IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 62 OF 2017
(High Court Civil Action HBA No: 11 of 2017)

BETWEEN	:	**AUTOWORLD TRADING (FIJI) LIMITED**	*1st Appellant*
		RAVINDRA LAL	*2nd Appellant*
AND	:	**ESALA MAU RAIDRUTA**	*Respondent*

Coram	:	**Lecamwasam JA** **Almeida Guneratne JA** **Jameel JA**
Counsel	:	**Mr S Singh for the Appellants** **Mr V Filipe for the Respondent**
Date of Hearing	:	**14 February 2019**
Date of Judgment	:	**8 March 2019**

JUDGMENT

Lecamwasam JA

[1] This appeal is filed by the appellant against the judgment of the learned High Court Judge at Suva dated 2 June 2017. The learned High Court Judge has in his judgment ordered

the originating Summons dated 18 April 2017 to be struck off and summarily assessed the cost of the application at $1,000.00

[2] Following are the grounds of appeal urged by the appellant as set forth in the petition of appeal:

> *"1. THE learned trial Appellate Judge erred in law and in fact in not properly evaluating the reason for the delay caused by the Appellants' former solicitors.*
>
> *2. THE Learned Trial Appellate Judge erred in law and in fact in concluding that the delay was due to the Appellants' 'lack of enthusiasm' when it was the former solicitor's negligence that they failed to advise the appellants of the Magistrates' Court Judgment.*
>
> *3. THE Learned Trial Appellate Judge erred in law and in fact in concluding that the Appellants failed to explain the delay to the court's satisfaction when such was fully explained by the Appellants through their current solicitors.*
>
> *4. THE Learned Trial Judge erred in law and in fact in concluding that the unexplained repeated delay can be explained as inordinate given that there was clear explanation being, the Appellants are not at fault for the delay but were due to the laxity of their former solicitors.*
>
> *5. THE Learned Trial Judge erred in law and in fact in not fully evaluating the merits of the appeal as it has a high chance of success.*
>
> *6. THE Learned Trial Judge erred in dismissing the Appellants' application for enlargement of time and ordering costs against it."*

[3] I find that even though sufficient consideration has been expended in relation to the delay in filing the application for the extension of time for leave to appeal by the Learned High Court Judge in his judgment dated 2 June 2017, I observe he had paid scant or no attention at all to the merits of the case.

[4] On the issue of '*delay*', I observe two instances of delay in this case. Having delayed the first application for more than 45 days i.e. from 29 December 2016 to 13 February 2017 the application seeking an extension of time for the notice of intention to appeal was also

delayed by 27 days. While I unequivocally hold that this delay can be treated as an *'inordinate delay'* as observed by his Lordship Calanchini J. in **Apostle Gospel Outreach Fellowship International –v- Fiji Development Bank** (unreported) (decided on 13 March 2015) and agree that the learned High Court Judge had every right to consider the delay an 'inordinate' delay in the matter at hand, the learned judge should have lent his mind to the merits of the case as well.

[5] This oversight is further apparent on perusing the judge's notes from page 190-218 of the High Court record. It is evident from these notes that the learned High Court Judge had merely used all those 28 pages for extraneous dialogue and discussions on the aspect of 'delay' and had not adverted his attention to the condition of the vehicle or the transactions germane to the case.

[6] As such, it is pertinent to delineate the factual matrix of the case before this court in order to address the grounds of appeal urged by the appellant;

FACTUAL MATRIX

The Appellant in the instant case were engaged in a vehicle dealership business while the Respondent is a businessman who operates a passenger transport business. The Respondent purchased a Toyota Hiace van in May 2007 from the Appellant for $27,000.00. Having used the vehicle for about a month the Respondent made a complaint to the Appellant regarding a hole on the right mud flap. Another complaint was made by the Respondent one month later i.e. in July 2007 to the effect that bubbles had appeared on the bottom right side panel of the vehicle. The Respondent was prompted to instruct his solicitors to write to the Appellants demanding that they repair the vehicle or in the alternative refund the money paid to them by the Respondent as the appellant paid no heed to both the complaints made by the Respondent. Failing all these efforts, the Respondents then filed the originating summons and the statement of claim seeking *inter alia* the following reliefs:

"1. *The time for filing of a Notice of Intention to Appeal against the decision of the Magistrate, Mr Ropate Green delivered on 29 December 2016 in Suva Magistrates Court Civil Action No. 389 of 2008 be extended and the Appellants/Applicants be granted leave to file the Notice of Intention to Appeal out of time.*

2. *The time for filing of the Notice and Grounds of appeal from the decision of the Magistrate, Mr Ropate Green delivered on 29 December 2016 in Suva Magistrates Court Civil Action No. 389 of 2008 be extended and the Appellants/Applicants be granted leave to file the Notice and Grounds of Appeal out of time.*

3. *The Judgment of the Magistrate, Mr Ropate Green delivered on 29 December 2016 in Suva Magistrates Court Civil Action No. 389 of 2008 be stayed until the hearing and determination of this Application."*

[7] The complaints of the respondent pertained to a hole on the mud-flap and some bubbles appearing on the paint on the bottom right side panel of the vehicle. It is important to bear in mind that this 14 seater vehicle was used for passenger transport on the Nausori/Korovou roads. As any judicious user of a vehicle is expected to know, general wear and tear of a vehicle, especially a passenger transport vehicle regularly operating on a public road, is inevitable. Such wear and tear includes running repairs such as punctured mud flaps. Even the bubbles complained about had appeared only on the bottom panel of the vehicle, which naturally happens with exposure to the elements, especially to mud or gravel. None of these can be considered defects per se in a vehicle which adversely impacts the roadworthiness of it. As per document marked 'E' at pages 52 and 53 of the CR, it is evident that the ownership of this vehicle had remained with the respondent from May 2007 up to May 2011. Had it being a vehicle not road-worthy, it would not have been possible for the respondent to use it continuously for over a period of 4 years. Further, it does not appear to be the case that the Respondent has attempted to divest himself of the vehicle by selling it. Therefore it can safely be concluded that there had been no misrepresentation by the appellant to the Respondent.

[8] Further, in the absence of any fraud or evidence to prove that the appellant had not afforded the respondent the opportunity of a reasonable examination of the vehicle prior

purchasing. If the respondent had taken the opportunity to thoroughly inspect the vehicle for possible defects, the defects of the nature complained of would have been readily apparent, had they been present at the time of inspection. However, as stated previously, the complaints pertain to reasonable wear of a running vehicle and not to pre-existing defects, which precludes a finding of any misrepresentation on the part of the appellants.

[9] In view of the above reasoning, despite the '*inordinate delay*' the merits of the case warranted the application for extension of time to appeal being allowed.

[10] In paragraph 38 of the judgment of the learned Magistrate, he orders thus "..... *I find that on the balance of probabilities that the Plaintiff has proven its claim and accordingly enter judgment for the Plaintiff in the sum of $27,000.00. I also make an award of interest of 3% from the date on which the writ was issued.*"

[11] In all the circumstances of the case, the Magistrate's award of interest at the rate of 3% on the total purchase price of the vehicle (which was $27,000.00), coupled with the failure to order the Respondent to return the vehicle to the Appellant, amounts to unjust enrichment of the Respondent.

[12] However, taking into consideration the disregard by the appellants of the two complaints made by the respondent regarding the defects, though trivial and which may very well be the result of ordinary usage of a passenger transport vehicle, I order the first appellant to make a payment of $5,000.00 to the Plaintiff/Respondent in place of the order of $27,000.00 made by the learned Magistrate.

[13] Therefore I am of the view that the learned High Court Judge should have set aside the order of the Magistrate. Accordingly, exercising the appellate powers of this court, I set aside the orders of the Magistrate as well as the orders of the Learned High Court judge dated 2 June 2017.

[14] In conclusion, I find that the grounds of appeal 1 – 4, and 6 are irrelevant in view of the above reasoning. I answer the fifth ground of appeal in the affirmative.

Guneratne JA

[15] I agree with the judgment of Lecamwasam JA including the orders proposed by his Lordship.

Jameel JA

[16] I have read the draft judgment of Lecamwasam JA and agree with his reasons and conclusions.

Orders of the Court:

i) Judgment of the High Court dated 2 June 2017 is set aside

ii) The order of the learned Magistrate dated 29 December 2016 is set aside

iii) The First Appellant is ordered to pay $5,000.00 to the Respondent

iv) Parties to bear their own costs.

Hon. Justice S Lecamwasam
JUSTICE OF APPEAL

Hon. Justice A Guneratne
JUSTICE OF APPEAL

Hon. Justice F Jameel
JUSTICE OF APPEAL