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

High Court Appeal No. HBA 12 of 2018
(MC Civil Action No. 91 of 2016)

IN THE MATTER of an Appeal from the Decision of the Lautoka Magistrate's Court in Civil Action No. 91 of 2016.

BETWEEN : **ALL FREIGHT LOGISTICS LIMITED** a limited liability company having its registered office at Foster Street, Walu Bay, Suva.

APPELLANT/ORIGINAL DEFENDANT

A N D : **CHOICE RESOURCES LIMITED** a limited liability company having its registered office at 2/36 Vitogo Parade, Lautoka.

RESPONDENT/ORIGINAL PLAINTIFF

Appearances : Mr W. Mucunabitu for the appellant/original defendant
Ms S. Ravai for the respondent/original plaintiff
Date of Hearing : 23 May 2019
Date of Ruling : 31 July2019

JUDGMENT

Introduction

[01] This is a timely appeal from the Magistrates Court sitting at Lautoka allowing the respondent's claim of $11,000.00 with cost against the appellant for breach of the agreement.

[02] At the hearing of the appeal, both parties made oral submissions in addition to the submissions they had filed prior to the hearing.

Background

[03] Choice Resources Limited, the respondent brought an action against All Freight Logistics Limited, the appellant, in the Magistrates Court claiming a sum of $11,000.00 on the ground that the appellant had failed to ship the container to Fiji from China.

[04] In or about May 2015 the appellant agreed with the respondent to ship a 20 toot container from China to Lautoka, Fiji. It was an oral agreement. On 27 May 2015, the respondent paid $11,000.00 for the shipping charges.

[05] The respondent alleged that the appellant breached the agreement and failed to ship the container to Fiji from China, and as a result they had to ship the container to Fiji at additional costs in or about August 2015.

[06] The appellant denied default on their part and pleaded that the container was retained at the port of Guangzhou by Chinese Authorities as it contained branded musical instruments and iron exceeding the permitted allowance, and that the appellant had to pay penalty of USD$5920.67 (FJD$12,551.77). The respondent only paid $11,000.00. The appellant counterclaimed a sum $1,551.77.

[07] At the Magistrates Court trial, both parties called one witness each and produced their documents (5 documents each). On 4 July 2018 the learned Magistrate (the Magistrate) handed down a judgment for the respondent in the sum of $11,000.00 with the costs of $800.00 and dismissed the appellant's counterclaim. The appellant appeals to this court.

The decision in the Court below

[08] Having considered the evidence given by both parties, the Magistrate found that:

> *"I have considered the evidence given by the witnesses for the Plaintiff and the Defendant. It is very clear that the plaintiff's Company and the defendant's company have come in to an agreement to ship a container from China to Fiji. Although the Defendant's witness said that the said container was seized by the authorities in China. He could not provide sufficient evidence to confirm that. Further the Defendant's witness failed to prove that the Defendant's Company in*

fact informed the Plaintiff's Company that the said container was seized by the Chinese Customs Authorities. Instead the Defendant's witness admitted that in the document that they submitted to the Plaintiff's Company it is only stated that $11,141.00 for the fees by the customs in China. Therefore he admitted that the plaintiff's Company was not informed that the said amount was requested to be paid as a penalty." [para 19 of the Magistrate's Judgment]

[09] On that basis, he held that:

"21. In the circumstances the Plaintiff has proved that the Plaintiff has suffered a loss of $11,000. Although the Defendant has put forward a counter claim the Defendant could not prove a counter claim on a balance of probability.

22. Accordingly I enter a Judgment in favour to the Plaintiff for a sum of $11,000 to be paid by the Defendant. Further I summarily assess the cost of this claim to be $800."

The grounds of appeal

[10] The grounds upon which the judgment of the Magistrate is challenged appear below:

1. *That the learned Magistrate erred in law and in fact in failing to consider that the Respondent was aware the container had not left China because it was seized by the Chinese Customs Authority.*

2. *That the learned Magistrate erred in law and in fact in failing to consider that the Respondent was properly informed by the Appellant that his container was seized by the Chinese Customs Authority.*

3. *That the learned Magistrate erred in law and in fact in failing to consider how would the Respondent get his container if it was seized by the Chinese Customs Authority.*

4. *That the learned Magistrate erred in law and in fact in failing to consider that the Appellant sent the money to their agents in China so that the container can be released from Customs.*

5. *That the learned Magistrate erred in law and in fact in failing to consider the document which shows the substantive drop in weight of the container which yields the fact that the container was seized by the Chinese Customs Authority and that they have removed goods the Respondent failed to declare.*

6. *That the learned Magistrate erred in law and in fact in that failed and/or neglected and/or did not adequately and/or property consider the Appellant's defence.*

7. *That the learned Magistrate erred in law and in fact in finding in favour of the Respondent considering the whole evidence and circumstances of the case.*

8. *That the learned Magistrate erred in law and in fact in finding in favour of the Respondent was wrong in principle in all circumstances of the case.*

9. *That the Appellant reserves their right to file further and/or amended grounds of Appeal upon receipt of the Court record in the matter.*

The issue

[11] The principle issue at appeal was whether the Magistrate erred in law and/or in fact in granting judgment in favour of the respondent for the return of the money paid by them to the appellant in view of the freight agreement when there was no evidence demonstrating that the respondent themselves paid the necessary charges to ship the container to Fiji from China.

Appellant's argument

[12] Mr Mucunabitu on behalf of the appellant contended that: the evidence tendered dated 8 July 2015 showing payment effected in the sum of USD$6,625.08 marked as D5 to show that payment made to the appellant's agents to pay the penalty fee and in addition the respondent answered affirmatively when asked whether he was informed the container was seized and whether he knew his container was seized. The respondent also admitted that D3 was given to him which is dated 19 May 2015 (page 26 of the copy record). He also contended that in evidence

marked as D5, the same container number is mentioned which confirms the appellant's defence that the container was seized and also D5 confirms the charges the agent for the appellant has to pay in order for the container to be released.

[13] On behalf of the respondent, Ms Ravai on the other hand contended that the learned Magistrate did not err in law and in fact as his decision was made solely upon reliance of all the evidence that was adduced before him with both oral and documentary. She further contended that there was no evidence tendered by the appellant's witness to prove to the Court that in fact the Respondent's container was seized by the Chinese Authorities. She concluded her contention saying that the respondent witness incurred further expenses and travelled to China and engaged another shipping company to ship his container to Fiji.

Discussion

[14] The appellant appeals the Magistrate's judgment delivered in favour of the respondent. The respondent brought action in the Magistrates Court against the appellant for breach of agreement. By his judgment, the Magistrate ordered the appellant pay the money paid to appellant by the respondent for shipping its container to Fiji from China.

[15] The appellant challenges the Magistrate's judgment on 8 grounds. The eight grounds of appeal collectively attack the judgment that the Magistrate had erred in law and/or fact in making the decision in favour of the respondent.

[16] As I said, both parties called one witness each and adduced their respective documents in support of their claim at the trial in the court below.

[17] The appellant's defence was that the respondent's container was seized by the Chines Customs Authority as it contained some undeclared items and the delay was because of the seizure and the appellant's agent had to pay penalty. The particular defence appears below:

"The $11,000.00 was part of a fine/penalty/levy and other incidentals (hereinafter referred as penalty) issued at the port of Guangzhou by Chinese Authorities against the plaintiff. The total penalty and incidentals being USD$5920.67 (FJD$12,551.77), out of which the plaintiff paid FJD$11000.00." [see: Paragraph 3 of the statement of defence]

[18] The Magistrate did not believe the appellant's evidence that the container was seized because of the undeclared goods, and that appellant's agent had to pay penalty as a result.

[19] It was common ground that the respondent paid $11,000.00 to the appellant for shipping the respondent's container from China to Fiji.

[20] The appellant had sent a sum of USD$6,625.08 (FJD$14,045.07) to its agent in China to enable them to ship the respondent's container to Fiji. The money was transferred to the appellant's agent in China via a bank transfer ('*D5*').

[21] The respondent claimed the sum of $11,000.00, being the sum paid to the appellant as shipping charges. The basis of the claim was that the appellant failed to ship the container to Fiji, and that the respondent had to ship the container to Fiji **at their own additional costs**.

[22] It will be noted that the respondent produced no documents at the trial to establish that they incurred additional costs to ship the container to Fiji. In other words, the respondent produced no receipts to confirm the additional costs. Instead, they only produced their director's ['*PW1*'] passport copy to establish that he travelled to China to settle the issue respecting the container. The respondent did not even tender the air ticket for such travel.

[23] The Magistrate has found that the appellant was in breach of the agreement. The reason given by the Magistrate for his finding is that the appellant failed to prove that it in fact informed the respondent that the container was seized by the Chinese Customs Authorities. However, under cross examination, the respondent's witness admitted that the appellant informed him of the seizure of the container as it had undeclared items. The cross-examination question and answer appear below [see: Page 27 of the copy record]:

"Q. Did All Freight Logistic inform you that container was seized?

A. Yes."

[24] It is unfortunate that the Magistrate had failed to appreciate the above admission by the respondent's witness.

[25] The defendant had produced two Bills of Landing at the trial. In the initial Bill of Lading dated 15 April 2015 (*'PE3'*), the shipper's load and count S.T.C were 75 cartons with the gross weight of 17,920.00KGS while in the second Bill of Landing (*'PE5'*) were 285PKGS with 8760.000KGS. The reduced gross weight in the second Bill of Lading confirms the appellant's position that the container was seized as it contained undeclared items. The reduced gross weight appears in the second Bill of Lading because the undeclared goods may have been seized by the Chinese Customs.

[26] Having found that the appellant was in breach of the agreement, the Magistrate entered judgment in favour of the respondent for a sum of $11,000.00, which the respondent paid to the appellant for shipment of the container. The respondent claimed $11,000.00, which they paid to the appellant on the basis that they had incurred additional costs in shipping the container to Fiji as a result of the appellant's breach of the agreement.

[27] It appears that the Magistrate has given judgment for the respondent in the sum of $11,000.00 on the basis that the respondent has suffered a loss. In my opinion, there was no sufficient evidence before the Magistrate to hold that the respondent has suffered a loss of $11,000.00 as a result of the breach of the agreement.

[28] The basic rule of recovery of compensation in the case of breach of contract is that the non-breaching party is to be put into the position it would have been in had the contract been performed as agreed (*Robinson v Harman* (1848) 1 Ex 850; *Surrey County Council v Bredero Homes Ltd* [1093] 1 WLR 961). This principle was also confirmed as fundamental in **Golden Strait Corporation v Nippon Yusen Kubishika Kaisha, The Golden Victory** [2007] UKHL 12, [2007] Bus LR 997, [2007] 2 WLR 691.

[29] The Magistrate had ordered the appellant to pay the sum of $11,000.00 as claimed, as compensation to put the respondent into the position it would have been in had the contract been performed by the appellant as agreed. The Magistrate had ordered compensation in the absence of any evidence to demonstrate that the respondent incurred additional costs to get down the container to Fiji, whereas, the appellant had produced document to prove that

they had transferred a sum of USD$6,625.08 (FJD$14,045.07) in respect of the respondent's container ('*DE5*'). The respondent did not even produce a single receipt to prove that they paid shipping charges to ship the container to Fiji.

Conclusion

[30] For the reasons set out above, I would hold that the Magistrate would not have made the decision in favour of the respondent. The evidence given before him does not support his decision. I would accordingly set aside the Magistrate's judgment dated 4 July 2018. Exercising the general powers under the Magistrates Courts Rules, Order 37, Rule 18, I remit the case to the court below to be reheard. I make no order as to costs.

The outcome

1. Appeal allowed.
2. Magistrate's judgment dated 4 July 2018 set aside.
3. The case sent back to Magistrates Court, Lautoka for re-trial.
4. No order as to costs.

31/7/19

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M. H. Mohamed Ajmeer

JUDGE

HIGH COURT OF FIJI
LAUTOKA

At Lautoka

31 July 2019

Solicitors:

Vijay Naidu & Associates, Barristers & Solicitors for appellant
Fazilat Shah Legal, Barristers & Solicitors for respondent