IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

Civil Appeal No. HBA 16 OF 2014

BETWEEN	:	Shobna Singh
		Appellant
AND	:	Koroi Ramusu and Suva City Council
		Respondents
Before	:	The Hon. Mr Justice David Alfred
Counsel	:	Ms. N Raikaci for the Appellant Mr. Z Sahukhan for the Respondents
Date of Hearing	:	19 August 2015
Date of Judgment	:	18 September 2015

JUDGMENT

1. This is an Appeal from the decision of the Resident Magistrate, Suva delivered on 9 January 2014 dismissing the Appellant's Appeal against the decision of the Small Claims Tribunal, Suva made on 2 August 2013, which dismissed the Appellant's claim on the ground it bore no merit. The claim according to the Magistrate's Appeal Ruling was for items removed from the Appellant's Kiosk in the Suva Market, by the Market Master of the Suva Municipal Market.

2. The Notice of Appeal had 8 grounds of Appeal. These can be briefly summarized as contending the learned Magistrate erred in law and in fact when she:

    1. Misconstrued that the Appeal which was primarily on the grounds of procedural irregularity, encroached into the merit of the Tribunal's decision.

2. Failed to consider that the Appellant was not allowed to present her case by calling her witnesses.

3&4. Failed to consider that the Referee had wrongly exercised his discretion in failing to inform the Appellant of her right to respond or adduce evidence in rebuttal of evidence obtained by the Referee.

The other grounds are not relevant for our present purposes.

3. When the Appeal came up for hearing before me on 19 August 2015, Counsel for the Appellant submitted there were essentially 2 grounds of appeal, viz:

(1) The Tribunal had conducted the hearing in an unfair manner to the Appellant.

(2) The Referee had not asked the Appellant to call her witnesses and had not asked her to make any submission.

These, Counsel contended amounted to a breach of natural justice and procedural irregularity and were in breach of Section 33(1) (a) and Section 24 (1) of the Small Claims Tribunal Decree of 1991 (the Decree).

4. Appellant's Counsel further contended she had made a full submission before the learned Magistrate, which the Magistrate had not fully addressed. The Magistrate did not consider the fact that the Referee had not disclosed the writ of possession and report of execution of writ to the Appellant. Finally, she contended that the Magistrate had misconstrued the High Court order of eviction.

5. Counsel, therefore asked for the Appeal to be allowed and for me to order the matter be referred back to the Small Claims Tribunal for hearing before another Referee where the Appellant will be allowed to call witnesses and make her submission.

6. Counsel for the Respondents in his submission said the issue before me was whether the Tribunal had been unfair and prejudicial to the Appellant.

7. He contended that the Tribunal proceedings were fair and not prejudicial. It was not true that the Appellant was not aware of the High Court Order. That

Order has been served on the Kiosk and Counsel, present before me, for the Appellant had also been Appellant's Counsel in those High Court proceedings.

8. Respondents' Counsel relied on the authority of **Sheet Metal and Plumbing (Fiji) Limited v Uday Narayan Deo** [1999] 45 FLR 80, (Sheet Metal) a decision of Fatiaki J (as he then was).

9. He submitted the Tribunal was correct, the decision of the Magistrate should be upheld and the Appeal dismissed.

10. Counsel for the Appellant in her reply submitted the above decision was inconsistent with the principle of 'audi alteram partem' and with Section 24(1) of the Decree. The Appeal was only against the Tribunal's irregularity and prejudice to the Appellant whose claim was dismissed.

11. At the conclusion of the hearing, I reserved judgment to a date to be announced.

12. In the course of reaching my decision, I have perused the following:
    i. The Record of the Small Claims Tribunal.
    ii. The Record of the Magistrates' Court.
    iii. The Written Skeleton submission of the Appellant.
    iv. The Decree.

13. I now proceed to deliver my judgment. The subject matter may appear insignificant in nature but the legal issue is not. This is whether the Tribunal is bound by the rules of natural justice as contended by the Appellant, or is not as contended by the Respondents. I will explain what natural justice entails in the course of this judgment.

14. As I see it, the decision of Fatiaki J in the Sheet Metal case and the English and New Zealand decisions cited therein all go to show that the basis for an appeal, in similar cases to this, can only be some unfairness in the procedure which had prejudicially affected the result and not the result of the hearing. It is therefore not a decision which supports the Respondents' case. On the contrary it supports the Appellant's case because her grievance was her inability to call her witnesses before the Tribunal, which is clearly a complaint of procedural unfairness and not as against the outcome.

15. Although the Tribunal is not a court, it is still required by Section 29 of the Decree to adopt such procedure as it thinks best suited to the ends of justice. In my opinion, the procedure best suited to the ends of justice, is the procedure which complies with the lodestar for both civil litigation and the alternative system set up to give ready access to those with small claims to have them resolved, which are:

(i) *Audi alteram partem* which requires a tribunal to hear the other side which means according to Osborn's Concise Law Dictionary *(7th Edition) (Osborn)* that no one shall be condemned unheard. In the present context "condemn" would according to the Oxford Advanced Dictionary of Current English, mean to 'give judgment against.'

(ii) *Nemo debet esse judex in propria causa* which according to Osborn means "no one can be judge in his own cause."

There is therefore nothing arcane about the rules of natural justice.

(i) Means fairness.

(ii) Means impartiality.

However, I am only concerned here with (i).

19. With that, I turn to the crux of the Appeal, the proceedings in the Tribunal.

20. Section 26(2) of the Decree provides that a Tribunal may, on its own initiative, seek and receive such other evidence and make such other investigations and

inquiries as it thinks fit. All evidence and information so received or ascertained shall be disclosed to every party."

21. Therefore, I set no store by Appellant's Counsel's contention that the Appellant was not aware of the High Court Order because I find that in the circumstances she was surely aware of it.

22. However, what is more troubling is the contention that the Appellant was not allowed or invited by the Referee to call her witnesses at the hearing before the Tribunal. This is because, in my considered opinion, the Tribunal is required to adopt a procedure that will meet the ends of justice, which would mean complying with paragraph 15(i) above.

23. This would require that the Appellant be allowed or asked to call her witnesses, the existence of whom was clearly known to the Referee, as I note from the contents of the Tribunal Record:

    (i) At page 30, the Referee's Minute records 'Witnesses to appear'.

    (ii) At page 33, the Referee's Appeal Report under "Summary of the Hearing" paragraph 1 records, inter alia, "She (Claimant /Appellant) stated that she had witnesses who would appear at the next hearing".

    (iii) At page 34 under 'Grounds of Appeal' is recorded, "The Claimant was given full opportunity to state her case. At the last hearing (the resumed hearing on 2 August 2013) no mention was made that witnesses were present."

24. With all respect, I do not think the Referee can take such an attitude as evinced above. At the least, he should have asked the Appellant whether her witnesses were present and recorded her answer whether it be in the affirmative or the negative.

25. If she had answered in the negative (and the Referee had recorded this) then his Order that the claim bore no merit and was therefore dismissed could be upheld. But he did not.

26. As Lord Hewart C.J said in **Rex v Sussex Justices, Ex-Parte MacCarthy** [1924] 1K.B 256, 259, ***"that it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly, be seen to be done".*** I translate this into everyday language as every person should have his day in Court, at the end of which whether the result was in his favour or went against him, he will feel he had a fair hearing.

27. To my mind, this is the pivot on which the scales of justice are balanced. The rights of the litigants/claimants are protected in the responsibilities, of the judges in the dispensation of justice, and of those involved in the resolution of small disputes.

27. The Tribunal's decision in my opinion cannot stand. In the light of the decision that I have arrived at, I shall not express any opinion on the merits or otherwise of the claim. Suffice it for me to say the Appeal against the Magistrate's Order on 9 January 2014 (whereby the Appeal was dismissed and the Small Claims Tribunal decision stood) is hereby allowed.

28. In the event I make the following orders:

    1. The decision of the Small Claims Tribunal made on 2 August 2013 dismissing the claim is hereby quashed on the grounds that the proceedings were conducted by the Referee in a manner which was unfair to the Appellant and affected the result of the proceedings.

    2. I order a rehearing of the claim in the Tribunal before another Referee (other than the Referee who had heard this claim).

3. I make no order as to costs.

Dated at Suva this 18th day of September 2015.

David Alfred
JUDGE
High Court of Fiji