

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION AT LAUTOKA**  
**CIVIL JURISDICTION**

**HBA NO. 2 OF 2018**

[Magistrate Court of Nadi Civil Action No- 184 of 2015]

**BETWEEN** : **FAIZAL ISMAIL DEAN**  
**APPELLANT** [Original Defendant]

**AND** : **MARSHALL WHOLESALE LIMITED**  
**1<sup>ST</sup> RESPONDENT** [Original 1<sup>st</sup> Plaintiff]

**AND** : **LESLIE NEVILLE MARSHALL**  
**2<sup>ND</sup> RESPONDENT** [Original 2<sup>nd</sup> Plaintiff]

**Before** : A.M. Mohamed Mackie- J

**Appearance** : Ms. Natasha Khan for the Respondent- Plaintiffs

: Mr. S. Khan for the Appellant- Defendant.

**Date of Hearing** : 28<sup>th</sup> August 2018

**Written Sub.** : On 08<sup>th</sup> June 2018 by the Appellant- Defendant.

: On 17<sup>th</sup> July 2018 by the Respondent- Plaintiffs (Reply)

: On 2<sup>nd</sup> August 2018 by the Appellants- Defendant (Reply)

**Date of Judgment** : 28<sup>th</sup> November 2018

**J U D G M E N T**

**A. INTRODUCTION**

1. This is a timely Appeal preferred by the Appellant- Defendant (Appellant) against the judgment dated 12<sup>th</sup> October 2017, pronounced by the learned Magistrate (Magistrate), of Nadi in Civil Action No.184 of 2015, granting

relief for the payment of \$50,000.00 unto the Respondent- Plaintiffs (Respondents) as prayed for in the Statement of Claim, together with a further sum of \$1,500.00, being the costs.

2. The Magistrate while granting relief to the Respondents, dismissed the counter claim advanced by the Appellant on the ground that he had failed prove same either during the cross examination of the 2<sup>nd</sup> Respondent (the Director of the 1<sup>st</sup> Respondent) or by giving or calling evidence on his cross claim.
3. In addition to the oral submission made at the hearing before this court, learned counsel for both the parties filed respective written submissions before me as aforesaid.

## B. BACKGROUND

4. The first Respondent being a registered company in New Zealand and the 2<sup>nd</sup> Respondent as the Director of it , filed their Statement of Claim dated 10<sup>th</sup> September 2015 against the Appellant praying for a judgment for a sum of \$ 50,000.00 and for any other reliefs the court may deem fit.
5. In the Statement of Claim, the Respondents averred, among other things, **that:**
  1. *The first plaintiff is a duly incorporated limited liability company and at the time material was engaged in importing fresh products and frozen food from Fiji.*
  2. *The 2<sup>nd</sup> plaintiff being the sole director of the first plaintiff and all time material was liaising with the defendant on behalf of the 1<sup>st</sup> plaintiff.*
  3. *The defendant is a duly registered individual firm, namely, Deans Marketing, with the Registrar of Companies.*
  4. *The defendant was introduced by one Mohamed to the 2<sup>nd</sup> plaintiff.*
  5. *On or about 10<sup>th</sup> November 2013 the 2<sup>nd</sup> plaintiff travelled all the way from New Zealand to discuss the terms and conditions of the contract with the defendant in Nadi and the handshake deal was agreed upon and a verbal contract was entered between the plaintiff and the defendant.*
  6. *That the parties , inter-alia, verbally agreed as follows;*
    - i. *The plaintiff to advance moneys to the defendant to purchase fresh fruits, vegetables, root crops, seafood and kava from the farmers around Fiji.*

- ii. *Having purchased the goods so requested by the plaintiff, the defendant to send the consignment of such goods to the plaintiff in New Zealand.*
  - 7. ....
  - 8. *During the period from 22<sup>nd</sup> November 2013 to 13<sup>th</sup> February 2013, the plaintiff advanced a sum of FJD 157, 897.98 and the defendant sent the consignment worth of FJD 101, 164.70.*
  - 9. *The defendant either refused and/or neglected to send the consignment for the balance sum of FJD 56,733.28 to the plaintiff...*
  - 10. ...
  - 11. *In order to bring this action within the jurisdiction of this court, the plaintiff foregoes the sum of FJD 6,733.28 and claiming only FJD 50,000.00 against the defendant.*
6. By the Amended Statement of Defence dated 28<sup>th</sup> February 2017, the Appellant, having admitted the contents in paragraphs 2 to 6 and 8 of the Statement of Claim, set up a counter claim as follows;
- a. *“That between November 2013 and February 2014, the plaintiff having placed an order for a shipment of Dalo, worth of approximately \$ 23,000.00 and once the defendant arranged the same after paying the growers, the plaintiff cancelled it breaching the agreement causing loss and damages for approximately \$23,000.00 and this amount has to be set off from the balance advance of \$ 56,733.28, reducing the balance to \$33,733.28.*
  - b. *The plaintiff, having agreed to pay for the internal shipments, failed and neglected to pay \$3,200.00 being the amount for 4 shipments.*
  - c. *That the balance \$30,233. 28 have to be set off as the plaintiff is liable to pay damages unto the defendant for the breach of the contract”.*
7. By the impugned judgment dated 12<sup>th</sup> October 2017, the Magistrate granted \$50,000.00 to the Respondents as they had pleaded, together with a sum of \$ 1,500.00 being the cost and dismissed the counter claim of the Appellant as same was not proved through giving or calling evidence by and on behalf of the Appellant.

**C. GROUND OF APPEAL:**

Initially, the Appeal was based on 11, purported, Grounds of Appeal and the Appellant, by subsequent amendment raised the numbers up to 18, which are

reproduced as follows:

1. *“THAT the Learned Trial Magistrate erred in law and in fact in finding in favor of the First Respondent (Original 1<sup>st</sup> Plaintiff) and the Second Respondent (Original 2<sup>nd</sup> Plaintiff) when:*
  - i. *The Agreement and/or contract the First Respondent (Original 1st Plaintiff) and the Second Respondent (Original 2nd Plaintiff) relied on to prove its claim in the matter is deemed by implication to be illegal and/or prohibited by Statute law in particular the Foreign Investment Act, Act No 1 of 1999 and was thus unenforceable, null and void and*
  - ii. *The First Respondent (Original 1st Plaintiff) and the Second Respondent (Original 2nd Plaintiff) were also prohibited in carrying on any business and/or commercial activity in Fiji without complying with the requirements under the Foreign Investments Act, Act No 1 of 1999.*
2. *THAT the Learned Trial Magistrate erred in law and in fact in finding in favor of the First Respondent (Original 1st Plaintiff) and the Second Respondent (Original 2nd Plaintiff) by enforcing an Agreement and/or contract and/or accepting that the First Respondent (Original 1st Plaintiff) and the Second Respondent (Original 2nd Plaintiff) could carry on business in Fiji Islands as it did when such carrying on of business and/or commercial activity by the First Respondent (Original 1st Plaintiff) and the Second Respondent (Original 2nd Plaintiff) is prohibited by virtue of non-compliance of statute and when the formation and/or performance of the contract relied on by the First Respondent (Original 1st Plaintiff) and the Second Respondent (Original 2nd Plaintiff) was thus illegal and by implication in breach of Statute in particular the Foreign Investments Act, Act No. 1 of 1999.*
3. *THAT the Learned Trial Magistrate erred in law and in fact in finding in favour of the First Respondent (Original 1st Plaintiff) and the Second Respondent (Original 2nd Plaintiff) by accepting that the 1st Respondent being a Foreign Company and the 2nd Respondent being a Director (and being a servant and/or employee) of the 1st Respondent may carry on business and/or commercial activity in Fiji and enforce a contract in Fiji despite non-compliance of Statute and/or Law of Fiji.*
4. *THAT the Learned Trial Magistrate erred in law and in fact in finding in favour of the first Respondent (Original 1st Plaintiff) and the Second Respondent (Original 2nd Plaintiff) when the First Respondent (Original 1st Plaintiff) and the Second Respondent's (Original 2nd Plaintiff) claim was unenforceable as the claim arising was out of the carrying on of business and/or commercial activity in Fiji by a Foreign Company which was in fact illegal and/or forbidden and prohibited by Statute law.*

5. *THAT the Learned Trial Magistrate erred in law and in fact in finding in favour of the First Respondent (Original 1st Plaintiff) and the Second Respondent (Original 2nd Plaintiff) by rendering assistance and/or relief to the First Respondent (Original 1st Plaintiff) and the Second Respondent (Original 2nd Plaintiff) when the carrying on of business and/or commercial activity in Fiji by a Foreign Company was in breach of the Foreign Investment Act, Act No. 1 of 1999 and the contract entered into by them was also illegal by implication also being in breach of the Foreign Investments Act, Act No. 1 of 1999.*
6. *THAT the Learned Trial Magistrate erred in law and fact in interpreting the relevant sections of the Foreign Investments Act, Act No. 1 of 1999 as applicable to this case and inter-alia including the definition of business as applicable to this case and in all the circumstances of this case.*
7. *THAT the Learned Trial Magistrate erred in law and in fact in finding the favour of the First Respondent (Original 1st Plaintiff) and the Second Respondent (Original 2nd Plaintiff) as she failed and/or neglected and/or did not adequately and/or properly consider the relevant evidence in the case.*
8. *THAT the Learned Trial Magistrate erred in law in finding in favour of the First Respondent (Original 1st Plaintiff) and the Second Respondent (Original 2nd Plaintiff) when she failed and/or neglected to properly consider the principles established in the relevant legal authorities cited by the Appellant (Original Defendant) in the case and its applicability to this case.*
9. *THAT the Learned Trial Magistrate did not properly direct herself and/or misdirected herself on the burden of proof including of where the business and/or commercial activity was in the particular case and/or instance was carried on as applicable to the First Respondent (Original 1st Plaintiff) and the Second Respondent (Original 2nd Plaintiff).*
10. *THAT the Learned Magistrate erred in law and in fact in that she failed and/or neglected and/or did not adequately and/or properly consider the Appellant's (Original Defendant's) case.*
11. *THAT the Learned Magistrate erred in law and in fact in finding in favour of the First Respondent (Original 1st Plaintiff) and the Second Respondent (Original 2nd Plaintiff) considering the whole evidence and circumstances of the case.*
12. *THAT the Learned Trial Magistrate had erred in law and in fact in finding that the First Respondent (Original 1st Plaintiff) and the Second Respondent (Original 2nd Plaintiff) were not carrying on business in Fiji and if the Learned Magistrate did so find that the First Respondent (Original 1st Plaintiff) and the Second Respondent (Original 2nd*

*Plaintiff) were not carrying on business in Fiji then the Learned Magistrate erred in law and fact by rendering assistance to the First Respondent (Original 1st Plaintiff) and the Second Respondent (Original 2nd Plaintiff) by granting relief to First Respondent (Original 1st Plaintiff) and the Second Respondent (Original 2nd Plaintiff) as the First Respondent (1st Plaintiff) being a Foreign Company not being registered in Fiji under the Companies Act and being in breach of the Foreign Investment Act, Act No. 1 of 1999 and not doing business in Fiji were not entitled to any relief including through the Second Respondent.*

13. *THAT since the First Respondent (Original 1st Plaintiff) and the Second Respondent's (Original 2nd Plaintiff) written submissions was out of time and there being no order for an extension of time to file the same and the same also not being served on the Appellant's (Original Defendant's) the Judgment ought to be set aside and/or there ought to be an Order for a mistrial.*
14. *THAT the Learned Trial Magistrate erred in law and in fact in not considering that there was no reply to the Appellant's (Original Defendant) Amended Statement of Defence as there ought to have been and that all matters not denied in the Amended Statement of Defence were deemed to be admitted and not to be proved by the Appellant (Original Defendant).*
15. *THAT the Learned Magistrate's finding in favour of the First Respondent (Original 1st Plaintiff) and the Second Respondent (Original 2nd Plaintiff) was wrong in principal in all the circumstances of the case.*
16. *THAT the Learned Magistrate erred in law and in not putting the Appellant (Original Defendant) on election in the matter when the Appellant had submitted no case to answer in the matter.*
17. *THAT the Learned Trial Magistrate erred in law and in fact in finding in favour of the First Respondent (Original 1st Plaintiff) and the Second Respondent (Original 2nd Plaintiff) when according to the evidence the First Respondent (Original 1st Plaintiff) and the Second Respondent (Original 2nd Plaintiff) were claiming more than the Jurisdictional limit of the Magistrate's Court.*
18. *THAT the Learned Magistrate erred in law and fact in awarding costs against the Appellant (Original Defendant)".*

**D. DISCUSSION:**

8. Having perused the contents of the record, together with the impugned judgment, grounds of appeal and the submissions made, it is my considered

view, that all the above Grounds of Appeal, particularly, Grounds of Appeal 1 to 15 do not warrant any consideration and with all due respect to the learned counsel for the Appellant, I must put in record that all the above grounds of Appeal are with no merits and bound to fail, for the following reasons.

- a. The main issue that begged adjudication before the Magistrate was the claim of the Respondents against the Appellant, which did not warrant any scrutiny by the Magistrate as same among other things, had been admitted by the Appellant in paragraphs 2 to 6 and 8 of his Amended Statement of Defence.
- b. The existence of a contract with the Respondents, according to which the Appellant was expected to locally purchase the relevant commodities from the Farmers in Fiji and consign to the Respondents in New Zealand, the receipt of the total sum of \$157, 897.98 from the Respondents for the above purpose, and the total value of the time to time shipment of goods was only \$ 101,164.70, have been clearly admitted by the Appellant. This has obviously left a sum of \$56,733.28 in the hands of the Appellant as the balance accountable by him to the Respondents.
- c. It is against the said balance sum of \$56,733.28, the Appellant made the counter claim to have it set off in the following manner, namely, by claiming that the Respondents were bound to pay \$3, 200.00 as freight charges, deduction of a further sum of \$23,000.00 being the amount, purportedly, paid by him to the farmers for the purchase of a consignment of DALO, which order the Respondents, allegedly, cancelled and the balance \$30,533.28 to be deducted as the damages payable to the Appellant as the Respondents had , allegedly, breached the said agreement.
- d. With regard to the Respondents claim as per their Statement of claim, the learned Magistrate has correctly identified that the admitted facts need not be proved and thus the Respondents were not under duty to prove their claim against the Appellant. (Vide paragraph 7 of the judgment).

- e. Therefore, the Magistrate has correctly observed further in paragraph 8 of the judgment that the issues to be determined according to the pleadings were:
- i. Whether the contract/ agreement/ deal entered between the plaintiffs (Respondents) and the Defendant is illegal and unenforceable?
  - ii. Whether the plaintiff required a shipment of Dalo worth approximately \$23,000.00 from the defendant?
  - iii. If so, whether the plaintiff breached the agreement by cancelling the shipment?
  - iv. If so, what is the amount of loss caused to the defendant?
  - v. Whether the plaintiff agreed to pay for the internal freight for the shipment?
  - vi. If so, what was the amount of damages to the defendant?
- f. Strangely, the Appellant neither gave nor called any evidence to substantiate his counter claim against the Respondents and to enable the Magistrate to answer the above issues in his favor.
- g. Instead, the Appellant's learned counsel before the Magistrate had raised few new issues such :
- i. *Whether the First Respondent was a Registered Company in Fiji?*
  - ii. *Whether, the 1<sup>st</sup> Respondent, being a company, had a registered office in Fiji?*
  - iii. *Whether it had a Foreign Investment Certificate (FIC) from the "Investment Fiji"?*
  - iv. *Whether the Respondents could have legally engaged in any business in the absence of registration as a company in Fiji and in the absence of a FIC?*
- h. The new issues under paragraph (g) above were not the part of the pleadings and these issues need not have been taken for the adjudication by the Magistrate.



- i. Those issues were not pure questions of law and they were mixed with fact. The Respondents should not have been called to face those new issues at the trial without same being pleaded, nor should the Magistrate have been called upon to try the above new issues, which were not before her in the form of pleadings and/or issues.
  - j. However, the learned Magistrate took pain to decide on these non-pleaded matters and has arrived at correct findings.
  - k. The first Respondent was undoubtedly a Company registered in New Zealand.
  - l. The Respondents were merely obtaining the services of the Appellant to collect the commodities and ship them to the Respondents in New Zealand, which exercise, the Appellant performed as a business for his own benefit of profit earning. Under the above circumstances, the Respondents cannot be considered as persons engaged in business in Fiji.
  - m. It is ridiculous to require the first Respondents to be registered as a Company in Fiji, to have a registered office in Fiji and to have a Foreign Investment Certificate (FIC) for the purpose of receiving goods from Fiji through the Appellant as aforesaid.
  - n. If this was the case, all the business entities in foreign countries, who wish to import goods from Fiji, will have to have their businesses registration and a registered office in Fiji together with the FIC for the importation of goods, which is not a legal requirement.
  - o. The Respondents were merely importing goods from Fiji, by advancing Money to the Appellant and were not engaged in business in Fiji by themselves. Obviously, the Appellant was in fact collecting required commodities in Fiji with the Money advanced by the Respondents and dispatching (shipping) them to the Respondents.
9. The Respondent's claim was admitted by the Appellant in the Pleadings with no requirement for any adjudication on it. The counter claim of the

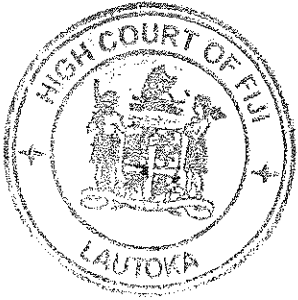
appellant was not substantiated by him through calling or giving evidence. However, the Magistrate has correctly answered the non-pleaded issues, findings on which do not warrant any scrutiny by this court.


10. Thus, the grounds of appeal 1 to 15 above touching the new issues such as, Whether the First Respondent should have been registered as a foreign company in Fiji? Whether the first Respondent should have had a registered office in Fiji? And whether it should have obtained a FIC to import goods from Fiji, have no merits and should be disregarded.
11. The ground of appeal No. 16 does not warrant consideration as the Appellant's learned counsel, after the learned Magistrate's ruling on the no case to answer application, had clearly indicated that the appellant was not going to give or call any evidence on his counter claim. Now, the Appellant cannot be heard to say that he was not allowed to give and/or call evidence. Thus, this ground of appeal should necessarily fail.
12. The Respondent in their Statement of Claim had conspicuously stated that they were limiting their claim for the maximum of \$50,000.00 in order to bring their claim under the Magistrate's jurisdiction, though the total sum due was \$56,733.28 . The Magistrate being satisfied of it has correctly ordered to pay \$50,000.00 only. Thus, the ground of appeal No.17 has no merit and should be rejected.
13. The cost ordered by the Magistrate is a different component. When cost is granted, it need not be counted for the determination of the Monetary jurisdiction of the Magistrate's court. The ground of Appeal No. 18 also should necessarily fail.
14. This appeal is an, abuse of process, frivolous and should necessarily fail.

**E. FINAL ORDERS**

- a. The Appeal is hereby dismissed.
- b. The impugned judgment dated 12<sup>th</sup> October 2017 pronounced by the learned Magistrate of Nadi, in the above styled action is hereby affirmed.

- c. The Appellant shall pay unto the Respondents a sum of \$1,250.00, being the summarily assessed costs in this forum.
- d. The Deputy Registrar shall dispatch a copy of this judgment, together with the original record, to the Magistrate's Court of Nadi forthwith.



  
A. M. Mohammed Mackie  
Judge

At Lautoka  
28<sup>th</sup> November, 2018