IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
APPELLATE JURISDICTION

CIVIL APPEAL No. HBA 12/2020
HBA 13/2020

BETWEEN		**ATONIO BALECOQO** of Suva, Solicitor **APPELLANT**
AND		**SAINUL SHABNAM** of Korotogo, Sigatoka **FIRST RESPONDENT**
AND		**ALIM KHAN** of Korotogo, Sigatoka **SECOND RESPONDENT**
APPEARANCES	:	Mr A Balecoqo (self represented) for appellant Mr A Khan (on behalf of himself and the first respondent)
DATE OF HEARING	:	30 October 2020
DATE OF JUDGMENT	:	18 November 2020

DECISION

1. These two appeals arise from the same transaction. In the middle of 2019 the respondents (wife and husband) were interested in acquiring land at Yadua on lease from the local mataqali. Mr Balecoqo was instructed to act for the mataqali in the sale, and in the course of doing so he and his clerk undertook some work, including a meeting with the respondents on 29 June 2019, in the course of which the respondents paid Mr Balecoqo the sum of $2500.00. Shortly afterwards on 9 July 2019 they paid Mr Balecoqo a further $825.50. These payments were, they say, on account of the costs of survey and legal costs relating to the purchase.

2. To put the matter briefly, the purchase did not progress as the respondents expected, and they lost confidence in the transaction. The respondent say they were told that the purchase would take a month, but nothing happened in that time, and material they received from the appellant did not make any sense to them. On 29 July 2019 the respondents and the mataqali agreed to abandon the proposed purchase, and that the sum of $3325.50 paid by the respondents should be refunded by Mr Balecoqo by 9 August 2019. A letter to this effect was signed by the respondents and the representatives of the mataqali on 29 July 2019.

3. The appellant was not willing to refund the money as agreed between the respondents and his client the mataqali, and on 23 August 2019 the respondents filed in the Small Claims Tribunal (SCT) in Sigatoka a claim (SCT 452/19) against the appellant for the return of the money paid. Their application included supporting

documents, emails etc., and including a copy of the agreement with the mataqali dated 29 July relating to the refund of the money.

4. In response to this claim in the Small Claims Tribunal Mr Balecoqo on 17 September 2019 made a claim of his own (SCT 477/19) against the respondents, effectively a counterclaim. In this he claimed from them the sum of $4680.00 for:

   i. A bill of costs for $3800.00 + VAT of $380.00 (total $4180.00) for work said to have been done relating to the respondents attempt to purchase the leasehold property at Yadua.
   ii. $500.00 for travelling expenses.

5. The respondents' claim for repayment of the money they had paid the appellant, and the appellant's claim for costs and travelling expenses were dealt with together by the SCT. The Referee's Tribunal Proceedings Records for the two files show that there were three hearings before the referee (I do not include in this a hearing on 12 September 2019 which the appellant did not attend because he was unwell. At that hearing the Referee made orders in favour of the respondents, but these orders were later set aside on the appellant's application, and explanation of his absence). The parties, when asked at the hearing before me, agreed that the following are the dates of these hearings:

3/10/19	both parties present, lasted approximately 30 minutes
11/10/19	Mr Balecoqo present, Mr Khan not present. Adjourned to 24/10/19. On this occasion Mr Balecoqo is recorded as saying to the referee: *I apologised to the Claimant [Mr Khan & Ms Shabnam] through email if I could be given a chance to finish my work. The friendship began with the Claimant and the landowners. They wanted to sublease the land at Yadua. I was given the process to sublease of documents by the Claimants. On 29 June 2019 I came with my clerk to Korotogo to the Claimants' place. At their place we talked and they paid me $2500.00. Then we went to the place and identify the boundary of the land. We also spoke with the landowners and went back.*
24/10/19	both parties present. Took approximately 10-15 minutes, after which the referee gave her decision. The SCT's notes for this appearance record that Mr Balecoqo was asked if he wanted to ask questions of Mr Khan. He declined to do so and said *'I have no questions to ask. I will take this matter to the High Court'.*

6. The Proceedings Records indicate that the Referee made her decision on the respondents' claim (for refund of the money paid by them to the appellant) after the hearing on 11 October after hearing from Mr Balecoqo (Mr Khan was not present). The record shows that the Referee made the following orders:

1. *THAT the Respondent Atonio Bale to refund the Claimants Sainul Shabnam & Alim Khan the total sum of $3325.00 on or before 18.10.19 being for sub-lease agreement to be prepared by the respondent.*
2. *THAT in the event respondent fails to pay as ordered. Claimant may enforce order to recover amount owing immediately.*
3. *THAT payment to be made at the Sigatoka Magistrate's Court Registry.*

Given the material that was filed with the respondents' claim, and taking into account what was said by Mr Balecoqo on that occasion as recorded above, this outcome, for the respondent's application, was I think inevitable. The material shows that Mr Balecoqo regarded himself as the solicitor for the mataqali, and the money paid by the respondents was paid as their contribution to the costs of the purchase. When the parties agreed in writing on 29 July 2019 to abandon the proposed transaction, and the mataqali agreed to refund the money paid by the respondents, there was no basis on which the appellant was entitled to refuse to refund the money he had received from the respondents.

7. Having made the decision she did on 11 October, the Referee adjourned the appellants counterclaim to 24 October to allow the appellant to provide evidence in support of his claim, which was that he was entitled to payment from the respondents of a bill of costs he had presented to them. At that hearing the Record shows that Mr Khan provided an explanation of why the respondents felt that the appellant was not entitled to payment (that they had not done any work, and then asked for more money for a goodwill payment to the mataqali, which the respondents were not willing to pay). It was at that point that Mr Balecoqo declined to ask any questions of Mr Khan, and – the records shows – said he would take the matter to the High Court (it is not clear on what basis he would do so).

8. Following this exchange the Referee made her decision, which is recorded in the Records as follows:

1. *THAT the Claimant Atonio Bale did not render his services to the Respondent. Matter is dismissed.*

Again, I think that this outcome was inevitable. As I have noted above, the appellant was the solicitor for the mataqali, not the respondents, and it was in his capacity as acting for the mataqali that the respondents had paid him the money at the start of the transaction. Once the transaction was abandoned, the respondents were entitled to the return of the money they had paid, as the mataqali agreed. At that point, if the appellant was entitled to payment of costs for work he had undertaken, that was a matter between him and his client, the mataqali. Certainly it might have been a matter for discussion between the mataqali and the respondents, at the time the abandonment of the transaction was agreed, whether the respondents should make any contribution towards the costs of the transaction, but the fact that no such discussion took place, or if it did, the mataqali decided not to ask the respondents to pay anything, does not mean that the appellant is then entitled to charge the respondents for work that he undertook not by arrangement with them, but for his client the mataqali.

9. The appellant is a solicitor. He must have understood the complexity of the situation, and he had the opportunity to clarify payment arrangements when he first accepted instructions to act in the transaction. He did not do so, and as a result of that now finds himself out of pocket for the work that he and his clerk undertook. He has only himself to blame for that outcome. He may still be entitled to bill his client for that work (I have not considered the reasonableness of the appellant's bill of costs, but accept that he certainly would have undertaken some work for which he could normally expect payment), but he is not entitled to bill the respondents unless he had a contract with them. There is no evidence of such an arrangement; all the evidence shows that Mr Balecoqo was working for the mataqali, not for the respondents. Hence only the mataqali were entitled to seek payment by the respondents, either in terms of their contract, if it provided for payment of costs by the purchaser, or – as the appellant suggests in his submissions in support of this appeal - for damages for anticipatory breach of contract by the respondents. Such damages might have included the cost of wasted work undertaken by the appellant at the expense of the mataqali. For reasons that have not been explored, the mataqali agreed to the respondents being refunded in full, and did not seek to deduct costs or damages. That decision may indicate that the mataqali agreed that the respondents were not at fault. Thereafter what happened regarding costs incurred was a matter to be sorted out between the appellant and his client, not between him and the respondents.

10. In an affidavit filed in support of his appeal and application for stay Mr Balecoqo said, of the hearings before the SCT:

> *15. That on the 11th October 2019 the matter was called and none of the Respondents appeared.*
> *16. That since the Responses didn't appear in the matter, I told the referee that I had prepared and ready to present my case as understood at the sitting on the 3rd September 2019 to present to the tribunal all evidence which shows and prove the amount of work I had done as agreed between myself and the respondent pertaining to the application for sublease.*
> *17. That to my dismay the referee did not want to listen to me nor to my case but continued to defend and fight the Respondent case vigorously, despite their absence and conclude that she will finalise the order against me to pay the total amount claimed by the Respondent.*
> *18. That the referee was biased in making the ruling against me despite the absence of the Respondent in the tribunal and the referee was biased and not listening to my case as it was understood in the sitting on the 3rd September.*

(It is clear that the references in these paragraphs to '3rd September' should be to 3rd October).

11. Although these appeals are against the decision of the Magistrates Court, not the decision of the SCT, I have set out this background to explain why I have come to the decision that I have, that the Magistrate, in dismissing the appellant's appeals against the SCT rulings, did not err as suggested by the appellant.

12. In his decision of 15 July 2020 on the appellant's appeals against the decisions of the SCT the Learned Magistrate has referred to the limited grounds for appeal against decisions of the SCT. The Small Claims Tribunal was established in 1991 (following a model used in other jurisdictions, including New Zealand) to deal with modest claims

without the procedural delays and expense associated with litigation in the higher courts. In striving for this objective the legislature has recognised that it is more important, where relatively small sums are involved, to get an outcome fairly but quickly even if there are questions about the legal correctness of that result, rather than achieving a legally correct outcome slowly and at great expense. Hence the primary function of the tribunal is to assist the parties to reach agreement, solicitors are not usually allowed to appear in the SCT, section 15(4) directs that the tribunal is not bound to give effect to *strict legal rights or obligations or to legal forms or technicalities,* and a right of appeal is allowed only on the grounds that the SCT has exceeded its jurisdiction, or – as set out in section 33(1)(a) Small Claims Tribunal Act 1991:

> *The proceedings were conducted by the Referee in a manner which was unfair to the appellant and prejudicially affected the result of the proceedings.*

13. That this is a two stage test is clear from the decision of Fatiaki J in a decision referred to by the Learned Magistrate in giving his decision in this case, **Sheet Metal Plumbing v Deo** [1999] FJHC 25 where he said:

> *What's more ground (a) specifically refers to 'the manner' in which the referee conducted the proceedings as the crucial concern of the right of appeal on that first ground. Furthermore not only must the conduct complained about be 'unfair to the appellant' it must, in addition, 'prejudicially' affect the result.*
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> *As to the 'manner' or procedure required to be followed by the referee in conducting a proceeding under the Decree these are principally to be found Sections 24 to 29 (inclusive) under the heading 'HEARINGS'. A cursory examination of these provisions serves to highlight the informal, non-adversarial nature of the proceedings before the Small Claims Tribunal and militates against a general appeal on the merits or for errors of law.*
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> *The non-legalistic nature of a Tribunal proceeding is further exemplified by the requirement in Section 15(4) of the Decree that:*
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> > *'The Tribunal shall determine the dispute according to the substantial merits and justice of the case and in doing so ... shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities.''*
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> *I am fortified in my narrow view of the appellant's 'right of appeal', by the observations of Thorp J. in **N.Z.I. Insurance N.Z. Ltd. v. Auckland District Court** [1993] 3 NZLR 453 when he said of a similar right granted in the Disputes Tribunals Act 1988 (New Zealand), in identical terms to our ground (a) above, at p.458:*
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> > *The essential matter (in the words used) ... is its specification of the basis for appeal against a referee's determination as being the conduct of proceedings in a manner that was unfair to the appellant and prejudicially affected the result of the proceedings. This formulation is both specific and unusual. On its ordinary grammatical construction it provides only a limited right of appeal, and requires any intending appellant to direct the (Court) to some unfairness in the form, and not simply the result, of the tribunal's hearing.*
>
> *and a little later in his judgment his honour said:*
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> > *read on (its) own, and on the basis of (its) ordinary grammatical meaning, (the section) would not leave any careful interpreter in much doubt that the right of appeal (it) created was a special type of appeal, limited to cases of procedural unfairness (and does not extend to the correction of errors of law).*
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> *Even more trenchant is the view expressed by Greig J in **Hertz New Zealand Ltd. v. Disputes Tribunal** (1994) 8 PRNZ where his honour said in rejecting the appeal in that case, at p.151:*
>
> > *... there is no appeal on the merits even if there is a clear and fundamental error of law in the conclusion of the Tribunal.*

14. It is not sufficient that the appellant can point to some unfairness in the conduct of the proceedings. He must also show that that misconduct prejudicially affected the outcome of the proceedings. Even if I were to accept the appellant's complaint that the Referee didn't listen to him (noting as I do the fact that the appellant has apparently chosen not to take the opportunity he was given to question the respondents, and has indicated that he will take the matter to the High Court), I do not accept that that conduct has prejudiced the result of the proceedings, because I think – for the reasons referred to previously - that the outcome of both the respondent's claim, and the appellants 'counterclaim' was inevitable, and the SCT was right in its decision. The appellant was not entitled to keep the money he had received from the respondents, and nor was he entitled to charge the respondents for his work.

Conclusion

15. Accordingly, the appeals by Mr Balecoqo against the Magistrates Court decisions of 15 July 2020 are dismissed, as also is the appellant's application for a stay of enforcement pending appeal. Because the respondents are self represented there will be no order for costs.

A.G. Stuart
Judge

At Lautoka this 18th day of November, 2020

SOLICITORS:
Bale Law, Suva for appellant