to one rent period under the tenancy and expiring at any time, whether at the end of a rent period or not.

31. There was no notice of termination before the eviction.
32. Section 3 of the Distress for Rent states as follows;

'Distress to be levied by certified bailiff

3.-(1) From and after the commencement of this Act no person, other than a landlord in person, shall act as a bailiff to levy any distress for rent unless he shall be authorised to act as a bailiff by a certificate in writing to that effect, and such certificate may be general or apply to a particular distress

or distresses, and may be granted at any time in such manner as may be prescribed by rules made under the provisions of this Act.

(2) Any resident magistrate may exercise the power of granting certificates in cases in which such magistrates may be authorised to do so by rules made under the provisions of this Act.

(3) If any person not holding a certificate under this section shall levy a distress contrary to the provisions of this section or if any bailiff holding such a certificate shall levy a distress otherwise than in accordance with this Act and any rules made thereunder, the person so levying shall be guilty of an offence, and shall be liable, on conviction, to a penalty not exceeding forty dollars or to imprisonment for any term not exceeding three months, in addition to any other liability which he may have incurred by his proceedings.

(4) Any person who shall authorise any person not holding a certificate under this section to levy a distress contrary to the provisions of this Act shall be guilty of an offence, and shall be liable, on conviction, to a fine not exceeding forty dollars in addition to any other liability which he may have incurred by his proceedings.

(5) A certificate granted to a bailiff under this section may at any time for good reason be cancelled or declared void by a resident magistrate.'

33. Above provision grants no right to evict tenants.
34. Without prejudice to what was stated above, the Respondent also state that he had exercised re-entry under the *Property Law Act (Cap 130), Distress for Rent Act (Cap 36)* and the Tenancy agreement between the Respondent and the 1st Applicant to re-enter the premises in the event of the default of rent payment.
35. I do not need to reiterate the clauses contained in the lapsed agreement that allowed re-entry as it cannot be enforced as there was no evidence of extension of the same for any period beyond initial one year, though monthly rentals were accepted beyond its time period.

36. Section 91(b) and (c) of the Property Law Act (Cap 131) states as follows

Powers in lessor

91. *In every lease of land there shall be implied the following powers in the lessor, his personal representatives and transferees:*

(b) that whenever the rent reserved is in arrear he or they may levy the same by distress:

(c) that whenever the rent or any part thereof, whether legally demanded or not, is in arrear for the space of one month, or whenever the lessee has failed to perform or observe any of the covenants, conditions or stipulation contained or implied in the lease, and on the part of the lessee to be performed or observed, he or they may re-enter upon the demised premises (or any part thereof in the name of the whole) and thereby determined the estate of the lessee, his personal representatives, transferees or assigns, therein but without releasing him or them from liability in respect of the breach or non-observance of any such covenant, condition or stipulation.

37. Since there was no valid agreement for lease between tenant and landlord above section cannot be resorted by the Respondent.

38. It pertinent to note that Section 39(1) of the Constitution restricted to evictions from a home and re-entry under Property Law is a general provision. Home is more important in the context of human dignity as well as to human rights. The Hon Justice Kevin Bell, Justice of the Supreme Court of Victoria and former President of the Victorian Civil and Administrative Tribunal in an article to Monash University Law Review(2013, March) stated as follows,¹

'The idea of home has profound social and cultural importance. In recent years, it has attracted substantial scholarly attention in the social and legal sciences. A number of books and journal articles have been published which

¹Bell, Kevin. "Protecting public housing tenants in Australia from forced eviction: the fundamental importance of the human right to adequate housing and home." *Monash University Law Review*, Mar. 2013, p. 1+. *Academic OneFile*, <http://go.galegroup.com.vlib.interchange.at/ps/i.do?p=AONE&sw=w&u=wash89460&v=2.1&id=GALE%7CA349306934&it=r&asid=bf484185a948e320c0bf182b28ce50ef>. Accessed 31 May 2017.

have carefully analyzed the role of the home in promoting individual, family and community wellbeing. Influential scholars have emphasized the importance of the home to our sense of 'personhood' and 'identity', that is, having identity and standing in society as someone of individual worth. Existing legal categories and principles have been criticized for failing fully to recognise and protect home based interests. Residential tenancy law is one of those categories'² (references deleted)

39. It should also be noted that Section 39(1) of the Constitution deals with evictions from home and not all the properties (e.g commercial properties, evictions from land that does not involve a home). So Section 91 of Property Law can be interpreted in more restrictive manner so that Bill of Rights are protected as stated in Section 7(3) of the Constitution.
40. The manner in which re-entry was exercised was arbitrary as it was exercised in degrading and in human manner total disregard to vulnerable groups such as children, elderly as well as women. Such an act was done when a child was alone also a factor to be considered for arbitrary eviction. It was an embarrassing situation for a parent to find alternate accommodation in the night and also on a weekend.
41. The manner in which the said right to re-entry was exercised was arbitrary considering the time of the entry and also that there was only a child at home. Evicting a child from a house when that child was alone in the house around 5-6 pm itself was an inhuman and deplorable act that would make the re-entry as well as exercise of purported distress unlawful. Leaving a child without any supervision of an adult around 5-6 pm after even without informing the adults, was a total disregard to safety of the child and this a violation of Section 41(1)(d) Constitution and also failure to consider interest of child was also a violation Section 41(2) of the Constitution.
42. The Respondent further submitted that Section 39 of the Constitution is not an absolute right. Chapter 2, Section 6(5) and 7(2) - (5) of the Constitution provides the manner in which the Bill of Rights is to be read and applied and had reproduced the said provisions

² ibid

in the written submissions. Section 6 and 7 of the Constitution is reproduced in full for better understanding of them. They are as follows;

CHAPTER 2 – BILL OF RIGHTS

Application

6.(1) This Chapter binds the legislative, executive and judicial branches of government at all levels, and every person performing the functions of any public office.

(2) The State and every person holding public office must respect, protect, promote and fulfil the rights and freedoms recognised in this Chapter.

(3) A provision of this Chapter binds a natural or legal person, taking into account-

(a) the nature of the right or freedom recognised in that provision; and

(b) the nature of any restraint or duty imposed by that provision.

(4) A legal person has the rights and freedoms recognised in this Chapter, to the extent required by the nature of the right or freedom, and the nature of the particular legal person.

(5) The rights and freedoms set out in this Chapter apply according to their tenor and may be limited by-

(a) limitations expressly prescribed, authorised or permitted (whether by or under a written law) in relation to a particular right or freedom in this Chapter;

(b) limitations prescribed or set out in, or authorised or permitted by, other provisions of this Constitution; or

(c) limitations which are not expressly set out or authorised (whether by or under a written law) in relation to a particular right or freedom in this Chapter, but which are necessary and are prescribed by a law or provided under a law or authorised or permitted by a law or by actions taken under the authority of a law.

(6) Subject to the provisions of this Constitution, this Chapter applies to all laws in force at the commencement of this Constitution.

(7) Subject to the provisions of this Constitution, laws made, and administrative and judicial actions taken, after the commencement of this Constitution, are subject to the provisions of this Chapter.

(8) To the extent that it is capable of doing so, this Chapter extends to things done or actions taken outside Fiji.

Interpretation of this Chapter

7.(1) In addition to complying with section 3, when interpreting and applying this Chapter, a court, tribunal or other authority-

*(a) must promote the values that underlie a democratic society based on **human dignity, equality and freedom**; and*

*(b) may, **if relevant, consider international law, applicable to the protection of the rights and freedoms in this Chapter.***

(2) This Chapter does not deny, or prevent the recognition of, any other right or freedom recognised or conferred by common law or written law, except to the extent that it is inconsistent with this Chapter.

*(3) A law that limits a right or freedom set out in this Chapter is not invalid solely because the law exceeds the limits imposed by this Chapter **if the law is reasonably capable of a more restricted interpretation that does not exceed those limits, and in that case, the law must be construed in accordance with the more restricted interpretation.***

(4) When deciding any matter according to common law, a court must apply and, where necessary, develop common law in a manner that respects the rights and freedoms recognised in this Chapter.

*(5) In considering the application of this Chapter to any particular law, a court must **interpret this Chapter contextually**, having regard to the content and consequences of the law, including its impact upon **individuals or groups of individuals.***

43. According to Section 7(5) in the interpretation of the Sections 39 (1) and (2) and 41 I need to consider the impact of it on individuals or groups of individuals specially vulnerable groups such as women, children and also elderly people.

44. In this case the household comprised women, including one elderly parents of the 1st Applicant, 5 children which included one child who was alone in the premises when the

eviction was executed late in the evening at dusk. So contextual interpretation favours that these vulnerable groups be protected and their human dignity be protected by law.

45. Another factor to be considered in the interpretation of the Chapter 2 of the Constitution is the International Law.

'The United Nations has a committee system operating under both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. The committees regularly issue General Comments about the human rights in the covenants. These comments are not binding but are persuasively authoritative. General Comment No 4 of the Committee on Economic, Social and Cultural Rights contains a detailed analysis of the scope of the human right to housing in art 11 of the ICESCR. In relation to security of tenure, the Comment recognises the variety of forms which that tenure may take, then goes on to state this fundamental principle:

Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection ... (footnotes deleted)³

46. So, the eviction of the 1st Applicant and her family from the premises located at Flat 4, Kings Road, Nakasi was arbitrary and this was a violation of their constitutional right guaranteed under Section 39(1) of the Constitution.
47. Section 41 of the Constitution state as follows

Rights of children

41.(1) Every child has the right-

(a) to be registered at or soon after birth, and to have a name and nationality;

(b) to basic nutrition, clothing, shelter, sanitation and health care;

(c) to family care, protection and guidance, which includes the equal responsibility of the child's parents to provide for the child-

³ *ibid*

(i) whether or not the parents are, or have ever been, married to each other; and
(ii) whether or not the parents are living together, have lived together, or are separated;

(d) to be protected from abuse, neglect, harmful cultural practices, any form of violence, inhumane treatment and punishment, and hazardous or exploitative labour; and

(e) not to be detained, except as a measure of last resort, and when detained, to be held-

(i) only for such period of time as is necessary; and
(ii) separate from adults, and in conditions that take account of the child's sex and age.

(2) The best interests of a child are the primary consideration in every matter concerning the child.

48. It is paramount importance that Child Rights are guaranteed and they are not subjected to inhuman and degrading treatment. In this case the child was alone in the house expecting a parent to return as others have gone for a funeral. The Respondent's caretaker had come to the house around 5-6 pm in the evening on a weekend and had locked that child out and left. This is not only inhuman and degrading but also exposed the child to danger as the child was left outside without any form of supervision. Father of the child had found that the child was loitering and inquired and came to know about the incident. Even after execution of the purported re-entry and or distress there was no concern about the safety of the child by informing an adult, by the caretaker and or Respondent.
47. It should also be noted that physiological impact from such an incident cannot be measured and may be irreversible. The child would have been mentally tormented by the actions of the Respondent. So there is a violation of Section 41(1)(d) and (2) of the Constitution.
48. The Applicants have sought damages for the alleged infringements. Neither party had submitted any cases in this regard. The counsel for the Applicant sought a damage of at least \$50,000 on the basis that Constitutional Redress matters are tried in High Court, and

also that these violations should be taken seriously. They also seek deterrent effect. The South African case that is mentioned in the written submission cannot be applied to present context as facts of that case are different.

49. Considering the circumstances of the case there are aggravating factors. There was no basis to exercise re-entry or distress. No action was taken to terminate tenancy before eviction. In the guise of purported Distress for Rent the Respondent had evicted an entire family including 5 children. The eviction was executed on or around 5-6 pm while only one child was at home while others in the household were attending a funeral. So considering the mental trauma to the parent in front of child/children of such an incident is enormous. The Respondent had not heeded to the notices of the 2nd Respondent and even interim orders for repossession and staying of purported distress was not fully implemented. The actual deprivation of the applicant's home was more than 50 days. While the distress is being purportedly exercised for arrears, a claim was also made to the Small Claims Tribunal for the 5 identified sum, at the time of eviction. The fact that eviction occurred on Friday evening is also an aggravating factor.
50. Considering all the circumstances of case I would award a compensation of \$25,000 to the 1st Applicant. The Respondent is granted 28 days to pay the said sum to the 1st Applicant

FINAL ORDERS

- a. The 1st Applicant is granted possession of premises at Lot 22, Flat 4, Kings Road, Nakasi until she and her family is evicted by an order of court.
- b. The Respondent is prevented from interfering, preventing in any way hindering the safe enjoyment of the said premises in pursuant to above order.
- c. The said orders are granted without prejudice to the Respondent's right to institute an action for eviction.
- d. The purported Distress for Rent is stayed permanently.
- e. Respondent to pay a compensation of \$25,000 to the 1st Applicant within 28 days.
- f. No order as to costs.

Dated at Suva this 2nd day of June, 2017.



Deepthi Amaratunga
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Justice Deepthi Amaratunga
High Court, Suva