IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

Civil Action No. HBC 113 of 2011

BETWEEN

RESHIMI LATA LAL t/a **ALL WAYS INVESTMENT** of Nausori Town, Nausori having its registered office at Nausori.

PLAINTIFF

AND

ABDUL AFIS MOTORS LIMTED a limited liability company having its registered office at Suit 20, First Floor Nadi Town Council, Nadi.

DEFENDANT

Counsel	:	Mr. A.K. Singh for the Plaintiff Mr. A.J. Singh for the Defendant
Dates of Hearing	:	01st, 02nd & 03rd October, 2018
Date of Judgment	:	20th November, 2018

JUDGMENT

[1] The plaintiff instituted these proceedings against the defendant claiming $180,475.00 being payments made to the defendant for the repair of the vehicle bearing Registration No. FI 203, cost of repairs to the said vehicle after the defendant damaged the vehicle and for the loss of business at the rate of $10,000.00 per months from September 2010 to December 2010 and January 2011 to April 2011.

[2] The defendant while denying the above claim of the plaintiff by way of a counter claim, claimed $4120.00 from the plaintiff as the amount due from the plaintiff as part of the repair cost.

[3] At the pre-trial conference the parties admitted the following facts:

1. The plaintiff at all times a business woman trading under the name and style of ALL WAYS INVESTMENT and was engaged in the business of logging and owned a logging truck registration No. FI 203.
2. The defendant is a limited liability company having its registered office at Suit 20, First Floor Nadi Town Council, Nadi in the Republic of Fiji and operates a garage and holds itself out to be expert in motor vehicle repairs.
3. The defendant agreed to repair the plaintiff's vehicle No. FI 203 and the vehicle was towed to the defendant's garage.
4. The Plaintiff Fiji Development Bank paid the defendant the sum of $30,060,00.
5. The plaintiff's vehicle held a Bill of Sale with Fiji Development Bank.
6. The plaintiff further paid payment to the defendant in the sum of $1000.00 being part of the excess or not.
7. The plaintiff on 31st January, 2011 served a demand notice on the defendant.
8. The defendant has refused to pay any of the said sums.

[4] The plaintiff had an agreement with Fiji Hardwood Corporation Limited (FHCL) to transport timber. The said agreement was tendered in evidence marked as "P2". To establish the fact that she in fact transported timber the plaintiff has annexed to her bundle of document 33 Log Delivery passes, but she formally tendered in

evidence the Log Delivery Pass dated 26 October, 2019. However, it is not in dispute that she had been transporting timber since 2008.

[5] The plaintiff in her evidence explained why she had to obtain the services of the defendant to repair her car. This vehicle had been parked at Fiji Development Bank (FDB) premises and the plaintiff's mechanic was doing some repair work and while she was away in New Zealand her driver Ami Chand had informed her that one day he was on leave but some mechanics were working on the vehicle. Later the vehicle was found in Ba but someone had removed the engine, gearbox and certain other parts from the vehicle. She had made a complaint to the police and tendered the letter (P5) issued by the police saying that they conducted the investigation. It appears from the said letter that the police investigation has not been successful. This may not be of that relevance to the matters in issue but since the plaintiff brought this evidence, I will discuss few matters arising out of this evidence. The plaintiff only tendered the letter from the police but for reasons unknown to the court she did not tender a copy of her own statement nor did she called any of the witnesses who were attending to the vehicle at the time it was stolen, if it was in fact stolen, which could have assisted the court in deciding the genuineness of the plaintiff's claim.

[6] It is fact admitted by the parties that the defendant was employed by the plaintiff to repair the vehicle. Before employing the defendant the plaintiff had obtained three quotations from three different garages one of which was from the defendant. FDB agreed to get the vehicle repaired by the defendant and by its letter dated 19th August, 2010 FDB agreed to pay $30,060.00 out of $42,400.00 and the balance $12,340.00 and labour cost was to be paid by the plaintiff.

[7] The vehicle was handed over to the defendant for the repair work which *inter alia*, included the fixing of an engine, a gearbox ten tires and rims and stub axel. After completing the repair work the vehicle was handed over to the plaintiff but she found some defects in the vehicle and it was returned to the defendant to fix the defects. The vehicle was brought back but since there were some defects the vehicle was again given to the defendant and finally it was re-registered handed over to the plaintiff. These facts are not disputed.

[8] The plaintiff's evidence is that even thereafter the vehicle was not performing properly. The Managing Director of the defendant company said one cannot expect the used parts to function as brand new parts, which in my view is common

sense. It is also a fact not disputed by the parties that the quotation given by the defendant was to fix used parts. However, when one considers the certain defects found after the initial repairs, it cannot be said that the defects were due the used parts but because the defendant did not fix the correct parts such as drive shaft and differential, to the vehicle.

[9] The plaintiff claims $60,435.00 as cost of repairs. When the defendant returned the vehicle to the plaintiff she obtained three quotations for the repairs. Carpenters Motors quoted $144,603.56 (P18), ESKAY Motors quoted $60,435.00 (P24) and Palas Auto Services Limited quoted $ 69,836. The plaintiff's claim is based on this quotation. In cross-examination the plaintiff said twice that she did not repair the vehicle. It is her position that this vehicle was under a bill of sale and when the plaintiff could not pay the loan installments she had informed the bank and the bank seized the vehicle and sold. The plaintiff said further the person who purchased the vehicle could use it only for 15 days but the person who purchased the vehicle who could have told court exactly what happened to the vehicle was not called to testify at the trial. The defendant informed court that he would call the purchaser of the vehicle but closed its case without calling him. It is evident that the vehicle was sold to one Dalip Kumar.

[10] The defendant tendered the history of the vehicle (D25) according to which the plaintiff transferred the vehicle to FDB on 07th December, 2012 and on the same day the bank has sold it to Dalip Kumar. I must say that the document does not bear the date of issue. However, there is no entry to say that Dalip Kumar sold the vehicle. For these reasons the plaintiff's statement that Dalip Kumar used the vehicle only for fifteen days is not sufficient for the court to conclude that the purchaser used it only for 15 days.

[11] The question is whether the plaintiff is entitled in law to recover the amount quoted by Carpenters Motors without repairing the vehicle. For the plaintiff to recover this amount she must spend that amount. In this case the bank seized the vehicle when the plaintiff informed them that she could not pay the loan installments. One can argue that if the vehicle was repaired it could have been sold for a higher price but there is no evidence as to the amount received by the bank from the sale.

[12] For the above reasons the plaintiff's claim for $60,435.00 based on the quotation must fail.

[13] The plaintiff adduced evidence that she paid $9000.00 to the defendant. The plaintiff tendered in evidence a receipt (P10) issued by the defendant company for $9000.00. She also relies on the letter dated 19th August, 2010 written by the bank to the defendant stating that the plaintiff had already deposited $9,000.00 with the defendant.

[14] The position of the defendant is that this was subsequently cancelled by the plaintiff. A copy of the cancelled receipt (D8) was tendered in evidence by the defendant. The plaintiff denied having signed this receipt. It was the defendant who relied on this receipt and the burden was on the defendant to establish that it is the plaintiff's signature. The court is not qualified to compare signatures by looking at documents. Since the defendant failed to establish the only conclusion the court could arrive at is that the receipt "P10" is still valid and in force.

[15] However, the plaintiff has not in her statement of claim or amended statement of claim has claimed this amount. The learned counsel for the plaintiff relied on the prayer (iii) of the amended statement of claim by which the plaintiff has claimed "further damages". It cannot in anyway be special damages because special damages must specifically be pleaded and proved. . In the amended reply to the statement of defence the plaintiff has stated that she paid $9000.00 to the defendant but even in the reply there is no prayer for $9000.00. Therefore, the plaintiff cannot recover $9000.00 she paid to the defendant in this action.

[16] The plaintiff also claimed by way of special damages $40,040.00 as the payments made to the defendant for the repairs. The question arises whether the plaintiff is entitled in law to recover the entire sum paid to the defendant for the repairs. The plaintiff's own evidence is that when the vehicle was given the defendant there was no engine, gearbox, differential driveshaft and wheels were not there. What was handed over to the defendant was only the chassis and the cabin of the vehicle with few other parts such as the steering wheel. There is no dispute that the defendant replaced the missing parts, the vehicle was re-registered and driven it the plaintiff's place. It is also an undisputed fact that there were defects in the repair work which were later fixed by the defendant. The vehicle was subsequently seized by the bank and sold. There is no evidence for what price the vehicle was sold but whatever the amount obtained by the bank was credited to the plaintiff's loan account.

[17] **Ruxley Electronics Ltd v Forsyth** [1996] AC 344 - A swimming pool was constructed with a diving area significantly shallower than that called for by the contract and there was diminution in value. The trial judge awarded compensation for loss amenity, but the Court of Appeal reversed the decision of the High Court and awarded costs of reinstatement. The House of Lords allowed the appeal and held that the owner was not entitled to costs of reinstatement but was entitled to recover damages for the loss of amenity which he suffered as a result of the pool being built to the wrong specifications. It was held to be unreasonable to award him the cost of reinstatement because the cost of carrying out the repair work was out of all proportion to the benefit which the owner would have obtained from the performance of such work.

[18] The plaintiff is not entitled to recover the entire sum paid to the defendant for the reasons stated above. However, she is entitled to recover the loss she suffered for not being able to use the vehicle for transportation of timber and there is different claim for loss business on the statement of claim.

[19] The plaintiff claims $10,000.00 per month from September to December 2010 and from January to April, 2011 for loss of business. The plaintiff's evidence is that by transporting logs she earned $10,000.00 a month and she tendered a letter from Kuliniasi Vonikedra, Harvesting Officer addressed to the Manager, Credit Corporation confirming that average proceeds per month from log cartage was $10,000.00. However, in her evidence the plaintiff said after deducting the expenses her monthly income from log cartage was $6000.00 per month.

[20] The plaintiff's evidence in this regard is that the vehicle was delivered after repairs on 09th October, 2010 but since the repair work was not done properly it was returned to the defendant and thereafter it was received on 27th October, 2018 but it was in the same status.

[21] Among many other 'log delivery passes' the plaintiff tendered the log delivery pass dated 26th October, 2010 marked as "P14", according to which on the 26th October the same vehicle has been used to transport logs from "NKR yard" to DAYAL, Ba". Although the plaintiff stated in her evidence after loading the vehicle it was not moving properly and gave it for repairs again, the document "P14" shows that 30 logs were delivered on that day to M. A. Dayal. For these reasons the plaintiff is not entitled to recover loss of income for the months of September

and October, 2010. Accordingly, I award $36,000.00 as damages at the rate of $6000.00 per month from November, 2010 to April, 2011.

[22] The defendant claimed by way of a counter-claim $4120.00. It is the position of the defendant that there is an arrears of payment of $2340.00 and another $1780.00 is due from the plaintiff for the purchase of tray booster. It is a fact admitted by the defendant that the vehicle was repaired three times. Witness Abdul Afis testified that the defendant paid $200.00 to Sun Insurance, $1881.55 as wheel tax, $571.90 and $430.00 for registration of the vehicle and also paid Carpenters Hardware $1793.55. The witness testified further that the plaintiff paid only $1000.00 out of the said amount and balance of $2400.00 but there is no such claim in the statement of defence.

[23] For the reasons set out above the court makes the following orders.

ORDERS

1. The defendant is ordered to pay the plaintiff $36,000.00 with interest of 6% from the date of institution of the action until the date of the judgment.
2. The defendant is also ordered to pay the plaintiff $5000.00 as costs (Summarily assessed) of this action.

Lyone Seneviratne

JUDGE

20th November, 2018