IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

HIGH COURT CIVIL APPEAL NO: HBA 02 of 2016

MAGISTRATE'S COURT SUVA CIVIL ACTION NO: 111 of 2014

BETWEEN : **HARI CHAND HANSRAJ**, of Wairiki, Taveuni in the Republic of Fiji Islands, Businessman.

APPELLANT

A N D : **BANK OF SOUTH PACIFIC LIMITED**, is a body incorporated under Part X of the Companies Act and having its registered office at Level 12, Suva Central Building, Corner of Renwick Road and Pratt Street, Suva, Fiji.

RESPONDENT

BEFORE : Justice Riyaz Hamza

COUNSEL : Mr. V. Prasad for the Appellant.
: Mr. A. Chand for the Respondent.

JUDGMENT

Introduction

[1] This is an Appeal against the Judgment made by the Learned Magistrate, Magistrate's Court of Suva, on 15 January 2016.

[2] The Appellant (the original Plaintiff), instituted proceedings against the Respondent (the original Defendant), in the Magistrate's Court of Suva, by way of a Writ of

Summons. As per the Statement of Claim attached thereto the Plaintiff, inter alia, stated as follows:

1. The Plaintiff is a businessman who resides in Wairiki, Taveuni.

2. The Defendant is a duly incorporated company.

3. The Plaintiff was at all times a customer of the Defendant, at their Taveuni Branch.

4. On 25 March 2013, at about 8.15 a.m., the Plaintiff called the Defendant's Taveuni Branch and requested if he could come to the Bank, before they opened at 9.30 a.m. for banking purposes, as he had a large sum of money to deposit.

5. The Plaintiff had spoken to one Namrata who had given him an appointment for 9.00 a.m.

6. The Plaintiff states that he was at the bank at about 9.00 a.m. that day. When he entered the bank, he was greeted by an I-Taukei man, who was the security guard contracted or employed by the bank. The I-Taukei security guard asked the Plaintiff the reasons for his visit and punched the Plaintiff on the left side of his face, without a reason.

7. Immediately after the incident, the Branch Manager approached the Plaintiff and asked what had happened. The Plaintiff had requested the Manager if he could call the Police, but the Manager had refused.

8. After the said incident, the Plaintiff had proceeded with his banking and visited the nearest Police Station and reported the matter.

9. The Plaintiff claims that the Defendants were negligent and had breached their duty of care owed to him.

10. Accordingly, the Plaintiff claimed damages and other reliefs against the Respondent.

[3] The Respondent (original Defendant) filed their Statement of Defence denying breaching the duty of care and also denying that an employee of the Defendant had assaulted the Plaintiff.

[4] By further defence, the Defendant stated that the Plaintiff had failed to identify whether the I-Taukei man was contracted to or employed by the Defendant or whether the Defendant should be liable in any manner whatsoever for the actions of an unidentified I-Taukei man.

[5] The Appellant (the original Plaintiff) filed a Reply to the Statement of Defence.

[6] During the Hearing, the Plaintiff gave evidence on his own behalf. He explained the incident which took place on 25 March 2013 and the relevant steps he took thereafter. The Certificate of the Court Proceedings (Taveuni Magistrates' Court Criminal Case No. 57 of 2013), depicting the sentence imposed on the security guard for the offence of Assault Causing Actual Bodily Harm, contrary to Section 275 of the Crimes Act No. 44 of 2009, was tendered to Court as Plaintiff's Exhibit P1. The Fiji Police Medical Examination Form confirming the medical examination conducted on the Appellant was tendered to Court as Plaintiff's Exhibit P2.

[7] On behalf of the Defendant, three witnesses gave evidence namely: Ms Marica Mara, the Branch Manager, BSP Taveuni Branch; Mr Alex Fong, Security Manager, BSP; and Mr Abishek Singh, Manager Services, BSP. The Security Services Agreement entered into between the Respondent Bank and the Security Company, City Security Services (Fiji) Limited, was tendered to Court as Defence Exhibit D1.

[8] At the conclusion of the Hearing, the Learned Magistrate held that the Appellant had failed to prove its claim and dismissed the action. He also ordered the Appellant to pay summarily assessed costs of $2000.00 to the Respondent.

[9] Aggrieved by the Judgment of the Learned Magistrate, the Appellant filed his Notice of Intention to Appeal, on 18 January 2016, and subsequently filed Grounds of Appeal, on 8 February 2016.

Grounds of Appeal

[10] The Grounds of Appeal the Appellant is relying on are the following:

1. The Learned Resident Magistrate erred in making a finding on the relationship between the security guard and the Defendant when no such allegation of fact was pleaded in the Statement of Defence which would have given rise to any such issue for determination.

2. The Learned Resident Magistrate erred in any event in making a finding that the security guard in the circumstances of the case was an independent contractor when the Defendant by virtue of its own agreements demonstrated that exact and precise control it had over the security guard by its specific instructions and degree of control exerted over the security guard and works to be carried out by him for the Defendant.

3. The Learned Resident Magistrate erred in law and fact in ordering the dismissal of the Plaintiff's action on the basis of findings made when such findings could not be made on the pleadings between the Plaintiff and Defendant and furthermore, such finding were erroneous in any event.

4. The Learned Trial Judge erred in law and fact in ordering the Plaintiff to pay costs in the sum of $2,000.00 to the Defendant when the Plaintiff's action was a proper and just claim for determination and which costs order in any event is excessive and unwarranted.

5. The Appellant reserves the right to amend the grounds herein and to add further grounds to this Appeal after receipt of the record.

First Ground of Appeal

[11] The first ground of appeal is that the Learned Resident Magistrate erred in making a finding on the relationship between the security guard and the Defendant when no

such allegation of fact was pleaded in the Statement of Defence which would have given rise to any such issue for determination.

[12] I have examined the pleadings filed in the Magistrate's Court. At paragraph 6 of the Statement of Defence (page 14 of the Copy Record) the Respondent has clearly stated as follows: *"That the Defendant says by way of further Defence, the Plaintiff has failed to identify whether the I-Taukei man was contracted to, or employed by, the Defendant or even determining whether the Defendant should be liable in any manner whatsoever as a result of the actions of the unidentified I-Taukei man or whether a Statement of Defence is necessitated as such. That at no point any employee employed by, or contracted to, the Defendant assaulted the Plaintiff."*

[13] In Reply to the above, the Appellant had responded at Paragraph 6 of the Reply to Statement of Defence (page 19 of the Copy Record) as follows: *"That as to the allegations contained in paragraph 6 of the said Defence, the Plaintiff makes no admissions of the allegations therein as he has no knowledge of the allegations made. The Plaintiff further pleads that at all material times the said security was an employee and/or servant and/agent of the Defendant Bank and was carrying out the works assigned to him by the Defendant Bank on the Defendant's instructions for Defendant's benefit."*

[14] From a reading of the above it is abundantly clear that the Respondent had in fact pleaded or alleged that the Appellant has failed to identify whether the I-Taukei man/security guard was contracted to or employed by the Respondent. To submit that the Respondent had failed to do so in their pleadings is clearly erroneous.

[15] Therefore, I rule that the first Ground of Appeal is without merit.

<u>Second Ground of Appeal</u>

[16] The second Ground of Appeal urged is that the Learned Resident Magistrate had erred in any event in making a finding that the security guard in the circumstances of the case was an independent contractor when the Defendant by virtue of its own agreements demonstrated that exact and precise control it had over the security guard

by its specific instructions and degree of control exerted over the security guard and works to be carried out by him for the Defendant.

[17] The Learned Magistrate has correctly stated at paragraph 10 of his Judgment that the main issue to be determined in the case is the relationship between the security guard and the Respondent bank. Since the Appellant is claiming damages from the Respondent, he has held that they have to first prove that the security officer was an employee of the Respondent bank.

[18] Clause 15 the Security Services Agreement (Defence Exhibit D1) deals with "Relationship of the Parties". Therein it is stated as follows:

> *15.1 Nothing in this Agreement shall be construed as constituting any of the parties as a partner, agent, employer or representative of the other. It being understood that the relationship of the parties to each other is as independent contractors to the other.*
>
> *15.2 Unless the Contractor has disclosed in writing to BSP that it is acting in a trustee capacity or on behalf of another party, the Contractor warrants that it is acting on its own behalf in entering into this Agreement.*

[19] Therefore, it is clear from the above that, the relationship between the Appellant and the Respondent is as independent contractors to the other.

[20] Notwithstanding this, the Learned Magistrate has said at paragraph 16 of his Judgment that the description in the agreement is not conclusive about the relationship between the parties, even though the Court can take that into consideration. This, in my opinion is a factually incorrect finding made by the Learned Magistrate.

[21] The Learned Magistrate has then gone on to discuss the tests to be applied to determine the employer-employee relationship. He has referred to the case of ***Laulea v. Tai-Fi Fisheries Ltd*** [2013] FJHC 400; HBC 34.2009 (12 August 2013); and to the

Supreme Court decision of ***Hassan v Transport Workers Union*** [2006] FJSC 11; CBV0006U.2005S (19 October 2006).

[22] The Learned Magistrate has then come to the following finding (see at paragraph 10 of his Judgment): "In this case my view is that the security officer is an unskilled person and the test to be applied is how much control the bank has on this person. There is no dispute that he was engaged by the City Service Security and was wearing their uniform. He was also paid by the company and not the Defendant. Also there is no evidence to show the bank was controlling his movement or his leave. Therefore, I find that the Plaintiff has failed to prove on preponderance of evidence that the bank was employing the security officer."

[23] In ***Ali v Patterson Brothers Shipping Co. Ltd*** [2015] FJCA 138; ABU0045.2012 (2 October 2015) the Fiji Court of Appeal dealt with the employer-employee relationship and stated as follows:

> *"[25] ……In **Yewens V Noakes (1880) 6 QBD 530,** a case cited by the Learned Trial Judge**,Bramwell LJ** stated:*
>
> *"A person was an employee, if his employer has the right to control not only what work he does <u>but the way in which that work is done</u>".*
>
> *In **Humberstone V Northern Timber Mills (1949) 79 CLR at 396** it was held:*
>
> *"The worker was an employee <u>if the worker was subject to the control and direction of the employer as to the manner in which it was done</u>"*
>
> *In **Federal Commissioner of Taxation V Walter Thompson (Aust) Pty Ltd [1944] HCA 23; (1994) 69 CLR 227 at 231** it was held: "The worker, it was said, was told <u>not only what to do, but also how to do it</u>".*
>
> *[26] In the case of **Mersey Docks & Harbour Board V Coggins & Griffith (Liverpool) Ltd, (1947) AC 1; 2 All ER345 (HL)** The board owned many mobile cranes, each handled by skilled operators engaged and paid by it. In the ordinary course of its business, it hired out a crane to the respondents, a stevedoring company, for use in unloading a ship. The power to dismiss remained with the board, but the contract provided that the driver was to be the employee of the hirers. While loading the cargo, the driver was under the immediate control of the hirers in the sense that hirers could tell him which boxes to load and where to place them, <u>but they could not tell</u>*

> *him how to manipulate the controls of the crane. Through the negligent handling of the crane by the driver while loading, a third party was injured. The House of Lords held that the board was solely liable……..This case illustrates the point that a worker remains the employee of the general or permanent employer even where another employer borrows the worker, although the jurisprudence on the liability of independent contractors has further developed since this decision."*

[24] Considering all the facts and circumstances of this case, I am of the opinion that the Learned Magistrate's finding on the above is correct. As such, the second Ground of Appeal is also without merit.

Third Ground of Appeal

[25] This Ground of Appeal is that the Learned Resident Magistrate erred in law and fact in ordering the dismissal of the Plaintiff's action on the basis of findings made when such findings could not be made on the pleadings between the Plaintiff and Defendant and furthermore, such finding were erroneous in any event.

[26] Having come to the conclusion that the Appellant had failed to prove that the Respondent bank was employing the security officer, the Learned Magistrate had then gone on to decide whether, in any event, the Respondent was liable for the actions of an independent contractor or his employees.

[27] In this regard, the Learned Magistrate had referred to the case of ***Tsang Hing Cheung v. Chan Po Ling Stella*** [2002] HKCFI 699; HCPI 869/2001 (20 November 2002).

[28] The Learned Magistrate has then reached the following conclusion (see at paragraph 20 of his Judgment): "Therefore, I find that the bank is not liable for the actions of the employees of independent contractor (Security Company) and also there is nothing to show that the bank has interfered with the work of the Security Company or selected the security officer who was involved in this incident. On that basis, also I do not find the Defendant has any liability for the action committed by the security officer of the company on that day."

[29] In ***Ali v Patterson Brothers Shipping Co. Ltd*** *(supra)* the Fiji Court of Appeal held thus:

> *"[30]* ***Clerk and Lindsell on Torts, 20th edition (2010) explains at P 6-56****:*
>
> ***"****If the employer has employed an independent contractor to do work on his behalf the general rule is that the employer is not responsible for any tort committed by the contractor in the course of the execution of the work and in this respect the employees of the contractor, whilst acting as such, stand in the same position as their employer, so that the employer of the contractor is not liable for the torts committed by the contractor's employees.****"***
>
> *However if the employer has negligently selected an incompetent contractor (as in the case of* ***Pinn V Rew (1916) 32 T.L.R. 451****) or has himself interfered with the manner of carrying out the work that damage results (as in the cases of* ***McLaughlin V Pryor (1842) 4 M.G. 48; Burgess V Gray [1845] EngR 768; (1845) 1 CB 578****), he will himself have committed a tort for which he can be held liable. Again in accordance with* ***Ellis V Sheffield Gas Consumer's Co (1853) 2 E. & B. 767****, if the employer has authorized or ratified the independent contractor's tort then, on normal principles, he will be jointly liable for that tort. It is clear that the facts of this case before us do not come within any of these exceptions.*
>
> *[31] If however the circumstances are such that the law imposes a strict duty upon the employer, then he cannot discharge his duty by delegating performance of the work in question to an independent contractor. In such circumstances if the duty is not fulfilled, the employer is liable even though the immediate cause of the damage is the contractor's wrongful act or omission. These are called 'Non-Delegable Duties', and may arise either by statute or at common law. A non-delegable duty, is a duty, not merely to take care as in the case of an ordinary duty to take reasonable care which can be discharged by the employment of a contractor reasonably supposed by the employer to be competent; but a strict duty to provide that care is taken so that if care is not taken, the duty is broken.* ***Per Langton J in the Pass of Ballater*** ***(1942) P 112 at 117****. I am of the view that this was not a case where there was a strict duty to provide that care is taken.*
>
> *[32]* ***"****Even where the duty is non-delegable, employers of independent contractors, unlike those employing employees, are never liable for the 'collateral negligence of their contractors.****", Law of Torts by R P Balkin & J L R Davis 5th edition, 2013****. The case of* ***Padbury V Holliday & Greenwood Ltd (1912) 28 TLR 494 (CA)*** *furnishes facts which illustrate this principle: A employed B to fit casement windows into certain premises. B's employee negligently put a tool on the sill of the window on which he was working at the time. The wind blew the casement open and the tool was knocked off*

the sill on to a passer- by. ***Fletcher Moulton LJ*** *holding the employer not liable said:*

".....before a superior employer could be held liable for the negligent act of an employee of a subcontractor it must be shown that the work which the subcontractor was employed to do was work the nature of which, and not merely the performance of which, cast on the superior employer the duty of taking precautions."

[33] Again as stated in ***Hyams V Webster (1867) L.R. 2 Q.B. 264****, where a statute requires a person to do a particular act, and an independent contractor employed by him fails to do that act, he cannot escape liability by pleading that the fault was not his, but that of his independent contractor. A duty may also be non-delegable where a statute confers on a person a power to carry out certain works, and expressly or by implication, impose upon that person a duty to take reasonable care in the exercise of the power. It was never argued before us in this case, that there was a statutory duty to take care.*

[34] The question whether a non-delegable duty is to be imposed under common law as stated in ***Farraj V King's Healthcare NHS Trust (2009) EWCA Civ 1203 by Dyson L.J.****: "is one of policy for the courts to determine by reference to what is fair, just and reasonable". For instance where if the act done by the independent contractor is one which in its very nature is inherently dangerous or one which involves a special danger, for example 'bungee jumping' or 'skydiving' then the employer of the contractor may be held responsible, if there is a failure to take the necessary precaution to avert the danger. The emphasis is upon the dangerous nature of the contractor's undertaking which insist on a higher standard of care in the performance of the duty……."*

[30] Considering all matters in this case, I am of the opinion that the Learned Magistrate's conclusion on this issue is correct. As such, the third Ground of Appeal fails.

Fourth Ground of Appeal

[31] This Ground of Appeal is that Learned Trial Judge erred in law and fact in ordering the Plaintiff to pay costs in the sum of $2,000.00 to the Defendant when the Plaintiff's action was a proper and just claim for determination and which costs order in any event is excessive and unwarranted.

[32] It is correct that the Learned Magistrate imposed costs, summarily assessed, at $2,000.00 against the Appellant. However, he has clearly explained the reasons for doing so. He has said considering the period this case has been in Court, as well as the witnesses called for by the Respondent that he was imposing the $2,000.00 as costs.

[33] I am of the opinion that the Learned Magistrate was justified in imposing $2,000.00 as costs against the Appellant considering all the circumstances of this case. This amount cannot be said to be excessive or unwarranted. As such, this Ground of Appeal is also without merit.

Fifth Ground of Appeal

[34] The Appellant reserved the right to amend the grounds herein and to add further grounds to this Appeal after receipt of the record. However, no additional or further Grounds of Appeal were urged by the Appellant. Therefore, this Appeal is only confined to the first four Grounds of Appeal aforementioned.

Conclusion

[35] Therefore, for all the reasons aforesaid, this Court finds no basis to vary the Order made by the Learned Magistrate, Magistrate's Court Suva. Accordingly, I uphold the Judgment of the Learned Magistrate, dated 15 January 2016.

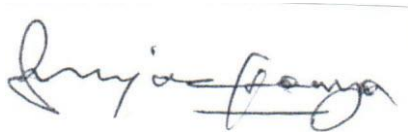
[36] Accordingly, I make the following Orders:

ORDERS

1. This appeal is dismissed.

2. The Appellant shall pay to the Respondent costs summarily assessed at $1,500.00, within 30 days of this Judgment. For the sake of clarity, the costs imposed by this Court is in addition to the $2,000.00 costs imposed by the Learned Magistrate.

Dated this 13th day of March 2019, at Suva.



Riyaz Hamza

JUDGE

HIGH COURT OF FIJI