IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

Civil Action No. HBC 58 of 2019

BETWEEN

JENNS CONSTRUCTION LTD a limited liability company having its registered office located at 5 Wilkinson Street, Off Rewa Street, Suva.

PLAINTIFF

AND

AUTOMART PTE LTD a limited liability company having its registered office located at 13 Namoli Avenue, Lautoka.

DEFENDANT

Counsel	:	Mr. Singh K. for the Plaintiff Mr. Patel K. with Mr. Chauhan V. for the Defendant
Dates of Hearing	:	28th & 29th October 2020
Date of Judgment	:	02nd December 2020

JUDGMENT

[1] The plaintiff filed the writ of summons seeking the following reliefs:

i. An order for the defendant to pay $132,000.00 to the plaintiff for misrepresenting the sale of the Sino Howo Hiab Truck Registration No. JL543.

ii. An order for the defendant to pay $185,000.00 owed to the plaintiff for loss of earnings.

iii. An order for the defendant to return/reimburse the sum $1,500.00 for the cost of labour and repairs on the Sino Howo Hiab Truck Registration No. JL543.

iv. A declaration that the defendant's action amounted to intentional fraudulent misrepresentation.

v. A declaration that the defendant has breached the Fair Trading Decree 1992, Sale of Goods Act and Commerce Commission Decree 2010.

vi. General damages for emotional distress suffered by the plaintiff's business and drivers.

vii. Legal costs in the sum of $20,000.00 (VIP)

viii. Interest on the award of costs.

ix. Any other order this Honourable Court sees fit and just.

[2] The plaintiff's case is that on 07th March 2018 it bought a brand new Sino Howo HIAB Truck Registration No. JL543 from the defendant for $132,000.00. On the same day the Vehicle was purchased the driver while driving it heard a noise coming out of the engine and when the vehicle was taken back to the defendant they found that cap mounting was faulty and the defendant replaced it with a new one. Two to three days thereafter near Tailevu the speed cable and the spring broke and the defendant arranged a mechanic to come to Ba to repair it. Forty five days thereafter the speed

cable broke again and Vehicle was towed to the plaintiff's yard and a mechanic from the defendant company attended to the vehicle. A month after the above repairs the started to heat up the defendant's mechanic informed the plaintiff that the thermostat was faulty and two engine mounts out of four had broken and also the 3rd engine mount was weak. Two weeks after the thermostat issue steam started coming out of the vehicle and when the defendant was informed about it they have told the plaintiff that there might be some issue with the engine advised to leave the vehicle for full inspection. Subsequently, the defendant replaced the engine but charged the plaintiff $6500.00. After replacing the engine the plaintiff noticed less power in the new engine.

[3] The defendant in its statement of defence states the defects were as a result of bad road conditions and extensive misuse of the vehicle and claimed $6500.00 for the replacement of the engine, $250.00 for a new windscreen and $4000.00 for storage and security costs by way of a counter-claim.

[4] The defendant in its amended statement of defence avers that the plaintiff has compromised his claim by way of settlement through its actions and conduct and is estopped from resiling from the settlement already effected.

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

1. The plaintiff is a limited liability company having its registered office located at 5 Wilkinson Street, Off Rewa Street, Suva and specializes in general building work.
2. The defendant is a limited liability company having its registered office located at 22 Sautamata Street, Lautoka and is in the business of importing and retailing of used and new vehicles from Japan, Singapore and China.
3. That the plaintiff entered into an agreement with the defendant on 7th March 2018 in Suva for the purchase of a Brand New SINO HOWO HIAB TRUCK which was an unregistered brand new vehicle. The registration

number assigned by Land Transport Authority is JL543 (hereinafter referred to as *"the said vehicle"*).

4. That the sum of $132,000.00 was paid to the defendant via Westpac Cheque No. 013658 and after the said vehicle was registered with the Land transport Authority it was delivered to the plaintiff. The LTA registration was arranged by the defendant and handed over to the plaintiff within a week of payment.
5. That the said vehicle shown and sold was a new vehicle.
6. The vehicle was checked, approved and certified by the Land Transport Authority before registration and delivery to the plaintiff.
7. The vehicle was sold by the defendant to the plaintiff with warranty.

[6] As admitted by the parties there is no dispute as to the purchase of the vehicle and the payment for the vehicle has been done about a week before the delivery of the vehicle.

[7] The first witness for the plaintiff, the Managing Director of the company said they were involved in the rehabilitation of almost 40 schools and this vehicle was purchased for the use of construction work.

[8] From the evidence of all five witnesses testified for the plaintiff it appears that the vehicle had defects. The very first day after purchasing the vehicle there had been an issue with cab mounts which was rectified by the defendant.

[9] The HIAB (Hydrauliska Industri AB) truck operator Roneel Kartik Bhan who took delivery of the vehicle from the defendant's yard said he has driven the vehicle No. JL543 although a new vehicle it was making a sound and it was from the cab mount and it was repaired by the defendant. Three days thereafter on the way to the west at Tailevu the speed cable and the spring had broken and a mechanic from the defendant company had fixed it but the parts fixed were not brand new ones.

[10] After three weeks thereafter, there had been another breakdown near Rakiraki and a mechanic from the defendant company had replaced the spring and the bracket

again. It is the evidence of the operator that the spring and the speed cable used to break often.

[11] After almost one month again the speed cable broke and the vehicle was towed to the defendant's yard for repairs. The witness says that he was informed by the mechanic that the vehicle was repaired but it broke again. The witness also testified that once he was returning from work the engine got heated and it was found that the thermostat was faulty. The mechanic has removed the thermostat but it was not repaired or replaced.

[12] In one month thereafter, smoke started coming out of the engine and when it was taken to the defendant company they have advice the witness to leave the vehicle because there is a big problem. The witness collected the vehicle after two to three months after the engine was replaced. During that period there had been discussions going on between the plaintiff and the defendant on another issue which I will discuss later in this judgment.

[13] Mohammed Saiyaz is a mechanic. He has been working as a mechanic for fifteen years. When the learned counsel for the defendant asked in cross-examination whether he is an expert he answered in the affirmative. The learned counsel then submitted that the plaintiff could not have called this expert witness without first serving his report facilitating the defendant adduce evidence to counter the report. Whether a particular witness is an expert acceptable to court is a matter for the court to decide. That is why at the commencement of evidence his educational qualifications and experiences in the area of his work are placed before the court. Anyone can say he is an expert but accepting him as an expert the court has to consider his qualifications and experiences in his field of work to ascertain whether he is an expert. On the other hand even if the court refuses to rely on this witness's opinion the court can always rely on his observation and the repair work he did on this vehicle.

[14] He said the chassis has completely broken and he repaired it but he could not align and therefore it cannot carry 9 tons and it is dangerous to drive.

[15] The defendant does not deny that there were defects in the vehicle but says the defects were due to bad road conditions, negligent driving and high mileage. The vehicle had run for six months 28,000 Kilometres. The Operations Manager of the defendant company testified that 28,000 Km is not excessive but it had been running back and forth quite a lot. Vehicles are purchased to run and not keep parked as an exhibit. Witness Roneel, the HIAB operator said the vehicle was driven on tar sealed roads. The fact that this vehicle was also driven on gravel roads was not denied by the plaintiff but the evidence is that it was about 5% of the total mileage.

[16] However, the defendant has not adduced any evidence to establish that the defects in the vehicle were due to negligent driving and bad road conditions. In cross-examination the Operations Manager of the defendant company said they do not have any report to say that the defects were due to negligent driving. The defendant has effected some repairs at early stages at their own costs but P5 to P8 (invoices and receipts) show that from May 2018 to August 2018 the plaintiff has paid for the repair works.

[17] The vehicle and the HIAB crane have two different warranties (D1 & D2). There are no defects complained of by the plaintiff on the crane. The plaintiff's evidence is that these documents were never shown or given to them nor has it asked for these document. The defendant's position is that this is the standard warranty for these vehicles. The plaintiff, although stated in evidence that the warranty document was not given to them, in paragraph 38(i) of the statement of claim which I reproduce below, states:

> THAT the General Manager agreed to sending a proposal and so sent two options:

To change faulty engine free of costs as the said vehicle was still under 1-year warranty since the engine problems happened 5 months after purchase.

The Plaintiff to pay the sum of $6500.00 inclusive of labor for new engine but the Defendant was to return the old engine and to guarantee 1 year extended warrantee on the said vehicles engine.

[18] From the above averment in the statement of claim it is clear that the plaintiff was aware of the warrantee and its terms.

[19] It is common ground that the engine of the vehicle became defective and the defendant replaced it. However, there had been an issue between the plaintiff and the defendant about the payments of the repair cost and the vehicle was lying in the defendant's yard for about three months.

[20] The evidence of Mohammed Saiyaz is the new engine fixed by the defendant was smaller than the original engine. He said the original engine had six cylinders and the new on only has four cylinders. The witness Elvin Vishal Singh, a Director of the plaintiff company said the vehicle is not being use for its full capacity. Kalyan Singh, the General Manager of the plaintiff company said the vehicle is now being used locally and the vehicle cannot be driven in hilly areas.

[21] The plaintiff also adduced evidence to show that the trailer of the vehicle was rusted and to confirm it the plaintiff tendered photographs [P10(a),(b) & (c)]. As I stated earlier in this judgment the defendant did not deny any of these defects in the vehicle. The question is whether the plaintiff is entitled to return he vehicle and recover the entire sum paid for the vehicle including $6,500.00 paid for the replacement of the engine.

[22] In this regard the plaintiff avers in the statement of claim that there was intentional fraudulent misrepresentation on the part of the defendant, and the particulars of which are as follows:

a. Non-disclosure of material facts when presenting the said vehicle to the Plaintiff and intentionally withholding information about how previous purchasers of the same type, make and model of vehicles had experienced similar faults and defects with their vehicle
b. Non-disclosure of material facts during the sale and purchase of the said vehicle to the Plaintiff and intentionally withholding information about how previous purchasers of the same type, make and model of vehicles had experienced similar faults and defects with their vehicle
c. Non-disclosure of material facts during the transfer of the said vehicle to the Plaintiff and intentionally withholding information about how previous purchasers of the same type, make and model of vehicles had experienced similar faults and defects with their vehicle
d. Failing to advise the Plaintiff at all material times during the sale, purchase and transfer of the said vehicle of any potential risk, factory faults and defects the said vehicle would likely to have
e. Falsely represented the said vehicle to be a particular standard, quality or grade to the plaintiff.

[23] Fraud is a broad term that refers to acts intended to swindle someone. In essence, it's the use of intentional deception for monetary or personal gain. Fraud always includes a false statement, misrepresentation or deceitful conduct. There cannot be fraud without intention. Hence, when one alleges fraudulent misrepresentation intention is presumed.

[24] Misrepresentation, according to the Oxford Legal Dictionary, is an untrue statement of fact, made by one party to the other in the course of negotiating a contract that induces the other party to enter into the contract.

[25] The learned counsel for the plaintiff in his written submissions has referred to various section in the Sale of Goods Act, various authorities and the provisions of Commerce Commission Decree 2010. However, before referring to the provisions

contained in the Sale of Goods Act the court must ascertain whether there was misrepresentation of facts on the part of the defendant when this agreement to sell the Truck was entered into.

[26] The plaintiff adduced no evidence whatsoever, to establish the above allegations against the defendant. When the plaintiff offered to buy the vehicle the defendant allowed to do a test drive which was in fact done by the plaintiff. There is no evidence to say that the defendant did not allow the plaintiff to have the vehicle tested by a qualified person. There is also no evidence that the employees of the defendant made any statement as to the quality of the Truck. It is common ground that this truck was imported brand new from the manufacturer.

[27] The plaintiff also alleges that the defendant failed to inform the plaintiff that the vehicles of the same brand imported previously were also defective but the plaintiff adduced no evidence that the vehicles of the same model sold previously by the defendant, had the same or similar defects.

[28] As I always say the pleadings and submissions are not evidence. Whatever averred in the pleading must be established by evidence before the court. The court cannot be expected to go on a voyage of discovery finding evidence for the parties.

[29] The learned counsel for the plaintiff also submitted on the law relating to merchantable quality of the Truck sold by the defendant and cited the decision in **Kumar v Carpenters Fiji Ltd** [2012] FJLawRp 129; (2012) 2 FLR 446 (30 November 2012). In that case the appellant alleged that the gear box in the vehicle that he purchased from the respondent was defective. The appellant returned the vehicle to the respondent to have the gearbox changed. The respondent repaired the gearbox but refused to change it. The appellant did not collect the vehicle from the respondent and purchased a new vehicle from another dealer. The High Court dismissed the appellant's action for damages.

The Court of Appeal distinguishing the decision in Bernstein v Pamson Motors (Golders Green) Ltd [1987] 1 All ER 220, held:

> The facts in the present case do not bring it within the principle laid down in Bernstein's case relating to merchantable quality. The vehicle had been used for a considerable period of time before the defect was complained of, and it had been after the expiry of the warranty period and a successful repair had been carried out.

[30] The plaintiff's claim is to return the vehicle and to recover the entire sum which is $132,000.00 paid for the vehicle. The plaintiff's witness say in evidence that even after repairs it was not safe to drive the vehicle. The consideration of $132,000.00 was paid to the defendant on 07th March 2018 and the first defect was found the day after the vehicle was purchased. After the engine replacement the vehicle was delivered on 17th December 2019(D4). Except during period in which the vehicle was with the defendant for replacement of the engine the plaintiff has been using the vehicle and the evidence is that even at the time this action was taken up for trial the plaintiff was still using the vehicle although it may not be for the very purpose it was purchased.

[31] In the Truck warrant under the sub-heading CLAIM PROCESS it is stated:

> In the case of a defect that may affect the safe operation of the Vehicle or may cause consequential damage to the vehicle, components or persons, the Purchaser must immediately notify the Company (using the address ABOVE) or one of its authorized Dealers in writing as soon as such defect becomes apparent. After such defect becomes apparent, the Purchaser must immediately stop operating the Vehicle with the defect unless otherwise advised by the Company or one of its authorized dealers in writing.

[32] The defendant cannot be held responsible for any defect or break down that happened after the warranty period whichever is earliest of the expiry of 12 months from the date of delivery or 30,000 kilo meters.

[33] In this instant all the defects and breakdowns complained of by the plaintiff were during the said period of warranty. However, the plaintiff did not take any steps to

return the vehicle to the defendant and demand for the purchase price. Instead it used the vehicle for its own benefit and still using it. The intention of the plaintiff is to return the vehicle after using it for about two years after the expiry of the warranty period.

[34] The plaintiff also claims $158,000.00 for loss of earnings. It is a well-established principle of law that special damages must be pleaded and proved. In this instance although the plaintiff has claimed the said amount in the statement of claim no evidence whatsoever has been adduced to establish his entitlement.

[35] The plaintiff also seeks an order that the defendant return/reimburse $1500.00 paid for the defendant for costs of repairs and labour. In evidence the plaintiff's witnesses tendered receipts and invoices marked as P4, P5 to P8 but these receipts are for the servicing of the vehicle.

[36] In the warranty there is a clause which says:

> If any defect occurs that is covered by this warranty and the Purchaser submits a valid claim to the Company in accordance with this Warranty, the company will, at its **sole and absolute discretion**, repair or replace the defective part. [Emphasis is mine]

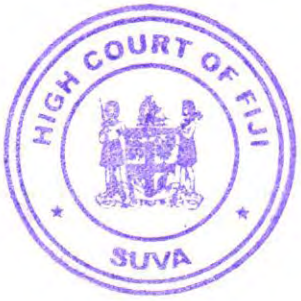
[37] In view of the above clause the plaintiff is not entitled as of a right to have all the repairs done free of charge.

[38] The defendant adduced no evidence to prove it counter claim. It claims $4000.00 for keeping the vehicle parked in its premises until the plaintiff removed it but there is no evidence as to how it arrived at that figure. It also claims $6500.00 for damages caused to the vehicle for misuse and bad road conditions. There is no evidence that the defects in the vehicle was due to bad road condition and misuse of the vehicle. These are all special damages and as I said earlier, the burden is on the defendant prove such damages. The defendant also claimed $250.00 for replacing the windscreen. If the intention of the defendant at that time was to charge for the new

windscreen it could not have replaced the windscreen free of charge. Since they have done it without a fee the only reasonable conclusion the court can arrive at is that it was done free under the warranty.

ORDERS

1) The plaintiff's action is dismissed.
2) The defendant's counterclaim is also dismissed.
3) There will be no order for costs of this action.



Lyone Seneviratne

JUDGE

02nd December 2020