

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

Civil Appeal No. HBA 1 of 2018

[MC Appeal No.1/17-SCT 122/16]

BETWEEN : **DIAMOND ENGINEERING (FIJI) LTD**

APPELLANT/ORIGINAL RESPONDENT

AND : **RUPESH REDDY**

RESPONDENT/ORIGINAL CLAIMANT

Appearances : Appellant represented by Mr M. R. Khan

: Appears in-person

Date of Hearing : 6 February 2018

Date of Oral Judgment : 6 February 2018

Date of Written Reasons : 20 February 2018

J U D G M E N T

Introduction

[01] On 6 February 2018, I pronounced my judgment and informed the parties that I will deliver my written reasons at a later date. These are my written reasons for the judgment pronounced on 6 February 2018.

[02] This is an appeal against a judgment of the Magistrate's Court sitting in Ba delivered on 16 November 2017 confirming the order of Small Claims Tribunal (SCT) dated 22 November 2016. The SCT ordered that the respondent (appellant)

pay a sum of \$4285.45, which includes travelling costs of \$160.00 SCT filing fee of \$5.45 and bailiff fee of \$120.00.

- [03] At the appeal hearing, both parties, appearing in person, orally argued the appeal. They did not file any written submissions.

Background

- [04] The background facts briefly are as follows: Rupesh Reddy (*'the respondent'* in this appeal) filed a claim in the SCT against Diamond Engineering (Fiji) Ltd, (*'the appellant'* in this appeal) claiming a sum of \$4,000. The respondent complained that the appellant had damaged his engine head and heater for his truck BB 296, which he took to the appellant for repair. The appellant by letter dated 14 June 2016, wrote a letter to the SCT, denied the claim and stated that, among other things, the claimant's (respondent's) head (engine head) was not damaged in their workshop. The Referee, after the hearing, ordered that the appellant pays a sum of \$4,285.45 to the respondent on or before 30 December 2016. The appellant appealed the SCT's decision to the Magistrate's Court. The Magistrate's Court dismissed the appeal confirming the SCT's order. The appellant, being aggrieved by the decision of the SCT, appeals to this court.

Grounds of Appeal

- [05] The appellant urged the following grounds of appeal:
1. *Information at hand suggests that the Respondent/Claimant is not the rightful owner of the property in question; therefore the Respondent/Claimant has no Locus standi to institute this proceeding.*

2. *Constitutional rights denied to the Appellant/Respondent when one of the respondent's witness was not given the opportunity to give evidence in the Small Claims Tribunal.*
3. *Despite a Notice of Re-Hearing being served on the Appellant/Respondent, the Small Claims Tribunal proceeded with a continuation of hearing despite objection by the appellant/respondent.*
4. *In the Small Claims Tribunal, a time limit of one hour was placed by the referee, on the cross examination of the respondent/Claimant, thus denying the appellant/respondent the opportunity to fully cross examine the Respondent/claimant, in breach of natural justice.*
5. *The tribunal in considering this case wrongly relied on a quotation of \$4,000.00 (Four Thousand Dollars) dated the 27th day of June, 2016, from Ba Motor Parts Ltd, which was issued to one Krishna, who is not a party to this action.*
6. *The Tribunal's decision is biased and unfair considering all aspects of the case as its decision cannot be supported by evidence adduced during the hearing.*

The Decision of the Court below

[06] The Learned Magistrate found that:-

"The learned referee made a decision on the basis of the claim made by the claimant and response filed by the respondent. Both parties were present for the hearing and the learned referee heard their respective case and also heard the respective witnesses who gave unsworn evidence. The witnesses were also cross examined before the learned referee made his decision."

[07] On the above findings, the learned Magistrate dismissed the appellant's appeal. He concluded that:

"As I see it, the appellant had failed to establish that the proceedings were conducted in the SCT in a way that was unfair and prejudicial and it affected the outcome of the proceedings."

The Arguments

[08] At the hearing before me, the appellant argued that:

1. Small Claims Tribunal struck out his claim. After he was given a chance for re-hearing. We were not given an opportunity to challenge the re-hearing.
2. One of our main witnesses – Mr Rajeshwar Mani, was not given the opportunity to give evidence.
3. He took engine head after repair without complaining and paid our charges \$40.00. We are not responsible for the damage.
4. He was hiding something in the Small Claims Tribunal. He did not show the purchase receipt of \$1,300.00. He is now showing it in this court. He only showed a quotation in the SCT.
5. His claim may be dismissed and cost ordered.

[09] The respondent did not advance any significant argument. He maintained that the SCT's decision is correct.

The Issue

[10] The main issue before me, as an appellate court, is whether the referee conducted the proceedings in a manner which was unfair to the appellant and prejudicially affected the result of the proceedings.

The Law

[11] The appeal stems from a decision of the SCT. Therefore, the provisions of the SCT Act relating to appeal and rehearing are applicable to this appeal.

[12] SCT 32 dealing with rehearing provides as follows:

“Rehearing

32.-(1) Subject to subsection (2), a tribunal may, upon the application of a party to any proceedings, order the rehearing of a claim, to be had upon such terms as it thinks fit.

(2) A rehearing may be ordered under subsection (1) only if an order has been made under section 15(6) or section 31(2) and, in the latter case, shall be limited to rehearing the enforcement proceedings taken under that section.

(3) Every application for a rehearing shall be in Form 5 of Schedule 1, shall be lodged together with the fee prescribed in Schedule 2 and shall be made within 14 days after the tribunal's order and shall be served upon the other parties to the proceedings. (Emphasis provided)

4) When a rehearing is ordered-

(a) the Registrar shall notify all parties to the proceedings of the making of the order and of the time and place appointed for the rehearing; and

(b) the order of the tribunal made upon the first hearing shall cease to have effect.

(5) Notwithstanding subsection (4)(b), if the party on whose application a rehearing is ordered does not appear at the time and place for the rehearing or at any time and place to which the rehearing is adjourned, the tribunal may, without rehearing or further rehearing the claim direct that the original order be restored to full force and effect.

(6) This Act shall apply to a rehearing in all respects as it applies to an original hearing."

[13] An appeal against an order made by the SCT lies on two grounds. SCT 33 states that:

"Appeals

33.-(1) Any party to proceedings before a tribunal may appeal against an order made by the tribunal under section 15(6) or section 31(2) on the grounds that:

(a) the proceedings were conducted by the Referee in a manner which was unfair to the appellant and prejudicially affected the result of the proceedings; or

(b) the Tribunal exceeded its jurisdiction." [Emphasis provided]

[14] SCT 35 dealing with the power of the court on appeal stipulates that:

"Powers of court on appeal

35.-(1) On the hearing of the appeal a Judge or Resident Magistrate may-

(a) quash the order of the Tribunal and order a rehearing of the claim in the tribunal on such terms as he or she thinks fit;

(b) if the appeal is heard by a Resident Magistrate, quash the order and invoke his authority under section 4 to exercise the jurisdiction of a Tribunal;

(c) quash the order and transfer the proceedings to a Magistrates' Court for hearing; or

(d) dismiss the appeal.

(2) in ordering a rehearing under subsection 1 (a), the Judge or Resident Magistrate may give to the tribunal such directions as he or she thinks fit as to the conduct of the rehearing.

(3) An appeal under this section shall be heard by a Judge or Resident Magistrate in chambers and, subject to this Act and any rules made hereunder, the procedure thereat shall be such as he may determine."

[15] SCT 26 states that:

"Evidence

26.-(1) Evidence tendered to a Tribunal by or on behalf of a party to any proceedings need not be given on oath, but the Tribunal may at any stage of the proceedings require that such evidence, or any specific part thereof, be given on oath whether orally or in writing. (Emphasis provided)

(2) A tribunal may, on its own initiative, seek and receive such other evidence and make such other investigations and inquiries as it thinks fit. All evidence and information so received or ascertained shall be disclosed to every party.

(3) A tribunal may receive and take into account any relevant evidence or information, notwithstanding the provisions of the Evidence Act and whether or not the same would normally be admissible in a Court of Law."

The Application of the Law to the Facts

[16] The appellant had preferred this appeal against the judgment of the learned Magistrate (the Magistrate). The appellant had appealed an order made by the SCT to the Magistrate. The Magistrate heard the appeal and dismissed the same on the basis that the appellant had failed to establish that the proceedings were conducted in the SCT in a way that was unfair and prejudicially affected the outcome of the proceedings.

[17] The respondent had lodged a claim in the SCT and claimed against the appellant a sum \$4,000.00 for damaging the engine head which the respondent took to the

appellant's workshop for repairs. The appellant had denied damaging the engine head and sought dismissal of the claim made by the respondent. The referee heard the matter, recorded the unsworn evidence of the witness, and made an order that the appellant pays a sum of \$4,285.45, which includes filing fees and bailiff fee. In arriving at his decision, the referee appears to have placed too much weight and relied on a quotation of \$4,000.00 dated 7 June 2016 from Ba Motor Parts Ltd produced by the respondent, which was issued to one Krishna, who is not a party to the proceedings in the SCT.

- [18] The appellant had challenged the order of the SCT on six grounds. I would consider those grounds together.
- [19] The appellant's main complaint is that the referee conducted the proceedings in a manner which was unfair to the appellant and prejudicially affected the result of the proceedings.
- [20] On 26 July 2016, the first hearing day the referee recorded the unsworn statement of Amit Kumar (the respondent's witness), a truck driver and partime mechanic. He was cross-examined by the appellant. He then recorded the unsworn statement of Ronesh Kumar Palani, a welder working for the appellant (a witness called by the appellant) and he was cross-examined by the respondent. Then the matter was adjourned to **23 September 2016** for further hearing. At the same time, the tribunal informed the Respondent's Rep (appellant here) that he has to produce Rajeshwar Mani the supervisor and Bobby whom the claimant (respondent here) stated was the mechanic who did the job.
- [21] On 23 September 2016 when the matter was called for further hearing, there was no appearance by or for the respondent. The referee struck out the claim, for the claimant (the respondent) failed to appear. The tribunal's journal entry of that date reads:

*"Date : 23/09/2016
Before: E. Antonio*

*Time: 9.00 am
Clerk:*

Claimant : Absent
Respondent : Present

Case called at 9.00 am. The Claimant failed to appear. No information received. The Respondent stated his witness the Supervisor; Rajeshwar Mani is present but Bobby has resigned last week.

ORDER

THAT Claimant failed to appear
THAT this claim is struck out.

Signed
Mr E. Antonio
Date: 23/09/2016"

Re-hearing

- [22] Subsequently, the referee listed the claim for rehearing (continuation of the hearing) on 01 November 2016. The tribunal minutes of 1 November 2016 records that:

"Date : 1/11/2016
Before : Mr E. Antonio
Time: 9.00 am
Clerk : Devendra K

Claimant : Absent
Respondent : Present

This is a Re-hearing case which the Applicant applied and was approved. The Referee's order dated 23/09/2016 is self-explanatory.

Tribunal noted that Notice of Re-Hearing is still not served by the Claimant on the Respondent. Note: Both parties turned up at 9.00 am. The Respondent's rep informed the Tribunal that his witness Palani who worked on the machine would do as the supervisor is busy to attend."

- [23] At the rehearing on 1 November 2016, the appellant cross-examined the respondent (claimant) and Amit Kumar, a witness called by the respondent. First, the respondent was cross-examined 9.00 am to 10.00 am. Secondly, witness (Amit Kumar) was cross-examined

by the appellant at 12 noon. At 10.00 am, the tribunal advised the appellant that 1 hour which he has taken and they can wait until the four other cases are called. Mr Amit was cross-examined at 12 noon. The tribunal then adjourned the matter for ruling on 22 November 2016. The tribunal made the impugned order on 22 November 2016. The order reads as follows:

"ORDER

1. THAT *the respondent; Diamond Engineering (Shaheed) to pay the Claimant; Rupesh Reddy the sum of \$4,000.00 (four thousand dollars) being the cost of one engine head to replace the one being damaged in September 2016 when given for repairs by specialist Engineers. In addition the running travelling cost of \$160.00 (one hundred and sixty dollars) the SCT filing fees of \$5.45, Bailiff fees \$120.00, all to the total amount of \$4,285.45 (four thousand two hundred and eighty five dollars forty five cents).*
2. THAT *the Respondent to pay the full amount of \$4,285.45 on or before 30/12/2016.*
3. THAT *payments to be made at the Ba Magistrates Court, Registry.*
4. THAT *failure to comply with this order further Court action will be taken.*

Signed

Mr E. Antonio

Date: 22/11/2016"

- [24] The appellant submits that they were not given an opportunity to challenge the application for re-hearing made by the respondent.
- [25] The tribunal struck out the respondent's claim on 23 September 2016, when the respondent had failed to appear to face the further hearing. On that day, the appellant was ready for further hearing with their material witness. The respondent had filed an application for re-hearing the very day on which the claim was struck out. The referee seems to have allowed that application over the counter without serving and giving an opportunity to the appellant to respond.
- [26] The order for re-hearing has been made against SCT 32 (3). That section requires that the application for re-hearing shall be made within 14 days after the Tribunal's order and shall

be served upon the other parties to the proceedings. The referee had failed to comply with the mandatory provisions of SCT 32 (3).

[27] The appellant also complains that the respondent did not show the purchase receipt of \$1,300.00 which he is now showing in this court and that he had only shown a quotation in the SCT.

[28] The referee had considered a quotation for \$4,000 given to a Mr Krishna who was not a party to the proceedings in the tribunal. The referee had failed to appreciate the fact that the quotation was given to a third party and not to the respondent. Moreover, the referee had also failed to ask for the purchase invoice. In the appeal hearing before me, the respondent showed me a purchase receipt for \$1,300. The respondent did not produce it in the tribunal hearing. If the referee had seen the purchase invoice, he would have arrived at a different decision.

Unsworn evidence

[29] Evidence tendered to a Tribunal by or on behalf of a party to any proceedings need not be given on oath, but the Tribunal may at any stage of the proceedings require that such evidence, or any specific part thereof, be given on oath whether orally or in writing (See SCT 26).

[30] The tribunal did record the respondent's evidence-in-chief but appellant was asked to cross-examine the respondent. There was two conflicting statement before the tribunal. The respondent stated that the appellant had damaged the engine head while repairing it. The appellant stated that the head was not damaged by them. In the circumstances, the tribunal could have called for the parties to give evidence on oath either orally or in writing pursuant to SCT 26).

Conclusion

- [31] The tribunal struck out the respondent's claim on the day the matter was fixed for further hearing (23 September 2016), for the respondent had failed to appear in the tribunal. On the same day, the respondent had filed an application for rehearing which the tribunal allowed over the counter (when the court clerk brought the application to the notice of the referee, the referee had written '*approved. Allocate a date please*' (See SCT file note of 30 September 2016). The application for rehearing has been allowed in contravention of SCT 26 (3) where it was not served on the appellant. Prior to allowing the rehearing application after striking out the claim, the tribunal ought to have served the application on the appellant and heard them in opposition. On the day when the tribunal struck out the claim, the appellant was ready with its material witness, whereas on the day of the rehearing the appellant's material witness was not present. The tribunal did not give an opportunity for the appellant to call its material witness. Moreover, the respondent did not tender the purchase invoice for \$1,300.00 which he produced in the appeal hearing. The tribunal appears to have accepted the quotation for \$4,000 issued to Mr Krishna (a third party) by Ba Motor Parts Ltd. The learned Magistrate had overlooked these procedural irregularities.
- [32] For the reasons set out above, I am satisfied that the learned referee had conducted the proceedings in a manner which was unfair to the appellant and prejudicially affected the result of the proceedings. Accordingly, I quash the order of the tribunal dated 22 November 2016, as well as the judgment of the Magistrate's Court, dated 16 November 2017. Further, acting under SCT 35 (1) (a), I order a rehearing of the claim in the tribunal but before another referee. I also order the respondent to pay \$300.00 for the cost of this appeal to the appellant.

The Final outcome

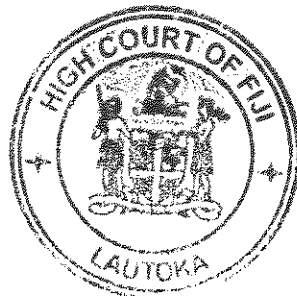
1. Appeal allowed.
2. Order of the Small Claims Tribunal dated 22 November 2016 and the judgment of the Magistrate's Court dated 16 November 2017 be quashed.
3. Rehearing of the claim in the tribunal before another referee ordered.
4. Respondent to pay \$300.00 as costs to the appellant within 28 days of this judgment.
5. The Deputy Registrar to transmit the record to Magistrate's Court, Ba and the Small Claims Tribunal.

M. H. Mohamed Ajmeer
20/2/18

.....

M. H. Mohamed Ajmeer

JUDGE



At Lautoka

20 February 2018