220

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO.ABU0046 OF 1997S
(High Court Civil Action No. 957 of 1982)

BETWEEN:

K.W. MARCH LIMITED

Appellant

AND:

SUVA CITY COUNCIL

Respondent

Coram: Reddy J R, President
Eichelbaum, JA
Gallen, JA

Hearing: Tuesday, 7 May 2002, Suva

Counsel: Mr Aminiasi Katonivualiku for the Appellant
Ms Tanya Marion Waqanika for the Respondent

Date of Judgment: Friday, 17 May 2002

JUDGMENT OF THE COURT

The appellant is the owner of certain properties in the city of Suva on which rates are payable and in respect of which rates were struck by the Suva City Council. It is the contention of the respondent Council that the rates payable by the appellant have been constantly in arrears at least since 1979 although it accepts that payments have been made from time to time by the appellant. The respondent Council asserts however that the payments never completely paid off the outstanding amounts.

221

Section 78 of the Local Government Act 1985 provides that rates which are overdue attract interest at the rate of 7% per annum and such interest is included in the expression "rates." The section provides that the Minister may by order vary the rate of interest and at all material times the rate had been so varied to 11%.

Section 84 of the Local Government Act provides that where money is paid to a Council in respect of rates the Council shall apply such money for or toward rates due on the rateable property in the order in which they became or become due.

In accordance with the Act the Council claimed interest in respect of amounts which it contended were due from the appellant time to time but there were continuing disputes between the appellant and respondent as to what amounts were payable. The respondent asserts that the calculations of the respondent were incorrect and that the total claim was always wrongly calculated.

In 1982 the respondent Council initiated proceedings against the appellant claiming both rates and interest in the sum of $14,781.32. The appellant filed a statement of defence. In 1986 the respondent filed an amended statement of claim which set out a detailed summary of rates arrears alleging these amounted to $28,237.65. The amended statement of claim contained a detailed account of the transactions between the appellant and the respondent. In March of 1995 a further amended statement of claim was filed by the respondent. By this time the claim had increased to the sum of $96,446.81 of which

222

a very considerable part represented interest including interest on interest.

The appellant filed a detailed statement of defence denying the allegations contained in the amended statement of claim specifically alleging that the respondent had not been able to produce a true and accurate account of rates that were owed by the appellant. The amended statement of defence specifically asked that the Court order an enquiry into the accounts of the respondent Council concerning a particular property.

The proceedings eventually came before the Hon. Mr Justice Byrne on the 8th of July 1996. The respondent called only one witness its Rates Officer a Mr Sang. The Rates Officer had been Rates Officer only from October 1993 so he was not responsible for rates before 1993.

The Rates Officer Mr Sang relied upon two documents which the respondent sought to produce. The first was a reconciliation statement which set out the way in which the respondent Council had arrived at the figure it claimed calculating this on an annual basis. He also sought to produce a computer print out.

Mr Patel who then appeared for the appellant objected to the Court receiving both documents. He did so specifically alleging they contained hearsay material, that he did not know how the rates had been struck nor who struck them, nor how the documents had been compiled. He stated he did not know who put the figures

223

into the computer or where they came from.

Mr Sang explained that he had obtained all the figures from the rates books at the respondent's office and that previously these had been contained in books but were now on computer.

The respondent indicated it was prepared to produce the rates books for the years 1979 to 1995 for inspection by the Court. The Court then adjourned for some three hours at the conclusion of which Counsel for the respondent indicated that the appellant had seen the rates books. Mr Patel for the appellant stated "we are satisfied the amounts shown as rates struck are accurate." The Court then accepted the statements tendered on behalf of the respondent.

There is some significance in the reference to the term "rates struck" and the Judge in his subsequent decision confirmed what appeared in his notes stating "when the Court resumed I was informed by Mr Patel who appeared for the defendant that the defendant was satisfied that the amounts shown as the rates struck in the reconciliation statement were accurate."

At the conclusion of the case for the respondent the appellant called one witness, Mr Edmund March the Managing Director of the appellant. The hearing concluded on the 19th of August 1996. Reserved judgment was delivered on

the 15 May 1997.

The judgment commences by expressing concern over the length of time which it had taken to bring the particular proceedings to a conclusion. The Judge noted that Mr Patel had conceded that the appellant did not dispute the principal amount claimed by the plaintiff as the "rates struck" for a particular year but only the method of calculation and the amounts charged for interest. The Judge noted however that the appellant had given him no evidence as to how the calculations should have been carried out nor what the amount of interest should have been. The Judge stated that the appellant had failed to satisfy him that the statement was not an accurate record of the various movements in the appellant's account with the respondent except for certain parts on which no evidence had been led by the plaintiff. He noted that these were minor in relation to the whole amount claimed and he made certain small adjustments which he then set out in detail on an annual basis. Having done that he arrived at a total of $92,429.75 and, after dealing with certain special defences raised by the appellant which he dismissed, he entered judgment for the respondent for the sum of $92,429.75 together with interest at the rate of 8% from the date of the further amended statement of claim, that is 13th March 1995, until the date on which the hearing of the action began, the 8th of July 1996. He also ordered that the appellant pay the costs of the respondent.

Against that decision the appellant appealed. In its notice of appeal the appellant relied upon seven grounds but before the hearing it abandoned all but one of

these and it is therefore unnecessary to refer to them. The one remaining ground of appeal is an allegation that the respondent's accounts were incorrect and misleading; that the respondent had been put to strict proof of the same; that the amounts claimed in the amended statement of claim did not tally with the reconciliation statement; that errors were repeated and thus the resulting interest had been wrongly calculated and wrongly charged. The appellant contended that in the end the matter was an accounting problem that could be better handled by a chartered accountant by way of arbitration proceedings under the Arbitration Act.

The question before us turns on the weight which is to be given to the reconciliation statement and the figures and calculations which it revealed. These were subject to adjustments made by the Judge and were the basis of the judgment against which the appeal has been made.

The reconciliation statement as originally tendered was at least for the years prior to 1993 hearsay because Mr. Sang who produced the reconciliation statement had not been the rates officer who was responsible for the rates before 1993. The hearsay objection was clearly raised by Mr Patel during the course of the proceedings. (We note in passing the situation would now be different under the provisions of the (evidence Amendment Act of 2000 but that was plainly not in force at the time this case was heard and its provisions could not be relied upon.)

During the course of the proceedings an opportunity was given to the appellant to inspect the rates books and the outcome was the concession to which reference has already been made that the appellant would accept the correctness of that part of the statement which referred to the rates as struck. That is a limited concession since it does not apply to the other figures contained in the statement which led to the particular conclusion, resulting in judgment for the respondent of the sum awarded. The Judge however considered that the onus of establishing any error in recording the payments made by the appellant and the effect of such error on the calculation lay on the appellant. He concluded this had not been discharged by the evidence upon which the appellant relied.

We think that the Judge was right in the conclusion to which he came. Once it was conceded that the rates, the basis of the calculations contained in the statement, were correct we consider the onus of establishing the record of payments for which he was responsible was wrong passed to the appellant. This he did not discharge. The calculation of interest payable was a mechanical matter to be carried out on the basis of the evidence before the Court. If the appellant had concerns over the calculation then it was open to the appellant to express those concerns by alleging any mathematical error but he did not do so.

There is however, a matter of some concern which needs resolution. The concession made for the production of the reconciliation statement was that the rates as

227

struck, which were shown in a separate column, were accepted. The reconciliation statement starts with a balance brought forward of $10,035.11. That could not be said to be within the concession, accordingly we are driven to the conclusion that that sum has not been established as within "rates as struck."

We have given some consideration to the way in which this matter ought to be resolved. If the initial sum of $10,035.11 is not properly to be taken into account then all the calculations need to be made again as the only material upon which the Court was entitled to rely was the rates as struck from 1979 on. The matter cannot be resolved by merely deducting $10.035.11 from the amount of the judgment because its absence in the calculations must result in different figures on a year by year basis throughout the calculation because of the interest component We considered the possibility of instructing a competent referee to carry out the calculation then substituting the figure so obtained for the judgment already entered. We have some hesitation however in attempting to resolve the matter in this way. In the end we think that it must be returned to the High Court and a re-calculation carried out by the High Court by such means as it considers appropriate.

No other matters in dispute in the proceedings are to be relitigated. The Court must start from the proposition that the respondent is entitled to judgment and that judgment will be the sum calculated in accordance with the provisions of the Local Government Act fixing interest and requiring payments made to be credited against amounts owing as contemplated by section 84 of the Act. That calculation will start from

228

a nil balance as at 1979 and be thereafter calculated in accordance with the figures contained in the reconciliation statement. In all other respects including interest and costs the judgment in the High Court will stand. Although the appellant has succeeded to only a minor extent it is entitled to some costs which we fix at $200 together with appropriate disbursements to be fixed by the Registrar.

.....
Reddy J.R. President

FIJI COURT OF APPEAL

.....
Eichelbaum, JA

.....
Gallen, JA

Solicitors:

Messrs. Peter Howard and Associates, Suva for the Appellant
Suva City Council, Legal Department, Suva for the Respondent

C:\OFFICE\WPWIN\WPDOCS\USHA\ABU0046U.97S