

IN THE HIGH COURT OF FIJI

WESTERN DIVISION AT LAUTOKA

APPELLATE JURISDICTION

HBA 11 OF 2016

[SCT CLAIM NO. 962 OF 2015]

[M/C APPEAL NO. 61 OF 2015]

[On an appeal from the Ruling delivered by the Magistrate's Court on the 26th day of October, 2016.]

BETWEEN : JABIN JABEENA B KHAN

APPELLANT

A N D : AIYUB HUSSEIN

RESPONDENT

Appearances : Appellant in person

Non-appearance for respondent

Date of Hearing : 3 April 2017

Date of Judgment: 3 April 2017

J U D G M E N T

Introduction

[01] This is an appeal against the Judgment of the Magistrates' Court delivered on an appeal from the Small Claims Tribunal ('SCT').

[02] By his ruling dated 26 October 2016, the learned Magistrate (‘the Magistrate’) sitting at Lautoka dismissed the appellant’s appeal. The Magistrate at paras 12, 13 and 15 found:

‘...

12]. *This appeal turns to the date of the appeal which was over the period of the appeal of 14 days. The Appellant did not file a proper application to appeal out of time as appeal period had lapsed and this is pursuant to Section 33 (3) of the Small Claims Tribunal.*

13]. *The ground of appeal is provided in Section 33 (1)(a) of the Small Claims Tribunal Decree namely – “did the Referee conduct the proceedings in a manner which was unfair to Jabin Jabeena B Khan – the Appellant, and in which prejudicially affected the result of the proceedings against her?”.*

15]. *I find that the Referee conducted the proceedings in manner that was procedurally fair to both parties and he did not exceed his jurisdiction. The Referee had properly reached a decision and therefore the appeal is refused. Furthermore the Appellant was not granted leave to appeal out of time and therefore the matter is struck out.*

...’

[03] The appeal came up for hearing today (3 April 2017) when the appellant appearing in person informed the court that she is ready for the hearing. The appeal accordingly proceeded with the hearing in the absence of the respondent. The respondent did not appear in court, albeit notice of hearing was duly served upon him by Sheriff Officer.

[04] The only ground of appeal that was pushed for consideration by this court is that the learned SCT Referee (*‘the Referee’*) was bias, which the appellant submits that the Magistrate also failed to appreciate. The

appellant orally advances argument that the Referee was bias and she did not listened to what I wanted to say.

Background

[05] The respondent, Aiyub Hussein files a claim in the SCT against the appellant, Jabin Jabeena B. Khan claiming a sum of \$5000.00. The claim arises out of money lent to the appellant by the respondent in preparation of the marriage. There was a marriage proposal that the appellant is to get married to the respondent. Upon hearing evidence adduced by both parties where the appellant gave evidence and called a witness and the respondent gave evidence and called a witness, the Referee ordered that:

1. *The Respondent; Jabin Jabeena B Khan agreed to pay the Claimant; Aiyub Hussein the total amount of \$2597.75 (two thousand five hundred ninety seven dollars seventy five cents) for the money given to her and along with other costs incurred to the Claimant.*
2. *The Respondent to pay cash (\$100.00) every month commencing from on or before 30/11/2015 until the full amount of \$2,597.75 is paid at Ba Magistrates Court Registry on production of this order.*
3. *In default of any payment, the total amount due is payable at once.*

The appellant appeals the Referee's order to the Magistrates' Court on the ground that the Referee was biased. The Magistrate dismissed the appeal. The appellant appeal to this court.

Grounds of Appeal

[06] The appellant appeals the decision of the Magistrate to this court on the following grounds of appeal:

1. *The Learned Referee of the Small Claims Tribunal did not give a chance to me the Appellant to address the Court on the issue of our de facto-relationship, which is how disgusting it was in relation to the Respondents involvement and manner.*
2. *That if the surpassing of the appeal period was a major issue and as to why I filed appeal instead of an application for Appeal out of time should **not** be blamed on me for it was Court Registry error as to why they accepted the application for appeal when it was out of time that if it was really out of time.*
3. *And if that was the case why should I be the victim of Court registry mistakes as their action in accepting my application for appeal was an open door for the Learned Magistrate to set a ground of striking out my appeal application.*
4. *The Tribunal did not give me a chance to explain as what the Respondent's money was used for during our time together, as all buying was done through my assumption that he loved me, very little did I know that he had other plans to use me.*
5. *That the Tribunal Referee failed to acknowledge that the Respondent has appeared before the Tribunal in other two separate occasion involving innocent woman like me where the Respondent has claimed quite a considerable amount which I find to be unfair.*
6. *That there has been few complained filed with the Police Department as to how the Respondent who claims to be from overseas exploit the feminine of ladies in Fiji for his personal ambition.*
7. *That the Tribunal Court has also failed to adhere to the complains forwarded to the Fiji Women Crisis Center on the Respondent's psychopathic behaviour in demoralizing the dignity of a woman which he has been doing repeatedly and no action has been instituted against the Respondent.*
8. *That all I ask for is a fair hearing before a Referee of the Tribunal who would hear my side of the story and not one who has already made their decision even before the commencement of the hearing.*
9. *That I sincerely seek the Honourable Court's indulgence in granting my appeal application for the better administration of Justice as the decision made by the Referee and the Learned Magistrate as to the reason I earnestly seek was so unfair.*

The Law

[07] Section 33 of the Small Claims Tribunal Decree (now Act) ('SCTA') is relevant to this appeal. That section sets out the grounds on which an appeal against an order made by the SCT can be made. The grounds are 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.*

The Issue

[08] The issue before this 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.

Discussion and Decision

[09] The appellant has formulated nine grounds of appeal to challenge the Magistrate's decision to dismiss her appeal against the Referee's order made against her.

[10] An appeal against the SCT's decision to the High Court is limited to two grounds of appeal, i.e. (i) the Referee was biased and unfair in the conduct of the proceedings and (ii) the tribunal exceeded its jurisdiction.

[11] The following decided case law is very relevant in deciding an appeal for the SCT.

Vidya Wati & Suresh Charan v. Waqabaca Truck Hire and Machinery [2005] HBA 0001/2005 on 04th May 2005 Per Singh J], where it was held that, "*an error of law is not a permitted ground of appeal nor is an appeal allowed on merits of the case – Sheetmetal and Plumbing (Fiji) Limited v. Uday Narayan Deo - 45 FL R 80, where Justice Fatiaki (now the Chief Justice) endorsed the principles expressed by Greig J in Hertz New Zealand Ltd. v. Disputes Tribunal - 1984 8 PRN2 at 151 as "there is no appeal on the merits even if there is clear and fundamental error of law in the conclusion of the tribunal".*

[12] In the matter before the court, the Appellant's appeal is based on the issue of bias. Therefore it is pertinent to deal with the issue of bias/unfairness.

[13] Another form of "procedural unfairness" is "bias ". On this aspect, I find the following passage from the judgment of **LORD MUSTILL** in **DODDY v SECRETARY OF STATE FOR THE HOME DEPARTMENT** (1995) 3 All E R 92 at 106 pertinent:

"What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive the following:

(1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.

(2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type.

(3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.

(4) As essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.

(5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both.

(6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

[14] At the risk of being lengthy, on the point of test to be applied whether there is **bias** , I refer to the following quotation from the judgment of **CHARLES J. A.** in **THE MAGISTRATES' COURT AT PRAHRAN v MURPHY** (1997) 2 V.R. (C.A) 186 at 207 quoting from **WEBB v R** [1994] HCA 30; (1994) 181 CLR 41, where **MASON C.J.** and **McHUGH J** said at 47:

When it is alleged that a judge has been or might be actuated by bias , this Court has held that the proper test is whether fair-minded people might reasonably apprehend or suspect that the judge has prejudged or might prejudice the case.... The Court has specifically rejected the real likelihood of bias test. The principle behind the reasonable apprehension or suspicion test is that it is of "fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." (Emphasis added)

Deane J. said, at 67-8, that:

In a series of recent cases, the Court has formulated the test to be applied in this country in determining whether a judicial officer ("a judge") is disqualified by reason of the appearance of bias, as distinct from proved actual bias. That test, as so formulated, is whether, in all the circumstances, a fair-minded lay observer with knowledge of the material objective facts "might entertain a reasonable apprehension that [the judge] might not bring an impartial and unprejudiced mind to the resolution of the question" in issue....[t]he test directly reflects its rationale, namely, that it is of fundamental importance that

the parties to litigation and the general public have full confidence in the integrity, including the impartiality, of those entrusted with the administration of justice. However, the test is an objective one and the standard to be observed in its application is that of a hypothetical fair-minded and informed lay observer.

- [15] It is seen that the Appellant need to prove at least one of those grounds enunciated in section 33 (1) of the Small Claims Tribunal Decree to succeed in this appeal. In this case it appears that the Appellant did not complain that the Tribunal has exceeded its jurisdiction. The SCT has jurisdiction to hear and determine any claim that is below \$5,000.00. The respondent claim \$5,000.00, which is within the jurisdiction of the SCT, against the appellant. Ostensibly, the Appellant's appeal is based on the first limb of section 33 (1) of the SCTD that the proceedings were conducted by the referee in a manner which was unfair to the appellant and prejudicially affected the result of the proceedings.
- [16] The Appellant complains that the Referee was biased and unfair in arriving at the impugned decision. Therefore, it is significant to ascertain whether the proceedings at the SCT were conducted in an unfair manner which prejudicially affected the result of the proceedings.
- [17] The main issue before me in this appeal is whether the Referee was biased in making the impugned order.

SCT's Order

- [18] The referee has made the order against the appellant upon her admission that she received the sum of \$2,597.75 from the respondent. She further

ordered that the appellant is to pay \$100.00 a month commencing on or before 30 November 2015 until the full sum is paid.

[19] The referee's order appears to be an order by consent. The respondent's initial claim in the SCT was \$5,000.00. The referee has recorded evidence given by both parties. At the end of the hearing of the matter on 30 October 2015, the parties had indicated that they were settling the claim for \$2,597.75. This is what happened on that day-

*“\$2597.75-Total amount revised agreed by the Respondent (Appellant here) to pay the Claimant (Respondent here) instead of \$5,000.00 as claimed. The Claimant agreed on \$2597.75 on monthly payment of \$100.00 from 30/11/2015. **Hence the order was made on the agreement by both parties.**”* [My Emphasis]

(See page 11 of the SCT Copy Pleading)

Conclusion

[20] It is noted that the appellant appeals an order entered by consent. Having admitted the respondent's claim and having consented to pay the sum of \$2,597.75 to the respondent, the appellant is not entitled to appeal the SCT's decision on the grounds that the Referee was bias, she did not hear the case properly and conducted the proceedings in an unfair manner that prejudicially affected the result of the proceedings.

[21] The learned Magistrate rightfully dismissed the appeal. He correctly applied the law and the case authority relevant to the appeal and dismissed the appeal having found that the referee conducted the proceedings in a manner that was procedurally fair to both parties and he did not exceed her jurisdiction. The Magistrate had dismissed the appeal after considering the merits of the appeal. The Magistrate in fact did not strike out the appeal on the ground that it is filed out of time, albeit he

indicated in his ruling that the appeal was filed outside the appealable period. Therefore, the complaint-primary ground of appeal that the learned Magistrate had struck out the appeal on the basis that it is filed out of time has no merit. I would, therefore, dismiss the appeal and affirm the decision of the Magistrate. I would make no order as to costs.

Final orders

1. Appeal dismissed.
2. Magistrate's order affirmed.
3. No order as to costs.

H. H. Mohamed Ajmeer 3/4/17
.....

M H Mohamed Ajmeer

JUDGE

**At Lautoka
03 April 2017**

