

IN THE HIGH COURT OF FIJI

APPELLATE JURISDICTION AT LAUTOKA

Civil Appeal: 11 of 2013

BETWEEN: **RAGWELL CHETTY** of Malolo, Nadi a General Manager

DEFENDANT/APPELLANT

AND : **TRADES FURNITURE & JOINERY LTD** a duly
incorporated limited liability company having its registered
office in Nadi

PLAINTIFF/RESPONDENT

Counsel : Mr J Sharma for appellant

 Ms D Barbara for respondent

Date of Hearing : 15 March 2016.

Date of Judgment : 16 May 2016

J U D G M E N T

Introduction

[01] This is an appeal, with leave to appeal out of time being granted by Justice Abeygunaratne, from a judgment of the Magistrate's Court at Nadi.

[02] The appeal was argued on 15 March 2016 when both parties made oral submissions and also tendered their written submissions.

Background

[03] Trade Furniture & Joinery Ltd, the plaintiff/respondent issued proceedings against Ragwell Chetty, the defendant/appellant. The plaintiff sought orders that:

- 1) A declaration that the motor vehicle registration number EW 677 (Honda CRV Station Wagon) is the property of the plaintiff.

- 2) An order that the defendant forthwith execute documents necessary to transfer the vehicle to the plaintiff.
- 3) Damages not exceeding \$50,000.00 and costs of the action.

[04] The defendant filed statement of defence and counterclaim.

[05] The facts as alleged by the plaintiff were that: The defendant worked for the plaintiff initially as General Foreman and later was promoted as General Manager. As the General Manager of the plaintiff, the defendant was entrusted with the responsibility of purchasing company assets including motor vehicle. In 2007 the defendant purchased the vehicle registration number EW677 for \$17,000.00. The plaintiff entrusted the defendant with full rights and responsibility to purchase the vehicle. The plaintiff paid the entire purchase price of the vehicle. After purchasing, the defendant registered the vehicle in his name instead of registering it in the name of the company (plaintiff).

[06] At the trial, both parties gave evidence and tendered their respective written submissions. The learned Magistrate delivered his judgment in favour of the plaintiff. By his judgment dated 8 July 2012 and handed down on 8 August 2012 the learned Magistrate held that:

- i. Declaration that the said vehicle registration number EW 677 is the property of the Plaintiff Company.
- ii. That the Defendant forthwith and no later than 14 days from the date of this Order at his own costs execute all the deeds and or documents necessary and do everything required to transfer the vehicle to the plaintiff.
- iii. Although the Plaintiff has not been able to provide necessary documents due to fire and flood to substantiate the loss suffered, the Court exercises its discretion and awards damages to the Plaintiff for the sum of \$20,000.00.
- iv. Summarily assessed costs of \$2,500.00 in favour of the plaintiff.

[07] Being aggrieved by the learned Magistrate's judgment the defendant appeals to this court.

Grounds of Appeal

[08] The Appellant relies on the following grounds of Appeal:

1. The Learned Trial Magistrate erred in law and in fact in finding in favour of the Respondent.
2. The Learned Trial Magistrate erred in Law and in fact in holding that:

"Although the Plaintiff has not been able to provide necessary documents due to fire and flood to substantiate the loss suffered, the Court exercises its discretion and awards damages to the Plaintiff for the sum of \$20,000.00"
3. The Learned Trial Magistrate erred in Law and in fact in awarding \$20,000.00 as Damages when there was no documentary or other evidence of any loss suffered by the Respondent.
4. The Learned Trial Magistrate erred in Law and in fact by in dismissing the Defendant's Counter-Claim.
4. The Learned Trial Magistrate erred in Law and in fact in awarding the Plaintiff/Respondent costs in the sum of \$2,500.00.

Issue

[09] The issue to be decided by this court is whether the Learned Magistrate erred in law and in fact in awarding \$20,000.00 as damages when there was no documentary or other evidence of any loss suffered by the plaintiff.

Discussion

[10] Although the appellant appealed the judgment on five grounds of appeal. The appellant argued the appeal primarily on grounds 2 and 3 that the Learned Magistrate was wrong in awarding \$20,000.00 as damages when there was no evidence documentary or otherwise of any

loss suffered by the plaintiff. Other grounds of appeal seem to have been abandoned.

[11] Mr Janend Sharma, counsel appearing for the appellant submits that, the onus of proof of damage was on the plaintiff. The plaintiff failed to discharge the onus placed on upon it. The award of \$20,000.00 in damages seems to have been plucked out of the air. The learned Magistrate erred in law and in fact awarding damages of \$20,000.00. He cited case authorities of (1) *R. B Patel Group Ltd v Mac Patel Investment Ltd* [2011] FJCA 29; ABU 0049.2010 (12 April 2011), (2) *Salim v iTaukei Land Trust Board* (Civil Action HBC 37 of 2012, (3) *A G & Ors v Tikotikoca* (Civil Appeal No. 048 of 2012) and (4) *Singh Shopping Ltd v Labasa Town Council* [2013] FJHC 586; Action 9.2005 (24 October 2013).

[12] Counsel for the respondent, Ms Barbara on the other hand argued that, the respondent had duly provided evidence of the deposit paid for the vehicle as well as to its financiers, Carpenters Finance. Furthermore, it was an undisputed fact that the purchase price of the vehicle was \$17,000.00 and that the respondent also paid for vehicle insurance. She further submits that, in addition to other documentary evidence produced by the plaintiff, the oral evidence put before the court is just as significant, sufficient and of probative value as any other documentary evidence. Although the documentary evidence was destroyed in a fire its contents were successfully reconstructed through oral testimony.

[13] Obviously, the there no evidence led before the learned Magistrate substantiating the grant of general damage. It is clear from his judgment. He held that:

'Although the Plaintiff has not been able to provide necessary documents due to fire and flood to substantiate the loss suffered, the Court exercises its discretion and awards damages to the Plaintiff for the sum of \$20,000.00.

- [14] In granting damages to the plaintiff the learned Magistrate exercised his discretion. Can the court grant damages in the absence of evidence to support the loss suffered by a party exercising its discretion? I would say the court cannot and should not award damages without proof of the loss suffered.
- [15] In **R.B. Patel Group Ltd v Mac Patel Investment Ltd** [2011] FJCA 29; ABU0039.2010) Kankani T Chitrasiri, J A said at paragraph 35 & 36 (under the heading General Damages):

*'The learned High Court Judge had awarded \$2,800 as general damages. The said amount of \$2,800 had been awarded on the basis that he appellant company had removed three scales that were used by the respondent. **However, general damages are a kind of damages which the law presumes to follow from the wrong complained of. In such a situation the matters that followed from the incident should be established by adducting evidence to that effect.***

I also could not find any evidence, as to the way in which the respondent company was affected by the acts of the appellant company. Even though there is clear evidence as to the removal of the three scales which were made use of for the day to day sales, there is no evidence as to the other matter of the loss caused to the respondent by the said removal of the scales or even by the removal of the other items of goods. Therefore, it is my view that the decision to have granted damages for the removal of the goods by the learned High Court Judge is not correct.

Moreover, the value of those scales had been already taken into account when the learned High Court Judge decided to award the special damages. Therefore, it is wrong on the part of the learned High Court Judge to include the value of the scales into both special and general damages without any proof of the manner of the loss caused to the respondent. In the circumstances, it is my view that the awarding of general damages considering the value of the three scales cannot be allowed to stand.'
(Emphasis added)

- [16] The High Court in **Salim v iTLTB** (supra) declined to award general damages on the ground that there was no proof for the loss that the plaintiff claimed.
- [17] In **Singh Shopping Ltd** (supra) the court limited the general damages to the extent the plaintiff was able to support with evidence.

- [18] Returning to the matter at hand. The learned Magistrate allowed damages of \$20,000.00 in the exercise of his discretion. There is no reason why he considered the grant of damage. There is nothing on the record to show as to how the figure has been reached. When reaching the figure, it appears, the learned Magistrate has taken into consideration the purchase price and premium paid by the plaintiff.
- [19] It was undisputed that the plaintiff purchased the vehicle for \$17,000.00 and it paid the purchase price.
- [20] As the General Manager of the plaintiff, the defendant was entrusted to purchase the company assets including the vehicle. After purchasing the vehicle he registered it under his name instead of registering under the company name. He used the vehicle for one week. Thereafter the vehicle was taken from him and the vehicle remained in the plaintiff's possession. The plaintiff later found that it was registered in the defendant's name.
- [21] It appears that the learned Magistrate in granting damages of \$20,000.00 has considered the full purchase price of the vehicle and vehicle insurance paid by the plaintiff.
- [22] It should be noted that the plaintiff did not lose the vehicle completely. All the times, except for one week the defendant had used, the plaintiff had possession and control of the vehicle when the vehicle had a crash with another vehicle. As a result of the accident the vehicle was written off.
- [23] As stated elsewhere in this judgment, the learned Magistrate has considered the full purchase price of the vehicle and vehicle insurance paid by the plaintiff. The plaintiff did not suffer any loss because the plaintiff was using the vehicle having full custody and control of the vehicle. The plaintiff never alleged that they were unable dispose of the vehicle as it was registered in the defendant's name. The defendant subsequently signed the documents to transfer the vehicle

to the plaintiff. In the circumstances, the learned Magistrate was, in my view, wrong in granting damage of \$20,000.00, which includes the full purchase price of the vehicle and vehicle insurance paid by the plaintiff.

[24] In **Abe v Azim** [2010] FJHC 34 (Master Tuilevuka (as he then was)), where the defendant converted the property into his name and sold to another, damage was assessed as the market value of the goods lost as assessed at the time of conversion. In the case at hand one can say there was an attempt to converting the property. There was no loss of the property. Therefore Abe case has no application to the present case.

[25] If the learned Magistrate minded to grant damage to the plaintiff he could have considered it under different ground namely, wrongful act.

[26] The defendant had committed a wrongful act towards his employer, the plaintiff. The defendant had attempted to convert the vehicle by registering it in his name. The plaintiff had entrusted the defendant with full rights and responsibility to negotiate and carry out transaction to its completion for the purchase of the vehicle between the plaintiff and the vendor (page 155 of Copy Record). The plaintiff company had reposed trust on its General Manager (the defendant). The defendant has abused the mutual trust placed upon him by the plaintiff by attempt to convert the property. In doing so the defendant had acted maliciously and wrongfully. The plaintiff was entitled to damage for the wrongful act committed by the defendant. I would have considered a sum of \$10,000.00 as damage for the wrongful act committed by the defendant in respect of the vehicle. This will do justice to the plaintiff. I accordingly correct the learned Magistrate's order on damage to reflect this. His order for damage of \$20,000.0 is reduced to \$10,000.00 as damage for the defendant's wrongful act. Subject to this variation the learned Magistrate's judgment is affirmed.

[27] The fifth ground of appeal is that the learned Magistrate erred in awarding the plaintiff costs in the sum of \$2,500. When ordering the costs the learned Magistrate has considered that the plaintiff had to apply for interim injunction against the defendant to restrain him from conversion of property and that the plaintiff had made about 30 appearances in the Nadi Magistrate's Court. I find no reason to disturb the learned Magistrate's costs order. I therefore affirm the costs order made by the learned Magistrate.

[28] With regard to costs of this appeal I would order each party to bear their own costs.

The result

1. Appeal partly allowed.
2. Damage ordered by the Magistrate is reduced to \$10,000.00.
3. Subject to the above variation Magistrate's judgment is affirmed.
4. Each party to bear their own costs of the appeal.



H. H. Mohamed Ajmeer
16/5/16

.....
M H Mohamed Ajmeer

JUDGE

At Lautoka

16 May 2016

Solicitors:

For appellant: Janend Sharma Lawyers, Barrister & Solicitors

For respondent: Rams Law, Barrister & Solicitors