

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA 18 of 2018

BETWEEN: **BURESALA TRANSPORT LIMITED**

APPELLANT

AND: **LABOUR OFFICER** for and on behalf of the dependents of
the deceased **DEO RAJ**

RESPONDENT

Appearances: Mr. S. Valenitabua for the Appellant.

No Appearance of the Respondent.

Date/Place of Judgment: Friday 29 September 2023 at Suva.

Coram: Hon. Madam Justice Anjala Wati.

JUDGMENT

A. Catchwords:

WORKMEN'S COMPENSATION CLAIM - Was the tribunal entitled to deal with the substantive claim when the employer indicated that it will not call any evidence and then made an application for non-suit after the close of the applicant's claim - the employer's contention that there should be a ruling on its application for nonsuit is superfluous as the Tribunal's finding that the applicant has met the claim is an indication that the application for non-suit is dismissed- in any event, is there a power to enter non-suit in Magistrate's Court?

B. Legislation:

1. **Magistrates Court Rules 1945: Order 31 Rule 4.**
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Cause

1. The Labour Officer had filed a workmen's compensation claim against the employer on behalf of one Deo Raj who died in the CWM Hospital on 16 October 2013 from Acute Myocardial Infarction.
2. Deo Raj was employed as a Carpenter by Buresala Transport Limited for only 3 months. On the day of his death he was nailing 3 meter high beam with a hammer. He experienced some discomfort and informed a fellow worker and the site foreman Mr. Tira Raj that he had chest pain. Deo Raj indicated to the two that he had gastritis. He was asked to rest which he did but then he started sweating profusely. Upon seeing that, he was given some Gaviscon and then taken to the hospital. He died within 30 - 45 minutes after reaching the hospital.
3. The claim for compensation was opposed so the matter went for hearing. Before the hearing started, the Tribunal asked the counsel for the employer whether he will be calling a medical witness and Mr. Valenitabua representing the employer indicated that he will. The Tribunal then questioned whether his medical witness was available and Mr. Valenitabua indicated that he was not.
4. The Tribunal then issued a stern warning as follows:

"Remember today is for hearing and I will not allow any further adjournment. Just bear that in mind."
5. The trial then proceeded and the Labour Officer called two witnesses to give evidence. The first was Dr. Tikoinayau and the second was the site Foreman Mr. Tira Raj.
6. After the close of the worker's case the counsel for the employer made an application for non-suit which is similar to a no case to answer in criminal proceedings.
7. The Tribunal then asked Mr. Valenitabua what his position would be if the findings went against him. Mr. Valenitabua then stated in no uncertain terms that he will not be calling any witnesses. Mr. Valenitabua then sought time to file written submissions on

his application for non-suit which was allowed. Mr. Valenitabua was given 21 days to file his submissions on non-suit. The counsel for Labour Officer was given 14 days to respond.

8. The Tribunal then went onto rule on whether the evidence met the necessary elements of the claim, that is, (as outlined by the Tribunal in its judgment):

1. *whether the workman suffered personal injury, that is physiological injury or change, by accident;*
2. *whether the injury arose out of the employment; and*
3. *whether the injury occurred in the course of the employment.*

9. In dealing with the elements of the claims, the Tribunal found that the evidence established all the elements of the claim. The Tribunal therefore ordered the employer to pay to the worker's dependents a sum of \$24,000.00 with post judgment interest of 5 percent. The parties were ordered to bear their own costs of the proceedings.

The Appeal and Analysis

10. The employer's grounds of appeal substantially complains that when it made a claim for non-suit, the Tribunal ought not to have ruled on the substantive medical evidence but given a ruling on non-suit.

11. At the time of hearing the appeal I was quiet convinced that when an application is made for non-suit, a ruling should be delivered on that application and not the substantive matter. I was of the view that if the Tribunal decided that there was a suit to answer, then it should have provided the defence with an opportunity to choose whether or not it will call evidence to defend the claim. I however did not make a final finding to that effect as I had to go through the relevant provisions of the law to confirm my preliminary views.

12. After having gone through the Magistrates Court Rules 1945 and the statutory provision on "***Proceedings at the Hearing***", I am now able to make a careful finding on Mr. Valenitabua's appeal which at the hearing of the appeal I thought had merits.
13. Order 31 Rule 4 states the procedure when the defendant produces no evidence at the conclusion of the plaintiff's evidence. I must not overlook that the defendant had told the court that it will not call any evidence. The rule says that if the defendant decides to produce no evidence, oral or documentary, the plaintiff shall be at liberty to sum up his or her case; the defendant shall then be entitled to state his or her defence and reply generally.
14. There is no provision in the Magistrates Court Act or the Rules for the defendant to apply for a non-suit. The Magistrates Court is a creature of statute and it derives its powers from the statute. If there is a power to apply for non-suit then it should be available in the Magistrates Court Act or the Rules. Mr. Valenitabua relied on s. 46 of the Magistrates Court Act 1944 which reads as follows:

"The jurisdiction vested in Magistrates shall be exercised (so far as regards practice and procedure) in the manner provided by this Act and, or by such rules and orders of Court as may be made pursuant to this Act and, and in default thereof, in substantial conformity with the law and practice for the time being observed in England in the county courts and courts of summary jurisdiction."
15. My reading of s.46 is that the English county court rules can only apply if there is a statutory power given to the courts to enter non-suit. Neither the Act nor the rules provide for such powers. If the power for non-suit was available and there was lack of procedural guidelines then the English county court rules could be followed.
16. Even if I am wrong in my finding above, I am firmly of the view that Mr. Valenitabua has failed to provide the court on the applicable English county court rules which sets out the procedure for dealing with applications for non-suit, in particular, the mode in which the courts here should deal with the application for non-suit.

17. Mr. Valenitabua has not shown to me any applicable rules which precludes the court from dealing with the elements of the claim on the balance of probability when an application for non-suit is made and in doing that, if it finds that the plaintiff has met the claim, can it then enter judgment for the plaintiff or should it then provide the defendant a right to call evidence despite the defendant informing the court that it does not wish to call any evidence.
18. I am of the view that when the employer raised that the plaintiff has not made out a claim for workmen's compensation, the Tribunal had to deal with each element of the claim and see if it is met by the evidence. To do that the Tribunal needed to analyse the evidence in its totality.
19. That is what the Tribunal did. Since, the employer was not going to call any witnesses, the Tribunal had to deal with the substantive claim. If the evidence did not meet any element of the claim then obviously Mr. Valenitabua's application for non-suit would be granted. Since the Tribunal found that all the elements had been met, it found that the claim was established. The consequence of that judgment is that Mr. Valenitabua's claim for non-suit was dismissed.
20. I need to emphasize that the Tribunal had already issued a stern warning to the employer's counsel that it will not be adjourning the case for the employer to call further witnesses. Even if the employer did not want to make an application for non-suit it was required to complete the case on that day. There is nothing untoward about the Tribunal requiring the parties to finish the case on an appointed day. Each court is responsible for its own case management and the parties and their counsel are to comply with the directions of the court.
21. It is obvious that the employer was not going to call any evidence in this case as it did not have any evidence to produce. All that was available was the evidence of the applicant and given that the Tribunal had to rule on the substantive claim. The findings of the Tribunal would not be any different even if it mentioned in the judgment that it was dealing with the application for non-suit. Finally, the Tribunal would have had to

deal with the claim since the employer did not wish to produce any further evidence. I do not find that the employer suffered any prejudice in the manner the Tribunal dealt with the proceedings and the claim.

22. At the appeal hearing, Mr. Valenitabua only pressed on the appeal point on why a ruling on his application for non-suit was not given. He asked the court to send back the matter for ruling on non-suit. The application is preposterous. Mr. Valenitabua fails to see that his claim for non-suit was dismissed. That is the effect of the judgment of the Tribunal.

23. Mr. Valenitabua did not press on other grounds of appeal and as such I will not deal with the same. I wish to however briefly reflect that the Tribunal had made a finding that the worker's death arose out of and in the course of his employment based on the unchallenged medical evidence. I find that it was open to the Tribunal to come to that conclusion.

Final Orders

24. I do not find any merits in the appeal and dismiss the same with costs to the Respondent in the sum of \$5000 to be paid within 21 days. I also order the employer to comply with the judgment of the Tribunal within 21 days.



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Hon. Madam Justice Anjala Wati

29.09.2023

To:

1. *Toganivalu & Valenitabua Barristers & Solicitors, Suva for the Appellant.*
2. *Ministry of Employment, Productivity and Industrial Relations for the Respondent.*
3. *File: Suva ERCA 18 of 2018.*