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IN THE FIJI COURT OF APPEAL
Civil Jurisdiction
CIVIL APPEAL NO. 23 OF 1980

Between:

SIVAMS TRANSPORT

APPELLANT

- and -

NADI TOWN COUNCIL

RESPONDENT

Mr. B.C. Patel for the Appellant.
Mr. Ram Krishna for the Respondent.

Date of Hearing: 10th March, 1981.

Delivery of Judgment:

JUDGMENT OF THE COURT

SPRING, J.A.

Appellant brought an action for damages in the Supreme Court of Fiji at Lautoka against the respondent Council claiming that respondent having accepted appellant's tender for the collection of garbage within its area breached that contract by accepting a tender from another contractor to whom the contract for garbage collection was subsequently let.

On 1st February 1980, after an hearing in the Supreme Court which lasted five days, the learned trial Judge dismissed the action and, in so doing, held that there was no binding contract between appellant and respondent.

The brief facts are as follows : The Nadi Town Council had previously employed an independent contractor to collect garbage within its boundaries; early in 1978 as a result of audit recommendations respondent was advised that tenders should be called for the letting of any contract for the collection of garbage; on 13th September, 1978, the Finance Committee of the respondent recommended that advertisements be issued not later than mid October, 1978, calling for tenders for the collection of garbage, the contract to commence on 1st January, 1979. An ordinary meeting of respondent held on 28th September, 1978, confirmed this recommendation. Advertisements were issued, somewhat tardily, on 18th and 21st November, 1978, which read as follows :

" T E N D E R
NADI TOWN COUNCIL
GARBAGE REMOVAL CONTRACT

Tenders are invited from approved and eligible contractors for providing garbage service on a yearly basis from and within the Nadi Town Boundary and part of the Airport area. Tender papers with terms and conditions can be obtained from the Office of the undersigned during working hours from Mondays to Fridays. Tenders close at 4 p.m. on 4th December, 1978. Late tenders will not be accepted.

S.S. Pillay
Town Clerk."

Appellant tendered as did the then current contractor Ram Pratap. A third tender was received but as no deposit accompanied this tender it was not considered. On 6th December, 1978, the Health Committee of the Council which included seven Councillors, opened and considered the tenders; the appellant tendered the sum of \$41,330.20 for the cost of garbage collection for each of three years - 1979, 1980 and 1981 - and forwarded a letter stating "our above prices are open for negotiation

and we request you to call us any time to reconsider the prices". A cheque for \$1,000 deposit was also enclosed. Ram Pratap tendered \$43,390.08 for the year 1978, and thereafter to increase by 8 per cent for the 3 year period. The Health Committee resolved that "that the lowest tender of Sivams Transport be recommended for acceptance subject to further negotiation as indicated by the tenderer in its letter with a view to reducing the quoted amount. His Worship the Mayor, the Town Clerk, the Town Engineer and the Health Inspector were given the mandate to carry out the negotiations with Messrs. Sivams Transport."

This Committee of the four named persons was called an "ad hoc" Committee of the Health Committee. Doubts as to the validity of the appointment of such a committee were expressed by the learned trial Judge in his judgment. A meeting was called for 7th December, 1978, at the Town Clerk's office and Kumar Sivam attended together with his brother Param Sivam; they were advised that the respondent did not require the market area to be included in the tender price; further, appellant was asked to reduce its price in view of the comments contained in the letter enclosing the tender. After discussion the tender price was reduced on 7th December, 1978, to \$35,500. A fresh tender form was produced by the Town Clerk which was duly completed by Kumar Sivam on behalf of appellant showing garbage work \$33,000 and dump service \$2,500. The new tender form was attached to the other relevant tender documents. The tender form signed by Kumar Sivam contained provision for the Town Clerk to sign, but the Town Clerk did not sign, nor did anyone present at the meeting request that the tender form be signed on behalf of respondent. On 8th December, 1978, a letter was sent to respondent council by appellant in the following terms:

"The Town Clerk,
Nadi Town Council,
NADI.

Dear Sir,

Re: Garbage Removal Contract 1979 - Tender
Dated 4th December 1978.

Further to our discussion herein we hereby reconfirm our new price for the undermentioned work and to be done in accordance with the above contract except the cleaning of the market on Saturdays which work with our agreement your Council elected to have done by its own employees.

(a)	Collection and Removal of Garbage	\$33,000. 00
	per year.	
(b)	Dump Maintenance	\$2,500. 00
	per year.	
		<u>\$35,500. 00</u>
		Per Year.

(Thirty Five Thousand and
Five Hundred Dollars).

We also confirm that our above price is quoted per year and shall be in force for 3(Three) Years only with effect from the 1st day of January 1979.

Thanking you for your kind consideration and an early confirmation of your decision.

Yours faithfully,

SIVAMS TRANSPORT "

This letter appears to have been received by respondent on 8th December, 1978. Kumar Sivam stated in evidence that his reason in sending the letter was for audit purposes and to reconfirm the price; Param Sivam confirmed :

- (a) that the price for the garbage collection was deleted as respondent did not require the cleaning of the market area and,
- (b) a fresh tender form completed and signed by Kumar Sivam with whom the Mayor shook hands; and the Mayor stated that work was to start on the 1st January, 1979.

Respondent's Engineer discussed with Kumar Sivam various matters relating to the garbage collection contract and Param Sivam heard the Engineer inquire "where he would park his truck if he got the contract". The Engineer in his evidence said that he told Kumar Sivam that "if he was successful he could park lorries for time being with us at our depot". Appellant assumed that once the tender price for the garbage collection contract had been agreed upon there was an oral contract binding upon respondent and appellant. Kumar Sivam in his evidence said :

"The form needed a signature of the Town Clerk. He was there. I was told it would be signed and copies sent to me. I had faith in the four of them. There was a contract, it was verbally agreed.....
"I was not told it would be put before the Council for consent."

The Mayor stated in evidence that he made it clear to Kumar Sivam that appellant's offer had to be approved by the full Council; that the ad hoc committee acted merely as negotiators; that the ad hoc committee had "no powers to accept anything without approval of full council". The Mayor said :

"We were to finalise fresh tender figures to put to Council. We were to negotiate to reduce price. Plaintiff wanted to bring figures down and he did so. Certain work was to be deleted. These were recommendations of Health Committee. He submitted new tender figures and cancelled previous figures. Tender figures were signed to be put before full council. Health Committee had no powers. We reported back to Health Committee with new figures."

The Town Clerk said in evidence :

"I referred tenders for garbage collection to Health Committee. Tenders opened on 6.12.78. I was present. Subsequently I asked plaintiff to come and see me. He came on 7.12.78 to see an ad hoc committee. Mayor arrived. Tender was made 'subject to negotiation'. We asked him to reduce figure. He cancelled his original figure and I gave him another tender form to complete. Nothing was said about a contract. It was said that committee would recommend his tender to full council and it was most likely that Council would accept it."

On or about 15th December, 1978, Kumar Sivam telephoned the Town Clerk of the respondent council advising that he had heard disquieting news that some Councillors were in favour of the garbage contract being given to the other contractor; he was advised to speak to the Mayor who confirmed the Town Clerk's advices. On 18th December, 1978, Kumar Sivam was requested by Town Clerk to come to his office along with the other tenderer; no satisfactory reason was given to Kumar Sivam for this summons. He called at the Town Clerk's office and handed him a letter from his solicitors claiming that appellant was the successful tenderer, and, that the Council through its ad hoc committee had accepted the tender; after waiting for some time in the Town Clerk's office Kumar Sivam left as nothing eventuated on that day. On 27th December, 1978, the full Council met and resolved "that the report of the ad hoc committee of the Health, Market, Fire and Parks be rejected". Thereupon the Council resolved that fresh tenders be called for the garbage collection contract. On 28th December, 1978, a letter was received by appellant from respondent Council stating that its tender had been unsuccessful and refunding the \$1,000 paid.

On 1st January, 1979, Kumar Sivam saw an advertisement in the local paper whereby respondent was calling for fresh tenders for garbage collection within its boundaries; appellant submitted a fresh tender

together with a cheque for \$1,000 deposit. On 31st January, 1979, respondent wrote to the appellant's solicitors advising that its subsequent tender was unsuccessful and returned the cheque for \$1,000.

After considering the evidence in detail the learned trial Judge made several findings of fact and held "that there was not on the 7th December, 1978, nor at any time thereafter a concluded binding contract between the plaintiff and the defendant".

Appellant appealed to this Court and submitted that the full Council had resolved to call for tenders and the committee acting on behalf of the full Council finalised the terms with appellant; that an oral contract had come into existence at the meeting on 7th December, 1978, when appellant's tender was accepted by the committee; that all the terms of the contract had been agreed upon at the meeting and that the committee had been delegated by the full Council to settle the terms of the contract which terms had been accepted by the Committee; that the \$1,000 deposit was receipted on 11th December, 1978 - after the settlement of terms - which was supportive of the claim that appellant was the successful tenderer; that if the agreement reached on 7th December, 1978, required formal confirmation by respondent a binding contract had nevertheless come into existence. That appellant was entitled to assume the committee had the necessary power to act on behalf of respondent; that appellant was not required, nor obliged, to inquire into the "indoor management" or respondent's procedures and that when the tender price was finally fixed there was an unconditional parol acceptance by the committee.

Another ground of appeal dealing with the admissibility of certain evidence was abandoned.

Mr. Ram Krishna submitted that the 'ad hoc' committee had power merely to negotiate a fresh tender

price consequent upon the removal from the tender of the cleaning of the market area; that appellant knew something further had to be done before a contract came into existence and submitted that the letter written by appellant dated 8th December, 1978, to the Town Clerk giving details of the new tender price confirmed this submission. That the evidence of respondent's Engineer (which was accepted by the learned trial Judge) clearly indicated that there were matters yet to be finalised; that there was no evidence of delegation empowering an ad hoc committee of the Health Committee to accept tenders on behalf of the respondent; that the learned trial Judge saw and heard the witnesses; made correct findings of fact on the evidence, and drew correct inferences therefrom; that the onus was on appellant to show that the learned trial Judge, in determining as he did the issues of fact, fell into error.

The real issue in this appeal therefore is whether the trial Judge erred in his finding that the appellant's tender, finally submitted as amended on the 7th December, 1978, was not accepted, in fact, by the respondent Council.

The principles governing the position of a Court of Appeal in relation to findings of fact made by a lower court are fully stated in Powell v. Streatham Manor Nursing Home (1935) A.C. 243, Watt (or Thomas) v. Thomas (1947) and S.S. Hontestroom v. S.S. Sagaporack (1937) A.C. 37, Benmax v. Austin Motor Co. Ltd. (1955) A.C. 370 and need not be repeated.

In the Court below the learned Judge analysed the case for the plaintiff - now the appellant - and said :

"The plaintiff's claim is based on breach
"of contract, on the basis that the meeting
"with the ad hoc committee on the 7th December
"1978, ended with a concluded agreement, binding
"on the Town Council even though there was no
"written signed agreement".

The trial Judge went on and said :

"What transpired at the meeting on 7th December, 1978, is in dispute and that it was the difference in versions which is one of the issues in this case".

The issue of credibility was therefore a matter which assumed importance in the action and the trial Judge made a clear finding as to the credibility of respondent's witnesses when he said :

"I must say also for reasons that will become apparent from the evidence, that of the three witnesses giving evidence for the Town Council the only one who emerged with his integrity intact was the Town Engineer, Mr. Mehrotra. And I must say that the Town Clerk, not only emerged as totally lacking in credibility, but I was also left seriously in doubt as to whether he was incompetent or whether the answer was rather more sinister. Amongst other things, not only did he appear to lack quite elementary knowledge of what a Town Council could and could not do or the procedure to be followed; but he also seemed to be of the understanding that the Mayor was a law unto himself, not bound by the usual rules or practices to be followed by other councillors. I don't doubt that this goes a long way to explain the troubles that gave rise to this case".

We have to decide the correctness of the conclusion reached by the trial Judge that on the 7th December, 1978, there was no acceptance by respondent of appellant's tender.

Mr. Patel argued that the tender as amended by appellant was accepted by the ad hoc committee and was binding on respondent Council; that the full Council resolved to call tenders for the collection of garbage; the ad hoc committee had settled the terms of the tender and had accepted same; accordingly the respondent Council was bound.

Counsel for appellant relied on Battelley v. Finsbury Borough Council (1958) 56 L.G.R. 165 which was a case where a works committee of a local authority had

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selected Battelley as assistant road superintendent "subject to confirmation"; subsequently the committee appointed someone else and Battelley brought an action for breach of contract. This case, however, dealt with the true construction of the standing orders of the local authority and is not, in our view, relevant to the matter we have to decide - namely whether appellant's tender was in fact accepted by respondent. The Local Government Act 1972 (Fiji) empowers a local authority to appoint committees and delegate certain powers to committees. Section 27 states :

"27.(1) A council may from time to time appoint standing or special committees and may delegate to any such committee any matters for consideration or enquiry or management or regulation and may delegate to any such committee any of the powers and duties conferred or imposed upon the council by the provisions of this Act except -

- (a) to borrow money;
- (b) to make a rate;
- (c) to make by-laws;
- (d) to execute a contract; or
- (e) to institute an action.

(2) Persons who are not councillors may be appointed to a committee, other than a committee for regulating and controlling the finances of the municipality, appointed under the provisions of this section but shall not be entitled to vote on any matter coming before the committee:

Provided that at least two-thirds of the members of every committee shall be councillors.

....."

We agree with the comments of the learned Judge when he questioned the validity of the appointment of the ad hoc committee and its ability to make effective and binding decisions on behalf of respondent Council; further the ad hoc committee consisted of four persons only one of whom was a Councillor - the Mayor. The trial Judge said :

"It is doubtful if the Health Committee
 "has power to appoint an ad hoc committee
 "or sub-committee, let alone delegate
 "powers to it. Certainly as constituted
 "the so called ad hoc committee would not
 "qualify as a committee of the Council,
 "because not only was it not appointed
 "and empowered by the Council, but it
 "also was not at least two-thirds comprised
 "of councillors."

It is clear that the tender, as amended and submitted by appellant, to be converted into a binding contract, unconditional acceptance thereof by the respondent Council or some committee duly authorised and empowered on its behalf was required; moreover the fact of such acceptance had to be notified to appellant.

It is apparent from the evidence that there was no acceptance in fact by the ad hoc committee of appellant's tender.

Turning now to the receipting on 11/12/78 of appellant's cheque for \$1,000 it is to be noted that the receipt forwarded to appellant states "Garbage Tender Deposit". The Town Clerk stated :

"I kept deposit in my custody. Cashier
 "had receipt written out on 11.12.78. I
 "had overlooked it till then."

The Mayor said :

"In my presence there was no discussion of
 "deposit money. We could have kept cheque
 "till 7/1/79. Tender documents require
 "\$1000. I believe in case of successful
 "contractor \$1000 is kept.

"Plaintiff's \$1000 was receipted on
 "11/12/78 - after 7/12/78. On p.3 of contract.
 "I don't know how deposit money was dealt
 "with. I don't know why it was receipted
 "on 11/12/78."

In our view, therefore, it is not possible to conclude on the evidence that the receipting of the cheque for \$1,000 on 11th December, 1978, was capable of being treated as an unconditional acceptance of

appellant's tender by the ad hoc committee on 7th December, 1978.

Dealing with the submission that the learned trial Judge failed to appreciate that even if the agreement of 7th December, 1978, needed the formal confirmation of respondent Council a binding contract had come into existence.

In our view there is no validity in this submission - the learned Judge found -

- (a) that there was no acceptance of appellant's tender by the ad hoc committee and
- (b) that the appellant was aware "that something more was necessary before the agreement was binding".

The evidence clearly establishes that no contract at all was concluded between the parties on the 7th December, 1978 - not even a contract conditional upon the Council approving same.

The trial Judge said :

"But was there a concluded binding agreement between the parties, even assuming that the negotiators had powers to conclude such an agreement? I don't think so, and there are three pieces of evidence that lead me to that conclusion, and the conclusion that even P.1 the main witness for the plaintiff, knew that something more was necessary before the agreement was binding."

The three pieces of evidence mentioned by the learned trial Judge from which he concluded appellant knew that the tender had not been unconditionally accepted by the Committee were -

- (1) The fresh tender form signed by Kumar Sivam on behalf of appellant was not signed by the Town Clerk in the space provided on the form for his signature.

The learned trial Judge said :

"Firstly it was agreed that the tender documents ultimately became the final contract documents once they were signed by both parties. The plaintiff had added his signature when he submitted the tender. A space was left for the Town Clerk to sign and clearly the addition of the Town Clerk's signature is the final step in the conclusion of the contract, and the execution of the contract documents.

"If, as the plaintiff claims, the contract was concluded on 7/12/78 why did he not insist that the Town Clerk sign there and then? He had amended his tender and signed it, so there was nothing further for him to do; the contract documents were all ready for the Town Clerk to sign."

The learned Judge was correct when he drew the inference from this evidence that appellant knew there was something further to be done; he said :

"The plaintiff must have realised that the signing of the tender documents by both sides was a necessary final step in concluding the contract, and that therefore all was not yet completed."

(2) The covering letter dated 8th December, 1978 which accompanied appellant's tender concluded with the words "Thanking you for your kind consideration and an early confirmation of your decision."

Again the learned Judge drew the correct inference that if the appellant's claim, that the tender had been accepted by the committee was true, there was no necessity to confirm the decision at an early date or at any other time.

(3) The evidence of appellant's own witness Param Sivam who overheard respondent's Engineer ask Kumar Sivam where he would park his lorries in Nadi "if he got the Contract" confirmed the view taken by the learned Judge on the evidence that the tender had not been unconditionally accepted by the ad hoc committee.

The learned trial Judge correctly stated the position when he said :

"Those words indicate once again that
"however confident everyone was that the
"plaintiff would get the contract all was
"not yet finalised."

The credibility of the witnesses was an important issue in determining the happenings on the 7th December, 1978, and thereafter, and, it is clear from the record that the learned trial Judge made correct assessments of credibility when -

(a) he accepted the evidence of respondent's engineer and disbelieved Kumar Sivam when he said :

"I accept the Town Engineer as an honest
"witness, and he said that it was always
"understood (even by the plaintiff) that
"everything would have to be approved by
"the full Council, and he was clearly in
"no doubt himself that whatever they agreed
"would have to go to the full Council."

(b) disbelieved Kumar Sivam's explanation that the letter dated 8/12/78 was sent for audit purposes.

The learned Judge said :

"P.1 said that he was asked to send a
"covering letter confirming the new tender
"figures were in the amended tender sheet,
"a covering letter was not a requirement of
"the tender conditions. P.1 said he was told
"that the covering letter was for audit
"purposes, but it is difficult to see what
"those purposes could be, or what the auditors
"could get from the covering letter that
"they could not get from the tender documents
"themselves."

(c) disbelieved Kumar Sivam when he stated he was called to the Town Clerk's office on 7th December, 1978 by the Engineer to finalise the terms of contract.

It is clear from the judgment in the court below that Kumar Sivam had gone to the Town Clerk's office to negotiate on the tender price which was consistent with the terms of the letter sent by him when he forwarded the tender.

In our opinion the learned Judge considered the whole of the evidence in detail and concluded finally by saying :

"Not only was there no power to conclude
"a binding contract, but the plaintiff
"was aware that whatever agreement had
"been reached on 7/12/78 was not a final
"concluded contract."

In this appeal the onus is on the appellant, if he is to succeed, to convince this Court that the trial Judge fell into error in coming to the conclusion on the evidence that there was no acceptance of appellant's tender.

The assessment of credibility of witnesses was as we have said a matter of prime importance; we have given careful consideration to the arguments advanced by counsel for appellant, but are satisfied that the trial Judge tested the evidence by careful scrutiny, took proper advantage of having seen and heard the witnesses, and, came to the clear conclusion that on 7th December, 1978, the ad hoc committee did not, in fact accept appellant's amended tender on behalf of respondent Council.

While we appreciate the expressed reluctance of the trial Judge, that judgment be given in favour of the respondent, we are led inescapably to the conclusion that the material findings of fact made by him in the Supreme Court must be accepted, and, we do so find that the tender as finally submitted by appellant was not accepted by the ad hoc committee on behalf of the respondent Council.

Having reached this conclusion it is unnecessary for us to pass to a consideration of such matters as delegation, agency or "indoor management", or, to consider generally the question whether the ad hoc

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committee had authority to accept appellant's tender on behalf of respondent.

Accordingly the appeal is dismissed with costs to the respondent to be taxed if not agreed.

Agreed

Vice President

[Signature]

Judge of Appeal

[Signature]

Judge of Appeal