

**IN THE HIGH COURT OF FIJI AT SUVA**

**APPELLATE JURISDICTION**

Civil Appeal No. 34 of 2012

Suva Magistrates Civil Case No. 04/2009

**BETWEEN** : **SHERANI & CO** **Appellant**

**AND** : **RACHAEL MONIKA KRISHNA**  
**Respondent**

**COUNSEL** : Ms. R. Naidu for the Appellant  
Mr. A. Vakaloloma for the Respondent

**Date of Hearing** : 7<sup>th</sup> December, 2015

**Date of Judgment** : 11<sup>th</sup> February, 2016

**JUDGMENT**

[1] The respondent on 09<sup>th</sup> July 2008 entered into a sale and purchase agreement with Tropical Properties (Fiji) Islands Limited to purchase the property mentioned therein. On 16<sup>th</sup> July 2008 the respondent rescinded the contract. As per clause 2(i) of the sale and purchase agreement the respondent had deposited with the appellant 10% of the sale price of the property which was \$ 4500.00.

[2] The respondent then made an application to the Small Claims Tribunal to recover the deposit paid to the appellant and the Small Claims Tribunal ordered the appellant to pay the respondent \$ 4500. Against the decision of the Small Claims Tribunal the appellant appealed to the Magistrate's Court and the learned Magistrate who heard the appeal ordered the appellant to pay \$ 4500 to the respondent with an additional payment of \$ 500 as costs of the appeal. Being aggrieved by the said decision of the learned Magistrate the appellant preferred this appeal on the following grounds:-

1. The learned Magistrate erred in law and in fact when she ordered the appellant to pay \$ 4500 to the respondent while accepting that the said sum was paid into the appellant's trust account on the advice of its clients.
2. The learned Magistrate erred in law and in fact when she failed to consider that the appellant should not be a party to the proceedings as the appellant only acted as solicitors in the sale and purchase agreement.
3. The learned Magistrate erred in law and in fact by failing to consider that the monies held by the appellant in its trust account was in the account of Tropical Properties (Fiji) Limited and payment could not be made without its instructions in accordance with the provisions the Trusts Accounts Act.
4. The learned Magistrate erred in law and in fact by holding that the defendant is liable to pay the respondent \$ 4500 when at paragraph 15 of her judgment she quashes the order of the referee made on 19<sup>th</sup> December 2008 in the Small Claims Tribunal.

[3] Paragraphs 14 and 15 of the judgment of the learned Magistrate read as follows:-

[14] In view of the above, it is my considered view that the claim of the respondent filed before the Small Claims Tribunal is not in order for the Small Claims Tribunal had no jurisdiction to hear and determine this case since issue was pertaining to land.

[15] In view of the foregoing, the appeal is successful to that extent and I hereby quash the order made by the referee.

[4] After setting aside the decision of the Small Claims Tribunal the learned Magistrate proceeded to decide the substantive matter under the powers vested in her by section 4(1) of the Small Claims Tribunal Decree 1991 which provides as follows;

The jurisdiction of a Tribunal shall be exercised by a Referee appointed under section 6 of this Decree, or by a Resident Magistrate.

[5] Under the provisions of the Small Claims Tribunal Decree the Magistrate acts in two different capacities that is, as an appellate Judge sitting in appeal from the decisions of the Small Claims Tribunal under section 33(2)(b) of the Small Claims Tribunal Decree 1991 and as a referee under section 4(1) of the Small Claims Tribunal Decree 1991. When a learned Magistrate is sitting as an appellate Judge in a particular matter he has no power to act as the referee in the same matter.

[6] Any Magistrate acting under the powers conferred upon him by section 33 of the Small Claims Tribunal Decree 1991 is only empowered to consider the correctness of the decision of the Small Claims Tribunal on the following grounds;

- (a) whether the proceedings were conducted by the Referee in a manner which was unfair to the appellant and prejudicially affected the result of the proceedings; or
- (b) whether the Tribunal exceeded its jurisdiction.

- [7] The Magistrate's Court cannot exercise both appellate and original jurisdiction conferred upon it by sections 4(1) and 33(2) of the Small Claims Tribunal Decree 1991 in the same case.
- [8] The other issue for determination is whether a cause of action has accrued to the plaintiff to sue the solicitors to recover the money paid into the trust account which the solicitors are holding in trust for their client.
- [9] In terms of **Section 2** of the **Trust Accounts Act** a trustee means any legal practitioner engaged in the practice of his or her profession or the carrying on his or her business, either solely on his or her own account or in partnership with any other person or persons and who, or the firm of which he or she is a partner, in the course of such practice or carrying on of business receives any money upon trust or upon terms requiring the legal practitioner to account to any person for that money, and includes any person deemed by regulation made under this Act to be a trustee.
- [10] **Section 5** of the said Act provides that a trustee shall establish and keep in a bank or banks in Fiji one or more trust accounts designated or evidenced as such into which the trustee shall pay all trust moneys received by that trustee.
- [11] **Section 6(1)** of the said Act provides as follows;
- (1) A trustee shall not withdraw moneys from a trust account except for the following purposes:-
    - (a) payment to the person on whose behalf the moneys are held or in accordance with that person's directions;
    - (b) payment to the trustee of disbursements properly paid by the trustee on behalf of the client in question. Disbursements shall be deemed to have been paid on the day the cheque in payment of the disbursement has left the possession and control of the trustee, and the trustee has no reason to believe that the cheque will not be paid on presentation;

(c) payment to the trustee for professional costs in the following circumstances:-

- i. where the payment is supported by authorisation in writing by the person on whose behalf the moneys are held. Where the authorisation is not specific as to the amount to be paid, the trustees shall forward an account to the client in question prior to making such payment;
- ii. in payment of an account which has been delivered to the client and at the expiration of 30 days after delivery no evidence exists of any objection by the client to the quantum thereof;
- iii. where payments in the trust account were received by the trustee in payment or part payment of an account previously rendered to the client in question;

(d) payment that is otherwise authorised by statute or made pursuant to an order of the Court.

[12] In view of the above provisions the trustees cannot withdraw money from the trust accounts without prior permission of the respective client.

[13] The respondent deposited \$ 4500 being 10% of the purchase price of the property to be given to the vendor once the transaction was finalised. The appellant held this money in trust for the vendor. After terminating the contract if the respondent intended to recover the amount of money deposited in the solicitor's trust account she should have sued the vendor and not the solicitors. There was no agreement between the appellant and the respondent and also that the solicitors cannot be sued in the representative capacity for the reason that they did not represent the vendor in entering into the sale and purchase agreement as its agents.

[14] For the reasons aforementioned the Court makes the following orders.

### ORDERS

1. The appeal of the appellant is allowed.
2. The judgment of the learned Magistrate delivered on 21<sup>st</sup> May 2012 ordering appellant to pay \$ 4500 with costs of \$ 500 to the respondent, is set aside.
3. The respondent shall pay the appellant \$ 1000 as costs of this appeal.



*Lyone Seneviratne*

Lyone Seneviratne

JUDGE.

11.02.2016