

Civil Appeal No. HBA 28 of 2012 - Jacob Kwan vs Pepes Limited

In the High Court of Fiji at Suva

Civil Jurisdiction

Civil Appeal No. 28 of 2012

Between: Jacob Kwan

Appellant

And: Pepes Limited

Respondent

Appearances: Ms Renee Lal for the appellant

Ms C.Sanchez for the respondent

Written submissions of the respondent filed on 24 September, 2013

Written submissions of the appellant filed on 17 October, 2013

Judgment

1. This appeal is concerned with a judgment of the Magistrates' Court setting aside a decision of the Small Claims Tribunal(Tribunal).

2. Sequence of Events

- a) The respondent filed a claim in the Tribunal, claiming a sum of \$3,500.00 from the appellant.
- b) On 12th July,2010, the Tribunal made order that the appellant pay the sum of \$ 3500 in monthly instalments of \$200.The respondent appealed against the order.
- c) On 4th May,2012,the Magistrates' Court allowed the appeal and set aside the orders made by the Tribunal.
- d) On 4th June, 2012, the appellant filed notice of appeal and grounds of appeal in this Court.

3. The hearing

On the date of hearing of the appeal, 19th September, 2013, Ms Sanchez, counsel for the respondent submitted that: (1) the appellant had not filed notice of motion to appeal within 7 days and, (2) the copy record was not served on the respondent, prior to the hearing. The parties agreed to file written submissions on these preliminary legal issues.

4. *The determination*

Notice of Intention to Appeal

A party aggrieved with a decision of the Magistrates' Court is required by Order XXXVII r1 of the Magistrates Court Rules to file "*within seven days after the day on which the decision appealed was given...notice in writing of his intention to appeal*". The proviso states that such notice may be given verbally, in the presence of the opposite party.

In *Crest Chicken Ltd v Central Enterprises Ltd*,(2005) FJHC 87 it was held that the provisions of Order XXXVII, r 1 are mandatory. There is no provision for extension of time to give notice of intention to appeal.

More recently, Wati J in *Fiji Posts and Telecommunications Ltd*,(HBA 003 of 2000L) held that Or11,r 2 of the Magistrates Court Rules titled "*Enlargement or Abridgement of Time*" enables an application to be made for extension of time to file notice of intention, provided the applicant had made an attempt to obtain the consent of the other party. Wati J stated that in the absence of a specific provision, the Court can rely on the general provision, to consider the application for extension of time.

The reasoning in that judgment appeals to me, in the light of Or11,r 9 which provides that a court shall have power "*to enlarge or abridge the time appointed by these Rules..*"However,a party applying for an extension of time has to provide a satisfactory explanation for his delay.

In the present case, the appellant has not filed notice of intention to appeal within 7 days nor did he seek an extension of time, to file the notice. In terms of Order XXVI of the Magistrate's Courts Rules, an application has to be made to that court, by motion supported by an affidavit.

I have perused the record of the lower court. On 4thMay, 2012, when the Ruling was delivered the Learned Magistrate had recorded the attendances of the parties' respective solicitors. The written submissions filed on behalf of the appellant urges that verbal notice was given of the appellant's intention to appeal. There is no

notation that the appellant's solicitors gave such notice nor has the appellant stated so, by way of affidavit evidence.

I uphold the objection of the appellant.

Copy Record

The appellant has taken up the objection that the copy record was not served on the respondent prior to the hearing, in terms of the Magistrate's Courts Rules. As urged by Ms Lal, counsel for the appellant, in her submissions, that matter was not brought to the attention of Court by the counsel who had represented the respondent before the hearing date.

Be that as it may, I would agree with Ms Lal, the failure to serve the copy record does not render the appeal defective and incapable of being cured.

The merits of the appeal

I turn to consider the merits of the appeal. The appellant, in his claim to the Tribunal stated that he took a amplifier/equalizer unit for repair to the respondent's shop in November,2000. In November,2008, the respondent informed him that he would take the case to the Tribunal. Six months later, the respondent could not find the amplifier and wanted to replace it with an obsolete amplifier.

The respondent, in its statement of defence, denied that he received the equipment for repair. The respondent further asked the appellant to provide proof that the equipment was given to the respondent. The statement of defence concluded that the claim was statute barred under section 4 of the Limitation Act.

On 20th October, 2009, the Referee had dismissed the respondent's defence of limitation stating that he "*regard(s) the period before 09/09/08 as ordinary negotiating period between the two parties. C wrote his letter of 9/9/08 but R still ignored their customer's complaint until he finally gave it up in November 2008 when he decided to go to court.*" The Referee concluded as follows:

In the circumstances it does not meet the end of justice to allow for the time limitation clause.. i.a.w. Section 29. I will rule in favour of the claimant”.

The respondent appealed to the Magistrates’ Court on the ground that the proceedings were conducted by the Referee in a manner which was unfair to the respondent and prejudicially affected the result of the proceedings. The notice of appeal provided further that the Tribunal exceeded its jurisdiction, in that the appellant did not present any evidence in support of the allegations against the respondent.

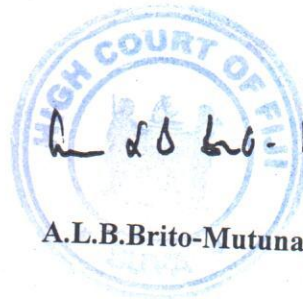
In my judgment, the reasoning of the Referee that the negotiating period takes the matter out of the Limitation Act, is erroneous in law. The Learned Magistrate correctly reached a finding that the claim was clearly statute barred under the Limitation Act.

In my view, there are no merits in the grounds of appeal. The prospects of success are minimal.

5. Orders

- (i) The appeal of the appellant is dismissed.
- (ii) The appellant shall pay the respondent \$2,500 costs summarily assessed within 21 days of this judgment.

23rd January, 2015



A.L.B. Brito-Mutunayagam

Judge