

**IN THE HIGH COURT OF FIJI AT LAUTOKA**

**APPELLATE JURISDICTION**

**Magistrate's Court Civil Action No. 30 of 2019**

**Civil appeal No. 01 of 2021**

**BETWEEN**

**JAYWANT PRATAP** trading as **JANSONS FARM** of Baulevu,  
Nausori.

**PLAINTIFF/APPELANT**

**AND**

**AWESOME CHICKS SUPPLIES** having its registered office at  
18km Kings Road, Lautoka.

**DEFENDANT/RESPONDENT**

**Counsel** : Mr. Sunil Kumar for the Appellant  
Ms. Chand A. for the Respondent

**Date of Hearing** : 07<sup>th</sup> July 2022

Date of Judgment : 25<sup>th</sup> July 2022

## JUDGMENT

- [1] The plaintiff/appellant (the plaintiff) filed writ of summons in the Magistrate's Court seeking the following reliefs against the defendant/respondent (the defendant):
- i. An order for the refund of the bank deposit made by the plaintiff in the sum of \$19,600.00 to the defendant with an interest to be assess by the court at the bank rate at the time of the judgment.
  - ii. Damages for the loss suffered at the time of writing of demand letter in the sum of \$15,000.00 and future loss and damage suffered until the determination of this action to be confined within the jurisdiction of this Honourable Court.
  - iii. Solicitor's costs in the sum of \$1750.00 plus costs of this action.
  - iv. Any other order and the total judgment sum plus costs to be confined within the jurisdiction of the court.
- [2] The plaintiff in his statement of claim states that on 09<sup>th</sup> November 2018 he placed an order with the defendant company for supply of 4000 day old chicks and made payment of \$19,600.00 via deposit in the ANZ Bank account No. 11352790 on the same day which fact is admitted by the defendant in its statement of defence. The plaintiff alleges that till the date of the statement of claim he did not receive any delivery of the chicks he purchased from the defendant.
- [3] The defendant in its statement of defence states that it delivered 1214 chicks on 27<sup>th</sup> December 2018 and the plaintiff acknowledge receiving the delivery. The balance chicks were ready for collection on 04<sup>th</sup> January 2019 which the plaintiff collected and off loaded the same without communicating with the defendant.

[4] The defendant alleges that the following acts of negligence of the plaintiff caused him damages and it claims special damages \$6500.00 and also general damages from the plaintiff.

[5] After the trial the learned Magistrate dismissed both claims without costs. Being aggrieved with the decision of the learned Magistrate, the plaintiff appealed the judgment on the following grounds:

- (1) The learned trial Magistrate erred in law and in fact when she failed to consider all the evidence of the plaintiff and his witness which was supported by exhibits tendered in court, which had proved the plaintiff's claim thus, has caused substantial prejudice and miscarriage of justice to the plaintiff.
- (2) The learned trial Magistrate erred in law and in fact when she failed to follow proper principles of proof of civil liability and wrongly applying the law without doing the analysis of evidence see paragraph 20 of the judgment thereby causing substantial miscarriage of justice.
- (3) The learned trial Magistrate erred in law and in fact when she failed to consider that the evidence led by plaintiff was that he had paid the defendant the sum of \$19,600.00 (Nineteen Thousand Six Hundred Dollars) and the defendant had admitted under oath that he received payment for the supply of 4000, day old chicks from imported New Zealand eggs which were not supplied thus has caused substantial miscarriage of justice to the plaintiff.
- (4) The learned trial Magistrate erred in law and in fact when she failed to give reasons as to how she came to her decision in dismissing the plaintiff's claim whilst in paragraph 14 of her judgment she starts to analyse the defendant's case rather than the plaintiff's when she fell into error which has caused substantial miscarriage of justice.
- (5) The learned trial Magistrate erred in law and in fact in being BIAS and failing to act judiciously by delivering ruling which is contrary

to the evidence in court which has seriously prejudiced the plaintiff; see case *Pettit v Dunkey* [1971] 1 NSW 376 CA.

- (6) The learned trial Magistrate erred in law and in fact by taking irrelevant consideration into account and leaving out relevant considerations and direct evidence from witness. See; Civil Action No. 117/2011, Civil Appeal No. 02/2018 *Roshni Devi v Estol Holdings Limited*.
- (7) The learned trial Magistrate erred in law and in fact taking into account delivery note which was for totally different transaction which was not acknowledged by the plaintiff thus has caused substantial miscarriage of justice.
- (8) The learned trial Magistrate erred in law and in fact in failing to accept that it was the plaintiff who ordered the particular type of chicks and his evidence alone is sufficient that the chicks do not meet the his requirement ordered and aid for; see Her Worship's analysis in paragraphs 23 and 24 of her judgment thus has caused substantial miscarriage of justice.
- (9) The learned trial Magistrate erred in law and in fact in failing to follow Order XVI of the Magistrates Court Act Cap 14 whilst hearing and determining the plaintiff's claim since her jurisdiction is derived from statute as the Magistrates Court is a creature of statute and she should not do her own research and accepting late filing of submission behind the back of plaintiff's counsel with no right to reply thus has caused substantial miscarriage of justice.
- (10) The learned trial Magistrate erred in law and in fact when started to advise the defendant's counsel how to conduct the case of the defendant company and when letter of representation is required thus has seriously breached the plaintiff's constitutional right of impartiality causing substantial miscarriage of justice.

[6] In grounds of appeal 1 to 8 the appellant challenges the findings of fact of the learned Magistrate. From the judgment it is clear that the learned Magistrate was very well

verse with the law relating to degree of proof in civil proceedings. In paragraph 9 of her judgment the learned Magistrate states that burden of proof in a civil case lies on the party who substantially asserts the affirmative of the issue to prove on a balance of probabilities.

- [7] The plaintiff instituted these proceedings seeking to recover \$19,600.00 on the basis that he paid that amount to the defendant to purchase one day old, 4000 chicks but the defendant did not deliver the chicks. However, the defendant's position was that it delivered 1214 chicks on 27<sup>th</sup> December 2018 and the balance of the order was ready for collection on 04<sup>th</sup> January 2019 which the plaintiff came and loaded. However, without any communication he unloaded the chicks and went away. The plaintiff then for the first time in his reply to the statement of defence said the chicks that were loaded were of low quality and older than a day.
- [8] As correctly observed by the learned Magistrate, the burden was on the plaintiff to establish all these allegations. Except the bare statement of the plaintiff there was no evidence adduced to prove these allegations.
- [9] The learned counsel for the appellant submitted that the plaintiff had been in this business for a long time and he was in a position to assess the age and the healthiness of the chicks. Being in business for a long time is not sufficient for the court to consider the plaintiff as an expert without any evidence before the court. If was sufficiently qualified to assess the age and the healthiness of the chicks he should have adduced evidence on his qualifications but no such evidence has been adduced by the plaintiff at the trial.
- [10] In the case of **Kumar v Carpenters Fiji Ltd** [2012] FJCA 95; ABU0052.2008 (30 November 2012) the Appellant instituted action by filing a statement of claim with his writ of summons wherein he stated that he had purchased a brand new Nissan UR Van in or about August 2002 for the purchase price of \$56,000.00 from the Respondent and, that after sometime he started to have problems with its engine, that the said problems persisted even after the same was purportedly rectified and repaired by the Respondent on a few occasions, that he finally returned the said

vehicle to the Respondent to have the gearbox changed but the Respondent had repaired the gearbox, that he demanded that the Respondent should change the gearbox but the Respondent had refused to do so and that accordingly he had no choice but to return the vehicle to the Respondent and he had to purchase another vehicle from another dealer to carry on his business. The Appellant claimed Special damages of \$65,000.00 made up as \$50,000.00 for the value of the said vehicle and \$15,000.00 for the loss of business, general damages and costs.

The Court of Appeal Held:

The Appellant had not apart from giving oral evidence and producing documents taken steps to prove that the gearbox of the vehicle was defective the onus of which was on him. The learned Judge stated in his judgment that the defect complained of regarding the gearbox related to its merchantable quality which meant as to whether it was fit for its use. Merely giving oral evidence on such a matter would not suffice as no inferences can be drawn regarding merchantable quality of a component like a gearbox from oral evidence. There has to be technical evidence adduced to show that the gearbox was not of merchantable quality through some person who had some expertise regarding such matters.

The defect of a component of a vehicle such as the gearbox could be either a patent or latent defect. In the instant case, it certainly was not a patent defect as seen from the evidence, the problems surfaced only after the vehicle was used for several months. If it was a latent defect the Appellant should have taken steps to prove such a defect through appropriate evidence. Merely stating in his oral evidence that the gearbox was defective would not be sufficient to prove such a latent defect.

[11] In this matter the plaintiff has failed to adduce sufficient evidence to prove that the chicks were order than a day and they were of low quality.

[12] The learned counsel for the plaintiff alleged that the learned Magistrate had been biased and referred to the following as discrepancies of the respondent;

- a) The respondent/defendant had admitted that he received payment in return for 4000 day old chicks from imported New Zealand eggs.
- b) The judgment was not neutral;
- c) The Learned Magistrate accepted and relied on a submission that was filed late and went against its own orders made on the 26<sup>th</sup> day of August, 2020.

[13] Order XXXI rule 4(b) of the Magistrates Court Rules provides;

If the defendant decides to produce evidence, the plaintiff shall have no right to address the court at the conclusion of his own evidence; the defendant shall then state his defence and produce his evidence. At the conclusion of the defendant's evidence, he shall be entitled to sum up his defence and comment upon the evidence generally; and the plaintiff shall then be entitled to reply generally upon the whole case.

[14] In **Nyholt v Bish Ltd** [1971] FJLawRp 5; [1971] 17 FLR 18 (12 March 1971) it was held:

It is absolutely fundamental to the trial of a defended civil action that opportunity be given to the contesting parties both to have the evidence of themselves and their witnesses heard and to address the Court either in person or through Counsel before a decision is reached.

The failure of any Court of Law to allow reasonable opportunity to the parties both to call witnesses and give evidence and to address it, is a fatal defect that must vitiate the decision that is given by that Court in those proceedings.

[15] On 26<sup>th</sup> August 2020, at the conclusion of the trial the learned Magistrate directed the parties to file their respective written submissions on 29<sup>th</sup> September 2020. The learned counsel's submission is that the court accepted written submissions of the defendant out of time without giving the plaintiff an opportunity to reply. The learned counsel for the plaintiff submitted that it was only after the record was made

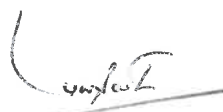
available to the plaintiff that they discovered that the court had accepted a late filing of defendant's submissions on the 23<sup>rd</sup> day of October, 2020.

- [16] Although the learned Magistrate had given an opportunity for both parties to file written submissions and also to file the submissions in reply, since the defendant filed its submissions late without serving a copy on the plaintiff giving him an opportunity to reply, his right guaranteed under Order XXXI rule 4(b) had been violated.
- [17] The learned counsel for the defendant submits that Submissions are not part of pleadings in a civil trial and the submissions are prepared by the counsel to assist the court on the relevant laws and evidence adduced before the court. Submissions whether written or oral are not evidence before any court of law. However, it is a statutory requirement that Magistrates must give an opportunity for the parties to address court and also to reply to the submissions made by the other parties. In the submission of the learned counsel these statutory provisions have been totally disregarded.

### ORDERS

1. The appeal is allowed.
2. The judgment of the learned Magistrate is set aside.
3. The matter is referred back to the Magistrate's Court for a trial de novo.
4. The defendant is ordered to pay \$1000.00 to the plaintiff within 30 days from this judgment, as costs of this appeal.



  
Lyone Seneviratne

**JUDGE**

25<sup>th</sup> July 2022