

IN THE HIGH COURT OF FIJI AT SUVA
APPELATE JURISDICTION

Civil Appeal No. HBA 13 of 2019
Magistrate's Court Appeal No. 13 of 2018
Small Claims tribunal No. 2592 of 2017

IN THE MATTER of an appeal from the of the Magistrate's Court in SCT Appeal No. 13 of
2018

BETWEEN

FIJI SPORTS COUNCIL

APPELLANT

AND

SHAAMAL SHIVON KUMAR

RESPONDENT

Counsel : Mr D. Nair for the Appellant
Ms N. Mishra for the Respondent.

Date of Hearing : 16th September, 2019

Date of Judgment : 04th October 2019

JUDGMENT

[1] The respondent, in the Small Claims Tribunal made a claim of \$2105.00 against the appellant for the loss of his personal belongings. The respondent alleged that his car was parked at the National Hokey Centre right beside the security office and his car was broken into and his personal belongings were stolen. The Small Claims Tribunal awarded \$2180.00 to the respondent and the respondent appealed to the Magistrate's Court on the following grounds of appeal:

1. The Referee acted unfairly when he based his decision on the issue of law based on TORTS of negligence and held that the appellant owed a duty of care to the claimant without giving both parties the right to be heard and this was unfair to the appellant and prejudicially affected the results of the proceedings.
2. The Referee acted unfairly by not giving the appellant the right to be heard through its witnesses to prove that there was no physical break-in of the vehicle that resulted in the loss of the items as claimed by the respondent.
3. The Referee acted in excess of his jurisdiction by determining the issue of law when he applied the Law of trots and held that the appellant owed a duty of care which only the court has the jurisdiction to examine and determine.
4. The Referee acted unfairly when he failed to determine the ownership of the goods allegedly stolen but took the mere words of the respondent without any proof and this prejudicially affected the results of the proceedings.
5. The Referee acted unfairly when he took into consideration the Police report which is not conclusive to prove that the items were actually stolen and this prejudicially affected the results of the proceedings.
6. The Referee acted unfairly when he determined the value of the items without any proof but entirely relied upon the mere words of the respondent and this prejudicially affected the results of the proceedings.
7. The Referee acted unfairly when he failed to take into account the public notice that was displayed that clearly indemnified the appellant from the

loss of any personal property and further the respondent was responsible for the security of his own personal belongings but the Referee shifted this responsibility upon the appellant and this prejudicially affected the results of the proceedings.

[2] The learned Magistrate who heard the appeal dismissed the appellant's appeal with costs of \$200.00.

[3] In her decision the learned Magistrate observed that;

The appellant was present at the substantive hearing both parties were present and provided documentary evidence to the Referee which contained the statements of the security officers, the incident report and the public notice.

It is apparent from the appeal record that the Referee provided an opportunity for both the parties including the appellant to be heard. He believed the evidence produced at the hearing of the original claimant. There is no evidence of any bias on part of the referee or that the manner in which the proceedings were conducted; were unfair to the appellant or prejudicially affected the outcome of the claim.

[4] The appellant appealed the decision of the learned Magistrate on the following grounds:

1. The learned Magistrate erred in law and fact when she failed to determine whether the appellant owed the duty of care for the protection of the personal belongings of the respondent whilst visiting the sporting facilities.
2. The learned Magistrate erred in law and fact when she failed to take into account that the proceedings before SCT was bias when the bare words of the respondent in the absence of any evidence of the break-in, items stolen, the value of the items and whether the items were indeed in the vehicle and this has prejudicially affected the outcome of the decision.
3. The learned Magistrate erred in law and fact when she failed to uphold that the proceedings before the SCT was procedurally unfair when the parties were not given the opportunity to adduce witnesses to address the disputed facts.

4. The learned Magistrate erred in law and fact by not giving consideration that the proceedings before the SCT was bias when the referee failed to uphold that the public notice that is displayed clearly warned the patrons that the appellant is not responsible for the security of the personal belongings of any person visiting the facilities.
5. The learned Magistrate erred in law and fact when she failed to determine whether the SCT has jurisdiction to deal with issues of law given the fact that the representation before the Tribunal are not legally qualified persons and this had prejudicially affected the outcome of the decision.

[5] The appellant submitted that the learned Magistrate failed to determine whether the referee had jurisdiction to determine the issue of law of torts.

[6] Sections 8(1) of the Small Claims Tribunal Act 1991 (The Act) provides:

- (1) Subject to this section and to section 9, a Tribunal shall have jurisdiction in respect of any claim which does not exceed \$5,000 in value.

Section 9 of the Act provides:

A Tribunal shall have no jurisdiction in respect of any claim:

- (a) for the recovery of land or any estate or interest therein;
- (b) in which the title to any land or any estate or interest therein, is in question;
- (c) which could not be brought in a Magistrates' Court; and
- (d) which is required by any law to be brought only before any other specified court.

[7] The findings of the learned Magistrate on the question of jurisdiction is as follows:

In the present case, the claim amount was well within the monetary jurisdiction of Tribunal. The Counsel for the Appellant did not provide any case authority or point this Court any relevant provision that prohibited the Small Claims Tribunal from considering the issue of law. This Court finds that the referee was well within his jurisdiction to make the orders he did after listening to both parties and considering the information provided by the Appellant at the hearing.

[8] It is the position of the respondent that the provisions of section 8 and 9 of the Small Claims Tribunal Act 1991 read with section 16(1)(b) of the Magistrates' Court Act, the Small Claims Tribunal has the jurisdiction to determine the issue of negligence.

[9] Section 16(1)(b) of the Magistrates' Court Act provides:

Without prejudice to the jurisdiction of a Magistrate under this Act or other written law, a Resident Magistrate shall have and exercise jurisdiction in the following civil causes -

in all other personal suits, whether arising from contract, or from tort, or from both, if the value of the property or the debt, amount or damage claimed whether as a balance claimed or otherwise, is not more than \$50,000;

[10] Section 8(1) confers jurisdiction to determine any claim the value of which does not exceed \$5000.00. This is subject to the further limitations found in section 9 of the Small Claims Tribunal Act 1991.

[11] After the hearing the Referee identified the following issues for determination in deciding whether the respondent ought to be compensated:

- a. Was the claimant at fault by parking his vehicle closer to the security sentry house or was he at fault?
- b. Was there any element of negligence on the part of security guards on sentry that night?
- c. Is the claim reasonable and justifiable?

[12] The referee held that the respondent is liable to compensate the claimant for the loss of items as a result of the negligence of the security officers.

[13] The referee in paragraphs 12 and 13 of his ruling states thus:

12. Black's Law Dictionary says that negligence is "the failure to exercise the standard of care that a reasonable prudent person would have exercised in a similar situation." This incident is a classic example of negligence. Security Guards on sentry, failed to exercise standard security procedure (SOP) that any security personnel in the world would have exercised in similar situations. There were three of them on duty, yet failed to see the break-in, meaning they

were not patrolling the premises regularly with the result Claimant's car was broken into. It clearly involves the failure of a duty to exercise reasonable care or to act in a manner consistent with how other reasonable people should act

13. The Respondent's reply and statement of defence itself has proven [to the Tribunal] that guards failed to act promptly to stop the break-in. It has been established that the guards were present with a clear instruction that it was their duty to act when but failed to act. All security guards failed to exercise their duty to protect visitors.

[14] Section 26 of the Act provides:

(1) Evidence tendered to a Tribunal by or on behalf of a party to any proceedings need not be given on oath, but the Tribunal may at any stage of the proceedings require that such evidence, or any specific part thereof, be given on oath whether orally or in writing.

(2) 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.

(3) A Tribunal may receive and take into account any relevant evidence or information, notwithstanding the provisions of the Evidence Act and whether or not the same would normally be admissible in a Court of Law.

[15] Section 26 of the Act confers a wide power on the Small Claims Tribunal to investigate and call for evidence which is not restricted by the provisions of the Civil Evidence Act 2002.

[16] In this matter the Tribunal has only relied on the written statements tendered by the parties and although there were witnesses present at the hearing the Tribunal has not shown any interest in recording their evidence or at least in directing them to tender their evidence in writing.

[17] It is unfair by the parties to decide on the question of negligence without proper evidence before the Tribunal. In my view this is in violation of the basic rules of natural justice. Both parties to a dispute must be given a fair hearing.

[18] There were two contradictory written statements before the Tribunal. The Tribunal preferred to accept the respondent's position as against the appellant's but no valid reason given. As I understand from the decision of the Tribunal one of the acts of negligence is that the security personnel have failed to brief visitors the security rules of the facility which in my view is practically impossible. If security personnel are engaged in explaining each and every driver who comes into the facility they will have no time to discharge the duties expected of them. There is a Public Notice displayed by the appellant very clearly explaining the responsibilities of the people who use the Sports Complex. The relevant portion of the public notice reads as follows:

PARKING – vehicles are permitted to park in the demarcated Car Park Areas:
NO PARKING ON THE GRASS; Parking near fence area is AT CAR OWNERS
RISK.

[19] There was no evidence before the Tribunal as to where the car was in fact parked. In this regard the appellant and the respondent took two contradictory positions. An issue of this nature cannot be resolved with evidence. A statement written by the parties is evidence before the Tribunal however, that kind of evidence is not sufficient to establish negligence.

[20] To establish the tort of negligence the Tribunal needs evidence and the burden is on the claimant to establish the alleged negligence of the by adducing sufficient evidence. The Tribunal has failed to exercise its powers conferred upon by section 26 of the Act.

[21] I find that some of the findings of the Tribunal are based on assumptions and not supported by evidence.

[22] The learned Magistrate has dismissed the appeal on the ground that the referee was well within his jurisdiction to make the orders he did after listening to both parties and considering the information provided by the Appellant at the hearing.

[23] The question here is whether the manner in which the proceedings were conducted by the Referee was unfair to the appellant and prejudicially affected the results of the

proceedings. For the reasons I have given above the manner in which the Tribunal conducted the hearing, in my view, is prejudicial to the appellant.

[24] In my opinion this matter should have been heard by a Magistrate. Section 22(2) of the Act provides:

If any proceedings have been commenced in a Tribunal which in the opinion of the Tribunal would more properly be determined in a Magistrate's Court, the Tribunal May, on the application of a party or of its own motion, order that the proceedings be transferred to a Magistrates' Court in its ordinary civil jurisdiction.


[25] Considering the nature of the dispute between the parties and the basis of the plaintiff's claim I am of the view that this matter should have either been instituted in the Magistrates' Court or the Referee should have transferred it to the Magistrates' Court for determination.

ORDERS

1. The ruling of the Small Claims Tribunal is set aside.
2. The decision of the learned Magistrate is also set aside.
3. The matter is sent back to the Small Claims tribunal for a fresh hearing before another Referee or if the Tribunal is of the view it is appropriate, to transfer the matter to the Magistrates' Court.
4. The parties will bear their own costs of this appeal.



04th October 2019


Lyone Seneviratne

JUDGE