IN THE HIGH COURT OF FIJI AT SUVA

APPELLATE JURISDICTION

Civil Appeal No. 2 of 2021

Suva Magistrate's Court Case No. 300 of 2018

BETWEEN

FIREFOX FIJI LIMITED through its Director Jag Ram of Waila Road, Nausori.

PLAINTIFF – APPELLANT

AND

SUN INSURANCE COMPANY LIMITED a Limited Liability Company, having its Registered office at Ground & Level 1, Kaunikuila House, Laucala Bay, Suva .

DEFENDANT – RESPONDENT

Counsel	:	Mr. S. Kumar for Appellant
		Mr. A. Vulaono for Respondent
Date of Hearing	:	27th October 2022
Date of Judgment	:	18th May 2023

JUDGMENT

[1] The Plaintiff – Appellant [hereinafter referred as Appellant] instituted proceedings in the Magistrate's Court against the Defendant- Respondent [hereinafter referred as Respondent] seeking special damages in the sum of $ 48,391.38 for the failure to honor an insurance claim.

[2] Subsequent to the hearing, learned Magistrate Mr. Daurewa dismissed the Writ and the Statement of Claim with a cost of $500 in favor of the Respondent.

[3] The Appellant lodged this appeal on the following grounds;

1. The learned trial Magistrate erred in law and fact when he failed to consider all the evidence of the Plaintiff and his witness including the business documentary evidence when the Defendant did not adduce any evidence through witness in Court.
2. The learned trial Magistrate erred in law and fact when he failed to follow proper principles of proof of civil liability and civil evidence Act section 11 hence there by causing substantial miscarriage of justice.
3. The learned trial Magistrate erred in law and fact when he wrongly applied principles of law relating to civil liability without doing the analysis of evidence.
4. The learned trial Magistrate erred in law and fact when he failed to consider that the evidence led by Plaintiff was that he bought the truck based on the quotation and not that was registered at LTA.
5. The learned trial Magistrate erred in law and fact when he failed to give adequate reasons as to how he came to his decision of accepting the Defendants copy LTA abstract without any witness giving evidence and tendering denying the right of cross examination by Plaintiff and rejecting the Plaintiffs manufactures quotation

tendered by plaintiff when both were business records and dismissed the Plaintiff's claim.

6. The learned trial Magistrate erred in law and fact by stating that every piece of evidence must always be corroborated or supported by documentary evidence when uncontroverted evidence of Plaintiff and his witness was sufficient to prove his case.
7. The learned trial Magistrate erred in law and fact in failing to act judiciously by delivering ruling which is contrary to the evidence given in court and which has seriously prejudiced the Plaintiff.

[4] The Appellant Company insured one of their company vehicles IU454 with the Respondent Company. On 11th September 2018 the said vehicle involved in an accident in Sigatoka. The vehicle was driven by an employee of the Appellant. He has lost control of the vehicle due to heavy rain. The vehicle got severe damages and the Appellant applied to the Respondent to recover the damages. The Respondent declined the claim due to the violation of terms and conditions of the insurance cover by the Appellant. Respondent's view was that the driver at the time of the accident had a class 2 driver's licence which limited him to drive vehicles below 3.5 tonns.

[5] The main issue for determination at the trial was whether the vehicle IU454 was within the allowed weight limit of the driver's licence.

[6] At the hearing before the learned Magistrate, the Appellant called two witnesses. The driver of the vehicle Mr. Mohammad Naushad stated that he was holding a group 2 licence and the vehicle did not carry any load when the incident occurred. And that the vehicle's weight was 3,300 kilograms. He stated that he weighed the vehicle on the day before the accident. Further the witness relied on a document issued by the dealer company of the vehicle. The Respondent's counsel suggested to the witness that

according to Land Transport Authority (LTA) records the IU454's unladen mass was 3,540 kilograms. But he refused to accept the same.

[7] The Court transcript confirms that at this stage of the trial both counsel presented two documents to the Court by consent. The first document has been the quotation dated 30th September 2016 issued by Niranjans (dealer company) for the vehicle Hino 300 series GVW6500KG Wodden Cargo body cargo truck. And the second has been a copy of the Land Transport Authority (LTA) record of IU454.

[8] The Managing Director of the Appellant Company gave evidence next and he confirmed the quotation he obtained for the vehicle from Niranjans which states the weight 3,300 kg. During cross examination witness agreed that the quotation doesn't state whether that was unladen weight of the truck.

[9] At the conclusion of the trial both parties by consent exhibited the Driver's Licence of the Appellant's witness No 1 and the motor vehicle policy. The Respondent did not call any witnesses.

[10] Now I will consider grounds of appeal submitted by the Appellant.

Ground 1 & 2

[11] Whether the learned trial Magistrate erred in law and fact and whether he failed to consider all the evidence of the Appellant and his witness including the business documentary evidence when the Respondent did not adduce any evidence through witness in Court. And whether he failed to follow proper principles of proof of civil liability and civil evidence Act section 11.

[12] The Appellant states that they never had the opportunity to cross examine on the LTA document produced by the Respondent in Court. Therefore the learned Magistrate erred in giving more weight to the evidence adduced not through a witness.

[13] The Court notes that the quotation provided by the Appellant and the LTA record of the Respondent included in the proceedings by consent of the parties. Both documents were photocopies. The quotation did not carry any signature or certification. It is clear that the said document was not created by the manufacturer of the vehicle. It appears to me that this document has been generated on an individual or a party's request and therefore may not necessarily fall into the interpretation of 'records of a business'. In my view the learned Magistrate has given proper consideration on placing evidential value of this document by stating *"PW2 refers to Exhibit 1 as a quotation from the manufactures but with respect, it is not. It is only a quotation from Niranjans and therefore, whether the same captures the same description of the said vehicle from the manufactures is a question only a representative from, ideally, the manufacturers or Niranjans can answer. It would have been reasonable and practical had a representative from Niranjans being present. Additionally it would have been helpful had there been a source document by or from the manufactures to Niranjans that would at least shown a nexus in description which the Plaintiff relies on. Under section 6 of the Civil Evidence Act this exhibit 1 is viewed as multiple hearsay as the description of the vehicle in the document supposedly originates from a description by the manufacturers"*.

[14] Though the driver of the vehicle stated that he weighed the vehicle on the day before, he has not provided any further information such as a certificate or a formal confirmation, in order to substantiate his position.

[15] Further, Appellant's witness Mr. Jaduram under cross examination stated as follows,

Mr. Vulano : Now with regards to that quotation where does it say the word unladen?

Mr. Jaduram : it does not say anywhere.

[16] On the other hand the document Respondent relied on was a copy of the LTA record. The copy carries a LTA 'Authorised Officer signature'. Section 11 (2) and (3) of the **Civil Evidence Act 2002** provides if a document forms part of records of public authority with

a certificate signed including a facsimile signature by an authorised officer, it may receive in as evidence in civil proceedings without further proof. Section 22 of the **Land Transport Act 1998** further states that any extract or copy of an entry contained in a record which includes particulars of the registration of vehicles shall be received as evidence in any proceedings and deemed sufficient proof without requiring the production of the record.

[17] Though there is a typographical error when mentioned section 11(3) of the Civil Evidence Act in the judgment, I take the view that the learned Magistrate has considered the legal principles of the Act before accepting the LTA record as evidence.

[18] The Appellant further states that in the insurance policy, there had been an exclusion clause and it was never brought to their attention. It is to be noted that this Motor Insurance Policy presented to the Court by the Appellant to establish the obligations of the Respondent. However upon perusal I have noted that the document itself has no reference to the Appellant's vehicle. It is a four page document with general insurance clauses. The document was presented by the Appellant by consent of the Respondent and at no point any of the Appellant's witnesses mentioned about their unawareness of the exclusion clause. It is settled law, that there is no general obligation on an insurer to bring exclusion clauses to the attention of the insured, at least where the intending insured is not suffering from any disability or inequality of bargaining power or a case where the insured was misled by the insurer as to the existence or meaning of clause. In the absence of such evidence, this argument of the Appellant must fail.

[19] Therefore Appellant's grounds of appeal 1 and 2 would not succeed.

<u>Ground 3 & 4</u>

[20] The Appellant states that learned trial Magistrate erred in law and fact when he wrongly applied principles of law relating to civil liability without doing the analysis of evidence.

And he failed to consider that the evidence led by Appellant was that he bought the truck based on the quotation and not that was registered at LTA.

[21] These two grounds have overlapping characteristics of the earlier grounds. The Appellant's view is that he bought the vehicle based on the specifications provided in the quotation and that he believed the vehicle weighed 3.3 tonnes and therefore they should be treated as an innocent party acting on what was provided to them when they bought the vehicle.

[22] I would like to reiterate that this quotation was provided by the dealer and not the manufacturer of the vehicle. A dealer and a manufacturer are two different entities. Therefore the quotation does not provide any conclusive evidence on the disputed issue of the case, the unladen weight of the vehicle. However the Land Transport Authority as the regulator of all means of land transport has the statutory authority under section 8(1) and 9(1) of the **Land Transport Act** to 'register vehicles and establish standards for such registration consistent with the objectives of road safety'. Therefore the learned Magistrate's findings on the unladen weight of the Appellant's vehicle based on LTA's registration record has been the correct approach.

[23] Thus Appellant's ground 3 and 4 lacks merit.

Ground 5 & 7

[24] Again these two grounds are somewhat associated in the earlier grounds discussed. The Court notes that the learned Magistrate has adequately analysed evidence before him and provided reasons for his conclusions under the heading 'analysis' in his judgment.

[25] Further the Appellant states that the Respondent had an opportunity to respond to the Appellant's closing submissions for the second time after their initial closing submissions. Appellant believes that the said procedure violates the Magistrate's Court Rules.

[26] Order 31 Rule 4 (a) of the **Magistrate's Court Rules 1945** states that in a case where the Defendant decides to provide no evidence the Plaintiff shall be at liberty to sum up his case and thereafter the Defendant is entitled to state his defence and reply. Filing of written submission in a case can be considered as a part of summing up. The Court notes from the Magistrate's Court case record that the learned Magistrate has not deviated from this procedure. At the conclusion of the trial the learned Magistrate has ordered both parties to file written submissions by 15.09.20. The Appellant filed their submissions on 10th September 2020, followed by the Respondent's submissions on 14th September 2020. There after the Appellant filed a reply on 18th September 2020. However it appears due to an ambiguity of the 2nd order by the learned Magistrate the Respondent filed a further reply on 24th September 2020. The ambiguity occurred when the learned Magistrate stated 'if need arises, 7 days to reply to respond' in his directives at the conclusion of the trial. Subsequently the Appellant wrote a letter to the registry seeking clarification from the Court. Thereafter the learned Magistrate has called the case in open Court and provided an opportunity for both parties to file further written submissions on the issue of not calling a witness by the Defendant.

[27] In my view the learned Magistrate should have limited the summing up as stated in Order 31 Rule 4(a). Magistrates' Court is a summary jurisdiction, the Court needs to have control over any unnecessary delays to achieve its primary objective of adjudication in a timely manner. Nevertheless filing of multiple written submissions would not invalidate the proceedings. After all written submissions is not evidence. The learned Magistrate did not allow any fresh evidence into the case after the conclusion of the hearing. On the other hand it is a constitutional right for parties to resolve their civil dispute through an appropriate court of law. In my view any minor irregularities such as this, must not take away the right of a party to defend themselves in any such civil dispute. Hence the two grounds will not succeed.

Ground 6

[28] The Appellant states that they only agreed to the tendering of the documents 'by consent' and no consent was given to the contents of those documents. Therefore the learned Magistrate failed to distinguish the difference between 'tendering of document' and 'acceptance of evidence via consent'.

[29] Order 31 Rule 7 of the Magistrate's Court Rules states that 'Documentary evidence must be put in and read, or taken as read by consent'. The learned Magistrate has stated in this judgment "*the Plaintiff procedurally should have objected to the documents which the Defendant was relying on at the time of the said documents or evidence was offered by the Defendant. Such are the tenets of Order 5 rule 14 of the Magistrate's Court Rules. Given there was no objection and the Plaintiff expressly consented to the said documents on record, the Court allowed the Defendant to not call any witness and to make submissions on the documents*". I am inclined to agree with the reasoning of the learned Magistrate.

[30] Order 31 Rule 7, in my respectful view has two options. The documentary evidence either 'put in and read' or 'taken as read by consent' at the trial. There is no other option to agreement to 'tender only'. When a party concedes for a document to be part of the trial, it would be treated 'taken as read by consent'. Hence the documentary evidence becomes part of the trial. Any objection to the admission of the content of the documents should have taken up at the hearing stage and not during the appeal.

[31] Therefore the Appellant is unable to succeed on this ground.

[32] The Court notes that the driver of the Appellant Company held a 'class 2 driver's licence' at the time of the incident. According to schedule 1 of the **Land Transport (Driver) (Amendment) Regulations 2002** a holder of class 2 licence can drive a goods vehicle having an unladen mass not exceeding 3.5 tonnes. According to the LTA records the vehicle driven by the driver had an unladen mass of 3540 kg. This clearly exceeds the

driver's approved limit of the vehicle class. The vehicle should have driven by a holder of a class 6 driver's licence. Therefore the Appellant must fail in bringing a claim against the Respondent company as they are in violation of clause 5 under the heading of 'When and what you are not covered for' in the insurance policy. The insurance cover does not extend 'if the vehicle, at the time of the event giving rise to the claim, was being driven by a person who did not hold a valid driving licence or a valid driving licence for the group or class of vehicle covered'. Irrespective of whether or not the driver has been charged by the police for driving without the appropriate class of licence for the vehicle, the Court is of the view that Appellant's civil action against the Respondent lacks merit.

ORDERS

1. Appeal is hereby dismissed.
2. In addition to the cost ordered by the learned Magistrate, a cost of $1500 (one thousand five hundred dollars) be paid to the Respondent by the Appellant within 14 days of this judgment.
3. The registry to forthwith return the record of Magistrate's Court Civil case No 300 of 2018 with a copy of this judgment.

Yohan Liyanage

JUDGE

At Suva on 18th May 2023