

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**APPELLATE JURISDICTION**

**CIVIL APPEAL CASE NO. HBA 05 OF 2016**

**BETWEEN:**                    **JAN'S RENTAL CARS (FIJI) LIMITED** trading as 'Budget Rent A Car of Fiji', a limited liability company having its registered office at 366 Grantham Road, Suva, Fiji.

**APPLICANT/ APPELLANT**  
(Original First Defendant)

**AND:**                            **PREMA NAND** of Naqere, Savusavu, Carrier.

**FIRST RESPONDENT**  
(Original Plaintiff)

**AND:**                            **ROGER LUTZ** of California, United States of America.

**SECOND RESPONDENT**  
(Original Second Defendant)

**BEFORE:**                    Hon. Acting Chief Justice Kamal Kumar

**COUNSELS:**                Ms. S. Devan for the Applicant  
Mr. V. Prasad for the First Respondent  
Mr. K. Jamnadas for the Second Respondent

**DATE OF JUDGMENT:**    26 May 2020

**JUDGMENT**

## **Introduction**

- [1] Pursuant to Leave granted on 27 January 2016, Appellant on 5<sup>th</sup> February, 2016 filed Grounds of Appeal.
- [2] Appeal was first called in this Court on 15<sup>th</sup> April 2016, when Court directed that Notice of adjourned hearing to be served on Appellant and First Respondent's Solicitors and adjourned the Appeal to 26<sup>th</sup> April 2016.
- [3] On 29<sup>th</sup> April 2016, Appeal was adjourned to 20<sup>th</sup> June 2016, to enable parties to collect Copy Record.
- [4] Appeal was next called on 8<sup>th</sup> July 2016, when parties were directed to collect and verify Copy Record after Counsel for Appellant informed Court that Appellant's submissions filed in Magistrates Court Action was not part of Copy Record and the Appeal was adjourned to 12<sup>th</sup> August 2016.
- [5] Appeal was next called on 19<sup>th</sup> August 2016, and adjourned to 8<sup>th</sup> November 2016, for hearing which date was vacated and re-fixed for 8<sup>th</sup> November 2016, for mention.
- [6] On 08<sup>th</sup> November 2016, Court directed parties to file submissions and the Appeal was adjourned to 31<sup>st</sup> January 2017, for hearing.
- [7] On 31<sup>st</sup> January 2017, leave was granted for Second Respondent to withdraw his Appeal and Appellant's Appeal proceeded to hearing.

## **Background Facts**

- [8] At the material time First Respondent was owner of Motor Vehicle Registration Number RSL 365 (“**MV RSL 365**”).
- [9] On or about 22 September 2011, Appellant and Second Respondent entered into a Rental Agreement whereby Appellant rented out Motor Vehicle Registration Number LR 990 (“**MV RL 990**”) to the Second Respondent.
- [10] On or about 27<sup>th</sup> September 2016, at or near Tuvimila Estate at Savusavu MV RSL 365 driven by First Respondent and MV LR 990 driven by Second Respondent were involved in an accident resulting in both vehicles being damaged.
- [11] Second Respondent pleaded guilty to charge of Careless Driving and was fined \$200.00.
- [12] On 23 May 2013, the First Respondent filed claim against the Appellant as owner of MV LR 990 and Second Respondent as Driver of the said vehicle in respect to the accident involving MV LR 990 and First Respondent's MV RSL 365.
- [13] On 25 June 2014, the Learned Magistrate delivered his Judgment awarding First Respondent \$29,156.00 in damages (including costs) plus interest at the rate of 6.5% from date of Judgment, against the Second Respondent and the Appellant.

### **Appeal**

- [14] Appellant filed eight grounds of appeal which are in following terms;

“1. The Learned Resident Magistrate erred and/ or misdirected himself in law and in fact in holding that the Appellant had a vicarious relationship with the Second Respondent and was thus jointly liable for the actions for the second Respondent when:

- (vi) The Second Respondent was not an authorized driver or agent of the Appellant.
  - (vii) The second Respondent was driving the rental vehicle registration no. LR 990 pursuant to a Rental Agreement between the second Respondent and the Appellant and not under any other circumstances which could give rise to a relationship of agency' in law.
2. The learned Resident Magistrate erred and/or misdirected himself in law and in fact in failing to take into consideration that there is no imputation of vicarious liability by law when the second Respondent was merely using the rental vehicle with permission of the Applicant but for his own purpose.
  3. The learned Resident Magistrate erred and/or misdirected himself in law and in fact in failing to apply and follow the legal principles enunciated in the High Court decision of Michael Bans v Jan's Rental Cars (Fiji) Limited [1992] 37 FLR 158.
  4. The learned Resident Magistrate erred and/or misdirected himself in law and in fact in failing to distinguish or give reasons for departing from the case authority of Michael Bans v Jan's Rentals Cars (Fiji) Limited [1992] 38 FLR 158 submitting by the Appellant.
  5. The Learned Resident Magistrate erred and/or misdirected himself in law and in fact in failing to hold that the second Respondent was solely liable to the first Respondent when the accident causing damages to the first Respondent's vehicle registration no. RSL 3654 was caused by the negligent driving of the second Respondent.
  6. The Learned Resident Magistrate erred and/or misdirected himself in law and in fact in disallowing the Appellant to tender the Rental Agreement through its witness when the second Respondent had already led evidence on the Rental Agreement. The Learned Resident Magistrate's decision to disallow the tendering of the Rental Agreement offended the Dunne v Brown principle.
  7. The Learned Resident Magistrate erred and/or misdirected himself in law and in fact in awarding damages of \$29,156.00 when the first Respondent had failed to take reasonable steps to mitigate its loss.

8. The Learned Resident Magistrate's decision tantamount to a wrongful exercise of discretion having regard to all the facts and circumstances of the case and evidence on the whole.”

[15] On date of hearing Appellant withdrew its Grounds of Appeal Numbers 6 and 7 which related to Learned Magistrate not permitting Appellant adduce rental agreement in evidence and awarding \$29,156.00 in damages to First Respondent.

[16] Grounds 1 to 5 and 8 are all related and the issue that needs to be determined by this Court is whether Learned Magistrate erred in law and in fact by holding that Second Respondent at the time of accident was driving MV LR 990 as agent or servant of the Appellant which makes Appellant vicariously liable for Second Respondent's negligence.

[17] In *Michael Ban v Jan's Rental Car's (Fiji) Limited* (1992) 38 FLR 158 Plaintiff sued the rental car company in respect to injuries he sustained as a result of accident involving motor vehicle rented out by the rental company to a third party. The third party was driving the vehicle at the time of the accident. His lordship Justice Scott (as he then was) stated as follows:-

*“As I see it, the basic question is whether the mere fact that Groot hired the car from the Defendant can give rise to the Defendant's liability. In my view it cannot. In his discussion of liability for torts committed by an agent the learned author of Bowstead on Agency makes no mention of any rule that a hiring company is liable in the way being suggested. On the contrary, under the heading “Casual Delegation” (15 edition page 393) a large number of cases are cited which tend to establish just the opposite and it is said “there is no question of liability where A is merely driving with B's permission for a purpose of his own in which B has no interest.” In the present case the Defendant's business was to rent cars but in my view that does not mean that each hirer is going about the Defendant's business. If the Defendant has asked Groot to perform some small service for him on his way to Sigatoka such as dropping off a packet to a friend of the defendant and had an*

*accident occurred while the packet was being dropped off then perhaps it could be argued that at that time Groot was driving on the Defendant's business. In my view the first submission made by Mr. Maharaj and already quoted is fallacious. Either a person is driving on the rental car hirer's business or he is driving for a pleasure purpose not both. That the defendant may have had an interest in seeing his hire car safely returned to him but the hirer did not, in my view, mean that he had an interest in legal terms in the hirer's driving. I agree with Mr. Singh that the evidence also quite clearly shows that the reason that Groot was driving the car was that he had rented it for pleasure purpose of his own. He had paid rent for the car."*

**(emphasis added)**

[18] The principle in *Michael Ban's* case is that hirer of rental car does not drive the car as agent or servant of the rental company and the rental company therefore is not vicariously liable for that drivers negligence except where the accident took place whilst the hirer was carrying out any act for and on behalf of the rental company.

[19] Learned Magistrate at paragraph- of his judgment stated as follows:

*"This Court further finds from the evidence before it that the 2<sup>nd</sup> Defendant was driving a rental vehicle and he drove the rental under a rental agreement with the 1<sup>st</sup> Defendant. The agreement between the 1<sup>st</sup> and the 2<sup>nd</sup> Defendant was lawful and the 1<sup>st</sup> Defendant authorized the 2<sup>nd</sup> Defendant to use the said vehicle"*.

[20] Hirer of a rental car would certainly drive the vehicle he / she hirers with the authority of owner of the rental car.

[21] The question that Learned Magistrate had to answer was that was Second Respondent at the time of accident driving as agent or servant of the Appellant (*Michael Bans case - Supra*).

[22] It is clear that there was no evidence before the court to establish that at the time of accident Second Respondent was driving MV LR 990 as agent or servant of the Appellant or carrying out any task assigned to him by the Appellant when accident took place.

[23] At paragraph 4 of the Statement of Claim, First Respondent as Plaintiff alleged that:

*“At all material times, the 1<sup>st</sup> Defendant was the registered proprietor of Motor Vehicle registration number LR 990.”*

*“At all material times, the 2<sup>nd</sup> Defendant was the servant and/or agent and/or authorized driver of the 1<sup>st</sup> Defendant and drove Motor Vehicle registration number LR 990.”*

[24] In response Second Respondent as Second Defendant at paragraph 3 of his Statement of Defence stated as follows:-

*“The 2<sup>nd</sup> Defendant agrees with paragraph 4 of the claim only to the extent that he was the authorized driver. Authority to drive was governed by a car rental agreement”.*

[25] Learned Magistrate failed to take this into consideration that Second Respondent **did not admit** that he was at the time of accident was driving MV LR 990 as agent or servant of the Applicant and no evidence was led to prove otherwise.

[26] It is noted that Appellant in its submission filed in Magistrates Court referred to the principle stated in *Michael Bans* case but for some obvious reason Learned Magistrate did not take it into consideration.

[27] Based on what is stated at paragraphs 22 to 26 of this judgment this Court has no hesitation in allowing the appeal.

### Costs

[28] Court takes into consideration that Appellant and First Respondent filed submission and made oral submissions.

**Orders**

[29] I make following orders:-

- (i) Appeal is allowed.
- (ii) Appellant is not vicariously liable for negligence of Second Respondent in relation to accident between Motor Vehicle Registration Number RSL 365 and LR 990.
- (iii) Judgment delivered on 25 June 2014, in Magistrate's Court Civil Action No. 94 of 2013, against Appellant as owner of MV LR990 is set aside.
- (iv) First Respondent is to pay Appellant's cost of Appeal assessed in the sum of \$800.00 within twenty-one (21) days from date of this judgment.



A handwritten signature in black ink, appearing to be "Kamal Kumar", is written over a horizontal line.

**Kamal Kumar**  
**ACTING CHIEF JUSTICE**

**At Suva**  
**26 May 2020**

**NEEL SHIVAM LAWYERS for the Appellant**  
**CROMPTONS for the First Respondent**  
**JAMNADAS & ASSOCIATES for the Second Respondent**