

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

CIVIL ACTION NO. HBC 198 OF 2018

BETWEEN : **KALIONI RATU & KALESI DALITABUA** trading as **MAX JOHN INVESTMENT** originally of Vunamoli Village, Ba, currently of Waiyavi, Lautoka.

PLAINTIFF

AND : **RAM TAPPESAR & SON** also known as **RTM GROUP** a limited liability company having its registered office at Queens Highway, Nawaicoba, Nadi.

DEFENDANT

Appearances : Mr Z. S. Mohammed for the plaintiff
: Mr R. Charan for the defendant
Date of Trial : 23 and 24 September 2020
Date of Judgment : 13 November 2020

J U D G M E N T

Introduction

[01] The plaintiff took out a writ of summons against the defendant for breach of an agreement claiming:

- a) *The sum of \$85,000.00 being the default for the eight months whilst the machines were in their possession.*
- b) *General and punitive damages for deceptive and misleading conduct.*
- c) *Interest under the Law Reform [Miscellaneous Provisions] [Death & Interest] Act.*

d) *Costs on a solicitor/client indemnity basis.*

[02] The defendant denied any breach of the agreement, filed a statement of defence and counterclaimed against the plaintiff a sum of \$47,000.00 for repairs it had done to the plaintiff's machinery. The defendant pleaded in its defence and counterclaim that:

- a) The defendant had repaired the two machines at its own costs and had paid the first mortgage instalment to Fiji Development Bank.
- b) The plaintiff upon the machines being repaired took possession of the same and leased it out to a third party.
- c) The plaintiffs had breached the agreement and caused loss to the defendant as the defendant could not maximize on its investments by repairing the machines on its own costs and using the machines in its business.

[03] The plaintiffs in their reply to defence and defence to the counterclaim denied the counterclaim. The plaintiffs in their defence to counterclaim states that the plaintiffs only took possession of the machine when an unknown company to the plaintiffs took possession of the machine to which the defendant company was also not aware of.

Background

[04] The plaintiffs were the registered owner of Cat Skidder 518, FZ 229 and Bell Loader 220, EG 316 (the "*machines*").

[05] The defendant is in the business of purchasing second hand vehicles and machines for its business.

[06] On or about 18 May 2017, the plaintiffs and the defendant entered into an agreement for the defendant to purchase the machines from the plaintiffs (the "*agreement*").

[07] The agreement provided that the defendant would pay \$10,200.00 towards the repayment to Fiji Development Bank as they were the mortgagee, and that upon the mortgagee being fully paid the plaintiffs would then transfer the machines to the defendant company.

[08] The defendants made payment of the first instalment after they were given possession of the machines.

[09] The defendants, according to the plaintiffs, thereafter used the machines and enriched themselves for a period of 08 months by doing the logging business and wilfully neglected to pay the monthly instalments as agreed upon and the defendant in breach of the terms and conditions of the agreement, failed to pay, even after the demand was made on 19 March 2018.

[10] The plaintiffs have brought the action against the defendant on the basis that they (plaintiffs) have suffered loss and damages as a result of the defendants default.

Agreed facts

[11] At the pre-trial conference ("PTC") held between the parties, the following were agreed facts:

1. *The plaintiff was the registered owner of Cat Skidder 518, FZ 229 and Bell Loader 220 registration EG 816.*
2. *The plaintiff and the defendant on 18 May 2017, entered into agreement to purchase the above said machines.*
3. *That upon the mortgage being fully paid the plaintiffs would then transfer the said machines to the defendants company.*
4. *That the defendants made payment towards the first installment after they were given possession of the machines.*

Evidence

[12] The plaintiff's called 4 witnesses to give evidence on their behalf. Their witnesses include: 1. Kalesi Dalitabua Ratu, second named plaintiff (PW1), 2. Sereli Taileka, Machine Operator (PW2), 3. Jone Seruvi Cava, Wood Supplies Officer (PW3) and Ronesh Tapessar, Company Director (PW4). The defendant called only one witness namely Mr Vijen Kant Tapessar, one of the directors of the defendant company (DW1). In addition, both parties marked and led in evidence their

respective documents. I would state what each witness testified in the discussion section of this judgment, where necessary.

The issue

[13] The central issue the court has to determine is whether or not the defendant breached the agreement.

Discussion

[14] The plaintiffs' claim arises out of an alleged breach of agreement on the part of the defendant.

[15] It is common ground that the parties entered into an agreement for the defendant to purchase a Cat Kidder 518, registration number FZ 229 and a Bell Loader 220, registration number EG 816 (the "*machines*"), (the "*agreement*").

[16] The agreement (PEX1) provided that the defendant shall:

1. *The company (defendant) to purchase and repair the logging machines belonging to the owner (plaintiffs) at its garage on its own costs;*

3. *This agreement shall begin on the 18 May and expire on the day and date when all fees and costs of the said machines are fully paid.*

4.1 *The company shall repair the said two machines at its own garage or wherever it may be at his own cost.*

....

4.6.1 *The company shall pay \$50,000 to the Machines Owners as the costs of the Machines when all debts are fully recovered by the bank.*

4.6.2 *The purchasing amount of \$50,000 shall be paid on instalment basis every month on an agreed amount between \$1,500 and \$2,000 in addition to monthly payment as mentioned in (4.3). The said sum shall be paid directly to the Machine Owner bank Account number 10055413 of the Bank of South Pacific, Lautoka Branch. It shall cease when full amount is recovered.*

[17] It was not in dispute that after the agreement the defendant took (towed) the machines to its garage, repaired the machines at its own costs, and paid the first

mortgage instalment to Fiji Development Bank as agreed. This clearly demonstrates that the agreement has been partly performed by the defendant.

- [18] It is notable that the agreement came into operative with effect from 18 May 2017, when the defendant was able to get fitness certificate from the Land Transport Authority for the machines after the necessary repairs, and that it was duly executed by the parties on 21 July 2017.

Whether or not the defendant breach the agreement

- [19] The plaintiffs complain that the defendants defaulted in making payment in terms of the agreement after the first payment of \$6,000.00. They (plaintiffs) claim a sum of \$85,000.00 from the defendant for work done or using the machines in their business during the period of 8 months from June 2017 to January 2018.
- [20] There was no dispute as to the formation of the contract and its terms and conditions contained therein. By the agreement, the defendant agreed to pay \$87,000.00 as mortgage repayment to Fiji Development Bank and a further \$1,500.00 the purchase of the machines.
- [21] The defendant was well aware of the terms and conditions of the agreement because it was the defendant's evidence that he knew that there were 2 accounts with the Fiji Development Bank, he made instalments in them during the first month being \$5,000.00 and \$1,000.00 respectively in each account. Thereafter, he did not make any payment.
- [22] The plaintiffs' witnesses (PW 1) confirmed that they had seen their machines working in the defendant's business whenever they visit the defendant's site during the operational period of 8 months from June 2017 to January 2018.
- [23] PW2 was the Bell operator who was employed by the defendant throughout 2017. He in his evidence confirmed that he operated the Bell machines (of the plaintiffs-EG 316) during the period May 2017 towards end of 2017 in the defendant's business. He said the defendant did not ask him to sign any formal employment contract to work in their business.
- [24] PW3 was a GIS officer who had worked for the defendant during the month of May 2017 to December 2017. He confirmed that Skidder and Bell Loader (he could not recall their registration numbers) were working at the site. He also said the defendant did not ask him to sign any formal employment contract.

- [25] Both PW2 and PW3 confirmed in their evidence that they had seen the defendant removing spare parts from the Skidder and Bell Loader and fixing to their machines.
- [26] More importantly, the defendant had hired out the machines to Eltech from May to December 2017 and Mr Vijen Kant Tappesar (DW1) accepted that Eltech had paid them (defendant) for the work they had done from May to December 2017 (see PEx8(a-i) for tonnage).
- [27] The plaintiffs called Ronesh Tappesar, one of directors of the defendant (to give evidence on their (plaintiffs) behalf ("PW4"). His examination in chief went smoothly. He confirmed in his evidence in chief that the defendant and the plaintiffs entered into an agreement for the purchase of the machines from the plaintiffs and he also confirmed the terms and conditions of the agreement. However, during cross examination PW4 turned around and became an adverse witness for the plaintiffs. During cross examination, PW4 appeared to be a bias witness. He started to give evidence in favour of the defendant because he is one of the directors of the defendant. He did not appear to be an independent witness during cross examination by the defendant's counsel. I would, therefore, disregard PW4's evidence given in the course of the cross examination.
- [28] The plaintiffs' witnesses especially PW1, PW2 and PW3 were consistent in their evidence. They gave straightforward evidence. PW2 and PW3 corroborated the evidence of PW1. The plaintiffs' witnesses were credible. It follows that I accept the evidence given on behalf of the plaintiff.
- [29] On the evidence, and on the balance of probabilities, I find that defendant had breached the agreement after partly performing the agreement by payment of the first instalment. The breach occurred when the defendant failed to make payments as agreed by the agreement. Because of the breach of the agreement, the defendant is liable to pay damages to the plaintiffs.

Damages

- [30] In February 2017, the defendant took possession of the machines from the plaintiffs and brought to their garage under an agreement that they (defendant) will repair the machines at their own costs, use them in the defendant's business and purchase them after repayment of mortgage to Fiji Development Bank. The

agreement appears to be 'as is where is'. The defendant undertook to repair the machines at their own expenses and use them in their (defendant) business.

- [31] The defendant was able to repair the machines in mid April 2017 and got it passed by the Land Transport Authority for operation in May 2017.
- [32] There has been sufficient evidence before the court that the defendant hired the machines out to Eltech and obtained money from May 2017 to January 2018, for a period of 8 months. This was also confirmed by DW1. He admitted receiving payments from Eltech during this period on account of hiring the machines out to them (Eltech).
- [33] The defendant had made only the first payment. Thereafter, it failed to make any payment towards the instalments as agreed.
- [34] The defendant had possession of the machines and use them in their business from May 2017 to January 2018, making up 8 months. The plaintiffs claim damages as follows:

Start date of contract	:	18 May 2017
End of contract	:	January 2018
Total No. of repayments not paid (8 months-June 2017-January 2018 \$8700.00x8 months)	=	\$69,600.00
Purchase price for the machines (\$1500.00x8 months)	=	\$12,000.00
May 2017 paid \$6000.00 towards the first instalment (minus \$10,200.00 shortfall of)	=	\$4,200.00
Total claimed	=	----- \$85,800.00 =====

- [35] The above calculation is based on the agreement. I am satisfied that the plaintiffs incurred loss as a result of the defendant's breach of contract in the sum of \$85,800.00. Therefore, it is fair to order the defendant to pay the sum of \$85,800.00 to the plaintiffs as damages for breach of contract.

Punitive damages

- [36] The defendant's conduct was deceptive and misleading in that the defendant used the machines in their business and failed to make payments in accordance with the agreement except for the first payment. Thereafter, the defendant refused to make payment and took up position that they (defendant) could not operate the machines because of lack of spare parts.
- [37] The plaintiff repossessed the machines from a third party. The machines had gone to the third party's possession while the machines were under the control and custody of the defendant. The defendant should bear responsibility for this, because the plaintiffs delivered possession of the machines to the defendant. The machines had gone to possession of the third party while the machines were still in the custody of the defendant. The only inference the court can draw under these circumstances is that the defendant should have given possession of the machines to the third party for hire.
- [38] For the defendant's deceptive and misleading conduct, I would allow a further sum of \$5000.00 as punitive damages. The defendant shall pay this sum to the plaintiffs.

Interest

- [39] The plaintiffs claim interest under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act.
- [40] The plaintiffs are entitled to interest on the judgment sum. Exercising my discretion, I order that the defendant shall pay interest on the judgment sum at the rate of 5% from the date of writ of summons (4 September 2018) to the date of this judgment.

Costs

- [41] As a successful party, the plaintiffs are entitled to costs of these proceedings. I intend to summarily assess costs. Taking all into my consideration, I assess costs at \$2,000.00. Accordingly, the defendant shall pay summarily assessed costs of \$2,000.00 to the plaintiffs.

Counterclaim

- [42] The defendant counterclaims a sum of \$47,000.00 for repairs it had done to the plaintiff's machinery.
- [43] The defendant agreed to purchase the machines from the plaintiffs 'as is where is' basis after mortgage repayments to the Fiji Development Bank. By the agreement, the defendant specifically agreed that they will repair the machines at their own costs at their garage.
- [44] There is nothing in the agreement that the plaintiffs have to reimburse the expenses incurred by the defendant in repairing the machines to the defendant. In the absence of any provision or any promise by the plaintiffs that the plaintiffs shall pay for repairs the defendant would do to the machines. On this ground alone, the defendant's counterclaim against the plaintiffs.
- [45] Presumably, even if one assumes that the plaintiffs were to pay for the repairs the defendant would do to the machines the counterclaim would still fail because the defendant was unsuccessful in establishing the counterclaim. The defendant's exhibits-invoices and delivery dockets were not signed or received. There are no payments receipts for repairs done to the machines. The descriptions of the parts that were purchased on all the invoices do not mention that the parts were for the machines (the plaintiffs' machines) except for two invoices.
- [46] The repair amount includes payment of \$20,000.00 to the mechanics to fix the machines. However, the defendant was unable to prove payment of this sum to the mechanics by payment invoice. I cannot accept the defendant's evidence that mechanics do not issue receipts.
- [47] The defendant has failed to establish the counterclaim against the plaintiffs. Therefore, I proceed to dismiss the counterclaim. I accordingly dismiss the counterclaim.

Conclusion

- [48] On the evidence, and having being satisfied on the balance of probabilities, I conclude that the defendant had breached the agreement after partly performing of the same. It follows that the defendant is liable to pay damages to the plaintiffs for their breach of contract. I accordingly order that the defendant shall pay a

sum \$90,800.00 to the plaintiffs as damages, which include punitive damage of \$5,000.00.

[49] In addition, the defendant shall pay interest on the judgment sum at the rate of 5% from the date of writ of summons (4 September 2018) to the date of this judgment.

[50] The defendant shall also pay summarily assessed costs of \$2,000.00 to the plaintiffs.

[51] The counterclaim made against the plaintiffs is dismissed.

Result:

1. The defendant shall pay the sum of \$90,800.00 to the plaintiffs.
2. The defendant shall also pay interest on the judgment sum at the rate of 5% from the date of writ of summons (4 September 2018) to the date of this judgment.
3. The defendant shall also pay summarily assessed cost of \$2,000.00 to the plaintiffs.
4. The defendant's counterclaim is dismissed.

M.H. Mohamed Ajmeer
13/11/20
.....
M.H. Mohamed Ajmeer
JUDGE



At Lautoka
13 November 2020

Solicitors:

Zoyab Shafi Mohammed Legal, Barristers & Solicitors for the plaintiffs
Ravneet Charan Lawyers, Barristers & Solicitors for the defendant