

Tonga v Langifisi

Supreme Court, Nuku'alofa
Ward CJ
Civil appeal No.505/94

21, 29 July 1994

Justice and procedure - non appearance - strikeout - reinstatement - need for records.

The appellant (plaintiff) sued in the Magistrates Court for an unpaid water bill. When the case was called before a Magistrate there was no appearance for the plaintiff, the matter had not been served on the defendant, and it was struck out. Counsel for plaintiff appeared shortly after, explained his absence and sought reinstatement of the case, which was refused. On appeal from that refusal.

Held:

1. Records must be kept in courts.
2. Although the Magistrate had the power to strike out yet if in the same sitting good reason is shown for the failure to attend, justice should be achieved and done by allowing reinstatement.
3. Appeal allowed and case remitted.

Statutes referred to : Magistrates' Court Act s.65

Counsel for appellant : Mr Taumoepeau

Judgment

The appellant in this case sued the respondent in the Magistrates' Court for an unpaid water bill.

The return day was 25 March 1994 and the case was called at 10.00 am at the start of the session for that day. Neither party appeared and the magistrate was advised that the defendant was abroad and had not yet been served.

In the absence of the plaintiff, the magistrate struck the action out under section 65 of the Magistrates' Courts Act.

50 The plaintiff/appellant was, in fact, represented by the Solicitor-General who arrived at the court five minutes later and, on hearing the case had already been called, explained to the magistrate that he had been unavoidably delayed at a hearing before Dalgety J. He asked the magistrate to reinstate the case but the magistrate refused. He appeals against that refusal.

It must be mentioned that there is no information as to the reasons for the refusal. Whether the application was made in open court or in chambers, it should have been noted. This Court has commented before on the inadequacy of records of proceedings in the Magistrates' courts.

60 When the parties did not appear, the magistrate had a choice under section 65 either to strike out the action or to adjourn the hearing. The record simply states "Case struck out". No reasons are given but the magistrate clearly had the power to take the course he did. The power given to a magistrate to strike out a case is important. If a plaintiff fails to take the trouble to prosecute his claim, the court should normally strike it out unless there are good reasons to allow an adjournment. In this case the magistrate was faced with a totally unexplained absence of the plaintiff. He had no way of deciding whether there was a reason for the absence because no one was present and no message had been sent to the court. In such circumstances it was correct to consider striking it out.

70 Within a very short space of time, counsel for the plaintiff appeared explaining his earlier absence. The record shows the court had adjourned; whether for the day or not is unstated. However it is clear the magistrate was still at court with his clerk when counsel appeared. It is difficult to understand why, in these circumstances, he declined to reinstate the action.

The Magistrates' Court does not have the inherent jurisdiction to control its proceedings that is enjoyed by the Supreme Court but it is entitled to correct any error that occurred earlier in the same sitting. In this case the time was a few minutes past ten in the morning. Both the magistrate and his clerk were present. If, having heard the representations of counsel, the magistrate had felt there was a good reason for the earlier absence, he should have recalled his earlier decision and allowed the case to be listed. Had the defendant been present and already left the court, different considerations may have arisen but in this case the defendant had not been served, as the magistrate knew, and so the case was to be adjourned to another date anyway.

80 Magistrates should always remember that, where they use their coercive power to strike an action out without having heard it and are then, during the same sitting, shown good reasons for the failure to attend, they should allow the plaintiff to have his day in court if that is the just result. The court exists to provide justice. It has rules of procedure and should ensure they are followed for the orderly and proper conduct of the proceedings

but the rules should not be used to defeat justice.

In this case, as has been stated, there was good reason both for the delay and the failure to advise the court. Counsel was held up before a superior court and could not leave the hearing to advise the other court when it went too long. The lawyer explained that to the magistrate within minutes of the case being called and struck out. Justice would have been better served in such circumstances by allowing the plaintiff to continue with his action so he had a chance to present his case. The defendant was not inconvenienced as he had not been served by the court officer.

.00 No magistrate should be too quick to leave the bench. Where, as here, the case was called at the start of the court day, a more sensible course would have been to stand the case down for a short period to see if anyone appeared to give an explanation that could then be considered before deciding whether or not to strike the action out.

Many things may cause a party to be late. If the lawyer appears with no better explanation than that he has failed to organise himself sufficiently, the magistrate should have little hesitation in refusing to reinstate the claim but if the circumstances are reasonable as occurred here, he should allow the matter to proceed.

110 I am satisfied it would be just to remit this case to the magistrates' court with a direction to hear the case.

The appeal is allowed to that extent and there is no order for costs.