

In the High Court of Fiji
At Suva
Civil Jurisdiction

Civil Action No. HBA 03 of 2018

Wee Kong Marine Products & Exports Company Limited
Appellant

v

The Ministry of Fisheries and Forests
First respondent

Iliesa Tadulala
Second respondent

The Attorney General of Fiji
Third respondent

Counsel: Mr J. Serulagilagi for the appellant
Ms S. Taukei for the first and third respondents
The second respondent absent and unrepresented

Date of argument: 16th July, 2018

Date of Judgment: 17th May, 2019

Judgment

1. The appellant appeals from a judgment of the Magistrates' Court on the following grounds of appeal:
 - i. *The Learned Magistrate erred in law and fact in coming to the conclusion that it was not in dispute that the period of employment of the Second Defendant commenced on 01 January 2012 and expired on 31 December 2013 when that issue was clearly in dispute between the parties.*
 - ii. *The Learned Magistrate erred in law and fact in relying upon the affidavit of Inoke Wainiqolo deposed on 18 August 2014 and filed on 19 August, 2014 when;*
 - a. *He was never called as a witness in the substantive trial;*
 - b. *The said affidavit was solely used in an interlocutory application filed by the First and Third Defendants to strike out the Plaintiff's claim which was dismissed by the Learned Magistrate who heard the said application at that time; and*
 - c. *Thereby the Plaintiff was prejudiced that he had no opportunity to cross-examine the deponent of the said affidavit.*

- iii. *The Learned Magistrate erred in law and fact in his failure to properly analyze the evidence actually adduced by way of oral evidence at the substantive trial and based his judgment on matters which were not evidenced or orally adduced before him at the said trial.*
 - iv. *The Learned Magistrate erred in having wrongly applied the Law on vicarious liability to the evidence which was never adduced by any of the parties in the substantive trial in any event.*
 - v. *The Learned Magistrate erred in law and fact in failing to enter judgment against the Second Defendant when such relief was prayed for by the Plaintiff in its statement of claim.*
 - vi. *The Learned Magistrate erred in law and fact concluding that there was an absence of contract between the Plaintiff and the Defendants when the Plaintiff's claim was also based on advice negligently given by the servants and agents of the First Defendant who were employed by the said First Defendant at the relevant time.*
 - vii. *The Learned Magistrate erred in law and fact whereby evidence on negligent misstatement was adduced at the substantive trial but he failed to take that in to account in order to make any finding on whether or not there was negligent misstatement on the part of the First and Third Defendants.*
 - viii. *The Learned Magistrate erred in law and fact in failing to make any findings on the credibility of any of the witnesses at the substantive trial in arriving at his decision.*
 - ix. *The Learned Magistrate erred in law and fact relying on the affidavit evidence of Inoke Wainiqolo deposed on 18 August 2014 and filed on 19 August 2014 which affidavit was filed in relation to an interlocutory application by the First and Third Respondent/Original First and Third Defendants and ought not to have been taken into account. Alternatively the Learned Magistrate having relied upon the said affidavit evidence of Inoke Wainiqolo failed to take into account the affidavit evidence filed in response of the Appellant which contained the police statement given by Kolinio Naivalu in which he admitted giving evidence to the Appellant to send the money to Iliesa Tadulala.*
2. The appellant, in his statement of claim stated that following "consultations and advise" from officials of the first respondent, he sent a sum of \$ 6331.50 to the second respondent on 16th and 31st January, 2013 by money order, for the purchase of a consignment of seaweed. The second respondent was employed as a fieldsman at the first respondent's station at Ono-i-Lau. The appellant claimed the sum of \$ 6331.50, as the second respondent failed to provide the seaweed.

3. The first and third respondents, in their statement of defence stated that they are not liable for the actions of the second respondent. He was employed by the first respondent as a fieldsman from 1 January to 31 December, 2012. He was not an employee of the first respondent at the material time. The respondents denied that the first respondent's role was to provide advice to the appellant on the purchase of seaweed. The role of the first respondent was "*limited to and responsible for the overall implementation of policy initiatives pertaining to the sustainable development and management of the Fisheries sector in the Eastern Division*". Their activities includes the development of inland, coastal, offshore and culture fisheries and provision of technical support and advisory services to farmers. The role and responsibility of the second respondent and officials of the first respondent did not include entering into monetary transactions with the appellant.
4. The Learned Magistrate dismissed the claim. He stated that it was clear that the second respondent's impugned conduct was not connected with his job description. He was not supposed to purchase sea products on behalf of the appellant. The appellant's argument that there was a contract between the first respondent and itself by virtue of the second respondent's action cannot be sustained, in light of section 29 of the Financial Management Act, 2004(FMA). In any event, such a contract would be illegal.

The determination

5. The first ground of appeal contends that the Learned Magistrate erred in concluding that it was not in dispute that the period of employment of the second respondent commenced on 1 January 2012 and expired on 31 December 2013, when that was in dispute.
6. The minutes of the PTC provide that the period of employment was a disputed issue.
7. DW2, (*Ms Laite Cavu*) in evidence in chief stated that the second respondent was employed by the first respondent from 4th January, 2012 to 31st December, 2012, as provided in his contract of employment she produced. DW2, (*Eroni Talemaikanacea*) said that his contract was not renewed.

8. In my judgment, the evidence reveals that the second respondent was not employed by the first respondent at the time the second respondent obtained funds from the appellant on 16th and 31st January, 2013.
9. The appellant contends in grounds 2, 3, 4 and 9 that the Learned Magistrate failed to properly analyze the oral evidence and relied on an affidavit filed in an interlocutory application, when the deponent's testimony could not be challenged in cross-examination.
10. The Learned Magistrate referred to paragraph 7 of an affidavit filed in an interlocutory application, which stated that the second respondent was not given ostensible, delegated or statutory authority to enter into a contract with another at any time.
11. In my view, a Court should not rely on affidavit evidence, unless the deponent can be cross-examined.
12. But the onus was on the appellant to prove that the second respondent had authority to enter into a contract with another party.
13. The appellant failed to establish that the second respondent was acting in the course of his employment. Accordingly, the Learned Magistrate was correct in coming to a conclusion that the second respondent's conduct was not connected with his employment, applying the principles of vicarious liability.
14. The sixth, seventh and eighth grounds of appeal contend that the lower court erred in concluding that there was no contract between the appellant and the first respondent, when the claim was based on a negligent misstatement given by servants and agents of the first respondent. It is contended that the Learned Magistrate failed to make a finding whether a negligent misstatement was made by the first respondent.

15. PW1, (*Ou Wee Kong, Director of the appellant*) testified at the trial that he trusted Assistant Fisheries Officers, Kuli and Eroni Talemaikanacca, as they were officials of the first respondent. Consequent to their advise he sent a sum of \$ 6331.50 to the second respondent for the purchase of seaweed. He attended meetings with the first respondent and had a letter to support his contention that he was provided advice by the first respondent . However, neither the minutes of the meetings nor the letter were produced.
16. DW2, in evidence in chief said that the second respondent's role was to facilitate and monitor seaweed farming. A project officer was not allowed to liaise with the appellant. He was informed by the appellant that it sent money to the second respondent, but it was not on the advice of the first respondent. The first respondent is not liable to the appellant.
17. In my judgment, the appellant failed to establish in the lower court that officials of the first respondent advised the appellant and that there was a contract between the first respondent and the appellant.
18. In my judgment, although the Learned Magistrate failed to come to a finding on the evidence that there was no contract between the appellant and the first respondent, he came to a correct conclusion in law that the contention that there was a contract between the parties cannot be sustained by virtue of section 29 of the FMA and such a contract would be illegal.
19. Section 29 provides that only a Permanent Secretary can enter into a contract on behalf of a Ministry.
20. The appeal against the first and third respondents fails.
21. Finally, the appellant contends in ground 5 that the Learned Magistrate failed to enter judgment against the second respondent.
22. PW1 testified that he had sent monies to the second respondent and produced receipts of money orders sent in support. The second respondent failed to provide the appellant with seaweed. Accordingly, he must refund the monies to the appellant.

23. The appeal against the second respondent succeeds.

24. *Orders.*

- (a) The appeal against the first and third respondents is declined.
- (b) The appellant shall pay the first and third respondents costs summarily assessed in a sum of \$ 1000.
- (c) The appeal against the second respondent is allowed.
- (d) The second respondent shall pay the appellant the sum of \$6331.50 together with interest at 3% per cent from 31st January, 2013 to date of this judgment.
- (e) The second respondent shall pay the appellant costs summarily assessed in a sum of \$ 1000.



A.L.B. Brito-Mutunayagam

A.L.B. Brito-Mutunayagam
Judge
17th May, 2019