# IN THE HIGH COURT OF FIJI. (WESTERN DIVISION) AT LAUTOKA EXERCISING CIVIL APPELLATE JURISDICTION

# ERCA 10 OF 2021. ERT Lautoka Grievance No. 128 of 2015.

In the Matter of an Appeal against the interlocutory Order dated 17th August 2018 pronounced by the Resident Magistrate Mr. R. Green at the Employment Tribunal Lautoka (ERT Grievance No. 128 of 2015)

# BETWEENTRADE FURNITURE & JOINERY PTE LIMITED alimited liability company incorporated in Fiji and having<br/>its registered office at Lot 1 Vunirewa Subdivision,<br/>Kerebula, Nadi Back Road, Nadi

# **EMPLOYER-APPELLANT**

AND

#### SALESH SINGH

# **GRIEVOR - RESPONDENT**

<b>BEFORE</b>	:	Hon. A.M. Mohamed Mackie- J.
APPEARANCES	:	Mr. S. Nand -for the Employer- Appellant.
	:	Ms. Devi.N- for the Griever -Respondent.
WRITTEN SUBMISSION	:	Filed by the Appellant on 18 <sup>th</sup> November 2024
	:	Filed by the Respondent on 13 <sup>th</sup> December 2024.
<u>HEARING</u>	:	On 12 <sup>th</sup> November 2024-Disposed by way of written
DATE OF JUDGMENT	:	submissions. 10 <sup>th</sup> February 2025.

# **JUDGMENT**

# A. INTRODUCTION:

- This is an Appeal preferred by the Employer Appellant Company ("the Appellant") on 23<sup>rd</sup> November 2023 by filing its Notice and Grounds of Appeal, against the interlocutory Order dated 17<sup>th</sup> August 2018 pronounced by the Learned Employment Tribunal Magistrate of Lautoka in the above numbered ERT Application.
- The Appeal was filed only after obtaining the Leave to Appeal and the Extension of Time to Appeal in terms of my Ruling dated 31<sup>st</sup> October 2023.

# B. BRIEF HISTORY:

- 3. Prior to the impugned interlocutory Order dated 17<sup>th</sup> August 2018, the same learned Tribunal Magistrate had, after hearing the Griever-Respondent's ("the Respondent's ") substantive Application on 24<sup>th</sup> October 2017 in the absence of the Appellant, by his Formal Proof Ruling dated 26<sup>th</sup> October 2017 made the Orders granting the following reliefs to the Respondent.
  - a. The Employer pays the Grievor the sum equivalent to six months' pay for unlawful dismissal.
  - b. Damages for unfair dismissal in the sum of \$3,000.00.
  - c. Post judgment interest of 5%.
  - d. Parties are to bear their costs.
- 4. Being dissatisfied of the above Orders in the formal proof judgment, the Appellant on 20<sup>th</sup> December 2017 filed its Notice of Motion supported by the Affidavit of Mr. Govind Goundar, the Managing Director of the Appellant Company, seeking reliefs, *inter alia*,
  - a. That the default judgment entered against the Employer on 5<sup>th</sup> December 2017 be wholly set aside.
  - b. That the within stated employment grievance be listed and determined in its entirety.

- 5. The Tribunal Magistrate, who heard the aforesaid Notice of Motion for setting aside inter-parte on 16<sup>th</sup> / 26<sup>th</sup> April 2018, by his impugned Order dated 17<sup>th</sup> August 2018, instead of making his Ruling on the merits of the said Application for setting aside, struck out the same on the ground of non- appearance of the Appellant on the date of Ruling.
- For the sake of clarity and easy reference, I will reproduce below the learned Tribunal Magistrate's notes (journal entry) dated 17<sup>th</sup> August 2018.

# <u>17/8/2018</u>

For the worker- Mr. Tunidau

For the Employer- Not present

Notice of Motion to set aside is struck out for non-appearance of the Applicant.

Costs of \$100 to paid within 21 days.

7. It is against the aforesaid Order; i.e. "*Notice of Motion to set aside is struck out for non-appearance of the Applicant*", the Appellant has preferred this Appeal, after obtaining the leave to Appeal and the extension of time to Appeal as aforesaid.

# C. GROUNDS OF APPEAL:

- 8. In relation to the above interlocutory decision dated 17<sup>th</sup> August 2018. the Appellant relies on the following Grounds of Appeal:
  - a. THAT the learned Magistrate erred in law and fact when he failed to take into consideration the written submissions filed by the Applicant and the legal arguments held on 26th April, 2018.
  - b. THAT the learned Magistrate erred in law and fact when he failed to give reasons for the decision to dismiss the setting aside application for the proof ruling.
  - c. THAT the Applicant reserves the right to add such further grounds of appeal in due course and upon the disclosure of the Tribunal records.

#### D. CONSIDERATION:

- 9. It transpires from the perusal of the record that the learned Tribunal Magistrate ("the Magistrate") on 17<sup>th</sup> August 2018, instead of pronouncing the Ruling on the setting aside Application filed by the Appellant, by considering the merits of it, has proceeded to strike out the said setting aside Application on the ground that the Appellant was absent.
- 10. The pertinent questions that arise for consideration here are; whether the Appellant and/or its Counsel should necessarily have been present in Court on 17<sup>th</sup> August 2018 for the Magistrate to pronounce the Ruling? And can the Magistrate, after fully hearing the matter and entertaining written submissions, strike out an application on account of the non- appearance of the appellant, while the Magistrate was required to pronounce his Ruling on the merits of the setting aside Application.
- 11. The stern argument advanced on behalf of the Appellant is that the Magistrate erred by proceeding to dismiss the Application for setting aside the formal proof judgment on the purported ground of the Appellant's absence in Court, instead of making his decision on it, for which written submissions were filed in addition to the oral hearing held before him.
- 12. Conversely, the Respondent's counsel argues that as the Applicant's Counsel was present in court on 26<sup>th</sup> April 2018 for hearing, and was aware as to when the matter was adjourned for ruling and they being aware of the ruling date, they did not appear on the said date.
- 13. The Respondent's counsel had argued further that the issue should have been dealt with by the Appellant and/ or its counsel immediately after the case was dismissed, but no action was taken for 3 years and 2 months. He also alleges that the Applicant and/or his Counsel did not make any inquiries at the Registry.

- 14.1 have considered the contents of the written submissions touching the grounds of appeal in relation to the interlocutory decision dated 17<sup>th</sup> August 2018. As I had alluded to in my leave Ruling dated 31<sup>st</sup> October 2023, the propriety of the decision in dismissing the setting aside Application, without going into the merits of it begs serious consideration.
- 15. I have not found any such a provision in the Magistrate's Court Rules that mandates a party to be personally present or authorizes the Magistrate to dismiss an Application on the ground of non-appearance, when the Magistrate was required to pronounce his/her decision on a matter.
- 16. Once the Tribunal Magistrate had concluded the hearing into the setting aside Application and entertained written submissions as well on it, it was the duty of the Tribunal Magistrate to pronounce his Ruling on it. The non-appearance of the Appellant or non-representation of it on the date of Ruling need not have absolved the Tribunal Magistrate from his duty of pronouncing the Ruling. It will also not authorize him to dismiss the Application for setting aside.
- 17. If the Ruling was ready to be pronounced on 17<sup>th</sup> August 2018, the Magistrate could have either; pronounced the same on the same date despite the absence of the Appellant and directed it to be sealed and served on the Appellant/ its Solicitors, or could have re-fixed the Ruling for a future date and issued notice on the Appellant and/or its Solicitors.
- 18. Unfortunately, the Tribunal Magistrate, for the reason best-known to him, failed to do any of the above and instead decided to dismiss the Application of the Appellant for setting aside, which was an unwarranted move on his part at that juncture. The case record does not at least indicate whether the Ruling was ready to be pronounced.
- 19. Undisputedly, the above decision made on 17<sup>th</sup> August 2018 to dismiss the Appellant's setting aside Application was not sealed and served on the Appellant. It was the duty of the Respondent to formally seal and serve the, purported, decision dated 17<sup>th</sup> August

2018 on the Appellant and /or its Solicitors. The Appellant had a right to have a decision on its Application on the merits of it and same has been violated.

- 20. The Appellant, cannot be punished for any act or omission committed by the Court. In this case, the Magistrate failed in his duty of pronouncing the Ruling on the Application preferred by the Appellant on its merits and thus, the Appellant has been deprived of its right to defend the action brought against it. I don't see the necessity for any further arguments in this regard.
- 21. The question of delay arises for consideration only if the impugned decision dated 17<sup>th</sup> August 2018, to dismiss the setting aside Application, had been sealed and served on the Appellant by the Respondent's Solicitors.
- 22.1 find that the both the Grounds of Appeal advanced by the Appellant are with full of merits, the Appeal should be allowed and the impugned decision dated 17<sup>th</sup> August 2018 should be set aside. Further, the present learned Tribunal Magistrate should be required to pronounce the Ruling on the Setting aside Application, after giving a further hearing to the parties orally and/or by way of written submissions, if needed.
- 23. Considering the circumstances, I decide not to make any orders for costs and the parties shall bear their own costs.

# E. ORDERS:

- a. The Appeal is allowed.
- b. The impugned Order dated 17<sup>th</sup> August 2018, pronounced by the Learned Tribunal Magistrate, dismissing the Appellant's Setting aside Application, is hereby vacated.
- c. The learned present Tribunal Magistrate will make an appropriate order on the setting aside Application, after giving a further hearing to both parties orally and /or by way of written submissions, if needed.
- d. No orders made for costs and the parties shall bear their own costs.

e. A copy of this judgment shall be dispatched forthwith to the Relevant Tribunal

At the High Court of Lautoka on this 10<sup>th</sup> day of February, 2025.



Sourced herin

A.M. Mohamed Mackie Judge. High Court (Civil Division) Lautoka.

SOLICITORS:

For the Appellant: Messrs. S. Nand Lawyers - Barristers & Solicitors. For the Respondent: Messrs. ACE Legal – Barristers & Solicitors.