

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBM 11 of 2022

BETWEEN: **PATRICK SANJAY MUDALIAR** of Tavakubu, Saru Back Road, Lautoka.
APPLICANT/ ORIGINAL RESPONDENT

AND: **VIJAY CHAND** of 44 Ravouvou Street, Lautoka
RESPONDANT/ ORIGINAL APPLICANT

Appearances: Mr. Rueben for the Applicant/Original Respondent
 Ms. Bilivalu for the Respondent/ Original Applicant
Date of Hearing: Ruling on Submissions
Date of Ruling: 26 September 2022

R U L I N G

1. Before me is a Notice of Motion (To Appeal Out of Time) and Stay of Execution filed on 07 March 2022 by Patrick Sanjay Mudaliar (“Mudliar”). Mudliar filed the application in person. On the first call of the summons motion on 22 March 2022 both Mudliar and the Respondent (“Chand”) appeared in person. I then timetabled the following:
 - a) I then give Chand two days to file and serve affidavit in opposition.
 - b) 14 days to Mudliar to file and serve reply.
 - c) Adjourned to 07 April 2022 for hearing.
2. On 06 April 2022 S. Nand Lawyers filed a Notice of Appointment of Solicitors to act for Mudliar.
3. When the matter was called on 07 April 2022, Mr. Nand made an oral application in Court seeking on direction for the vacation of the hearing and that a new hearing date be set. I did direct accordingly, and gave 28 days to Legal Aid Commission (which had appeared for Chand) and 14 days to Mudliar to reply. I then adjourned the case to 23 May 2022 for mention.
4. I gave leave to Mudliar to file a supplementary affidavit on 23 May 2022. Legal Aid Commission filed Notice of Appointment on 20 May 2022.
5. On 27 July 2022, the date of the hearing, both parties agreed to that I would rule on their submissions.

6. This is essentially an appeal out of the Magistrates Court decision which had sat an appeal from the Small Claims Tribunal. The background to this is succinctly stated in the Respondent's submissions at paragraphs 2.1 to 2.12:

- 2.1 Sometimes in early 2017 the parties entered into a verbal agreement for the Applicant/ Original Respondent to do some construction work on the Respondent/ Original Applicant's house in the sum of \$7,000.00, however the work was neither complete nor satisfactory as agreed.
- 2.2 The parties are known to each other and have had an otherwise good relationship before these proceedings.
- 2.3 The Respondent/Original Applicant then went to the Fiji Competition and Consumer Commission (hereafter "FCCC") for assistance who arranged for mediation with the parties and the Respondent/Original Applicant was also told to draft a scope of work agreement.
- 2.4 On 10 March 2017 the parties attended mediation at FCCC and executed an agreement before one Mr. Atish of FCCC. However despite the agreement, again the Applicant/Original Respondent failed to finish the works as agreed.
- 2.5 On or about June 2017 the Respondent/Original Applicant lodged a claim in the Small Claims Tribunal against the Applicant/Original Respondent for unsatisfactory and incomplete construction work done in the sum of \$4,850.00 whereby orders were subsequently made on 29 June 2017 in his favor.
- 2.6 After this order was made, the Applicant/Original Respondent filed for a re-hearing after which the Tribunal made orders dated 11 August 2017 for the Applicant/Original Respondent to pay \$3,500.00 to the Respondent/Original Applicant.
- 2.7 Being dissatisfied, the Applicant/ Original Respondent filed an appeal at the Ba Magistrates Court against the order. The matter was heard before then Magistrate, Mr. Naivalu who also conducted a site visitation before deliberating that the Tribunal order dated 11 August 2017 was to remain. This judgment was entered on 25 May 2018.
- 2.8 Being dissatisfied again, the Applicant/Original Respondent filed a Notice of Motion in the Magistrates Court seeking leave to appeal out of time and for stay on execution of the Judgment.
- 2.9 On 8 December 2021, the Lautoka Magistrates Court after hearing the application granted only the first order sought and that is, for leave to appeal.
- 2.10 However, despite this, the Applicant/Original Respondent again filed a Notice of Motion with supporting affidavit in the High Court seeking leave to appeal the decision of the Tribunal out of time, he is not appealing the decision of the Magistrates Court.
- 2.11 It is important to note that throughout the initial appeal in the Magistrates Court, the Applicant/Original Respondent never raised the issue of forgery as now raise, and these High Court proceedings is the first instance where he is claiming that his signature was forged.

2.12 The Respondent/Original Applicant wants to enjoy the fruits of his litigation and is exhausted with the numerous appeals and motions filed by the Applicant/Original Respondent in relation to the construction dispute, as such, he is seeking that this application be dismissed with costs.

7. The general principle governing the grant of leave to appeal out of time are:
 - a) Length of delay.
 - b) Reason for delay.
 - c) Chances of Appeal succeeding.
 - d) Degree of prejudices.
8. The applicant's solicitors blames the applicant's former solicitor, Tunidau Lawyers for the delay. I accept that. However, when it comes to chances of appeal succeeding the issue is whether fraud was raised at first instance and in the Court below.
9. The first thing I note is that there are no proposed grounds of appeal before me by which to assess the chances of appeal succeeding. I note that Mudliar submits that he has raised forgery/fraud all throughout from the time this matter was pending before the Small Claims Tribunal, right through to the Magistrates Court. Chand submits that Mudliar is raising this for the first time.
10. The second thing I note is that the Court records are not before me to verify which of the two is telling the truth.
11. I have read paragraphs 1.1 to 2.8 of the applicant's submissions. There is nothing there to indicate that he did raise fraud/forgery before the Small Claims Tribunal. In my view, if he had not raised this before the Small Claims Tribunal, then he could not raise it before the Magistrates Court – let alone before this Court. In saying that, I am mindful of the policy behind the nature of proceedings before the Small Claims Tribunal as succinctly set out by Mr. Justice Fatiaki in **Sheet Metal & Plumbing (Fiji) Ltd v Deo** [1999] FJHC 26; Hba0007d.99s (14 April 1999).
12. If assuming, the Applicant had raised this before the Small Claims Tribunal, then any finding of fact entailed would hardly be appealable. In my view, if the point was raised but disregarded by the Small Claims Tribunal because he did not believe so, that is also hardly appealable.
13. Section 33 of the Small Claims Tribunal Decree and noted that appeals from the SVCT are limited to the two following grounds:
 - (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.
14. Fatiaki J in **Sheet Metal & Plumbing (Fiji) Ltd v Deo** [1999] FJHC 26; Hba0007d.99s (14 April 1999) said as follows:

As to the 'manner' or procedure required to be followed by the referee in conducting a proceeding under the Decree these are principally to be found in Sections 24 to 29 (inclusive) under the heading 'HEARINGS'. A cursory examination of these provisions serves to highlight the informal, non-adversarial nature of the proceedings before the Small Claims Tribunal and militates against a general appeal on the merits or for errors of law.

The non-legalistic nature of a Tribunal proceeding is further exemplified by the requirement in Section 15(4) of the Decree that:

'The Tribunal shall determine the dispute according to the substantial merits and justice of the case and in doing so ... shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities.'

I am fortified in my narrow view of the appellant's 'right of appeal', by the observations of Thorp J. in *N.Z.I. Insurance N.Z. Ltd. v. Auckland District Court* (1993) 3 N.Z.L.R. 453 when he said of a similar right granted in the Disputes Tribunals Act 1988 (New Zealand), in identical terms to our ground (a) above, at p.458:

'The essential matter (in the words used) ... is its specification of the basis for appeal against a referee's determination as being the conduct of proceedings in a manner that was unfair to the appellant and prejudicially affected the result of the proceedings. This formulation is both specific and unusual. On its ordinary grammatical construction it provides only a limited right of appeal, and requires any intending appellant to direct the (Court) to some unfairness in the form, and not simply the result, of the tribunal's hearing.'

and a little later in his judgment his honour said:

'read on (its) own, and on the basis of (its) ordinary grammatical meaning, (the section) would not leave any careful interpreter in much doubt that the right of appeal (it) created was a special type of appeal, limited to cases of procedural unfairness (and does not extend to the correction of errors of law).'

Even more trenchant is the view expressed by Greig J. in *Hertz New Zealand Ltd. v. Disputes Tribunal* (1994) 8 PRNZ where his honour said in rejecting the appeal in that case, at p.151:

'... there is no appeal on the merits even if there is a clear and fundamental error of law in the conclusion of the Tribunal.'

Quite plainly in my view not only is this second 'ground of appeal' misconceived in so far as it seeks to question the 'merits' of the referee's decision without pointing to any 'procedural unfairness' but further, in so far as it purports to be predicated on the difficult legal principle of 'unjust enrichment' it fails to properly appreciate the function and nature of a non-legally qualified referee exercising what in effect is an equity and good conscience jurisdiction.

In this latter regard can it not be said in 'good conscience' that the inconvenience and damage suffered and the expenses incurred by the respondent since the installation of the defective solar water heater cancels out (for want of a better term) any unquantifiable 'benefits' the respondent may have enjoyed over the past 3 years from being in possession of the hot water system ? and is

not the buyer of defective or unfit goods entitled to damages under the Sale of Goods Act (Cap. 230)? These considerations merely serve to reinforce the broad nature of a referee's jurisdiction.

Aaryan Enterprise v Mehak Unique Fashion [2011] FJHC 727; Civil Appeal 17.2011 (10 November 2011). Hon. Justice W D Calanchini (as he then was) more elaborated the meaning as follows;

"In essence the ground allows for an appeal to the Magistrates on the grounds that the appellant has been denied natural justice in the form of procedural fairness which has prejudicially affected the result of the proceedings. The other allowable ground of appeal under the Decree is that the Tribunal exceeded its jurisdiction. Together they represent a limitation on the general principle that an appellant's right to appeal is as of right in respect of an error of law and/or fact. It is a right of appeal which requires the appellate court (the Magistrates Court) to review the proceedings conducted by the Referee in the **Small Claims Tribunal** and determine whether the applicant's complaint has any merit. There is certainly no right of appeal in respect of any error of law nor in respect of any factual error. The procedure to be adopted is clearly one of review and not one of re-hearing."

15. Application dismissed. Costs to the respondent which I summarily assess at \$500-00 (five hundred dollars only).



Anare Tuilevuka
JUDGE
Lautoka

26 September 2022