

IN THE MAGISTRATES COURT
OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil
Case No. 17/2544 MC/CIVL

BETWEEN: PAKO LIN B. TITONGOA MURI

Claimant

AND: HARRY SHIN

Defendant

Coram: Fsam

Date of Oral delivery of Judgment: 14th of September, 2018.

Appearances: Ms Sarisetts on behalf of Mr Yawha for the Claimant

Mr Livo_B as agent for Mr Botleng on behalf of the Defendant

Copy: Tom Botleng of Tee Jay Bee & Associates, Port Vila, Yawha & Associates,
Port Vila, Claimant, Defendant.

JUDGMENT

Introduction

1. The claimant brings an amended claim for misrepresentation against the defendant concerning the sale of his second hand vehicle to the claimant that was defective and of which defects the claimant alleges the defendant had failed to disclose.
2. The claimant claims a Judgment Sum of VT850,000 with interest and costs.

Background Facts



3. The claimant had entered into a verbal agreement with the defendant sometime in 2017 in respect of the sale of his second hand Hyundai vehicle registration No. 18399, (hereinafter referred to as "the vehicle) wherefrom the final sale price agreed between the parties was an amount of VT750,000.

4. The claimant had made a first payment of VT250,000 to the defendant on month of July 2017 and the second payment was of VT500,000 to the defendant on 8th of August 2017.

5. On the 25th of July 2018, the vehicle was transferred out of the defendant's name into the claimant company's name - "Nambawan Water" including registration book.

Allegations:

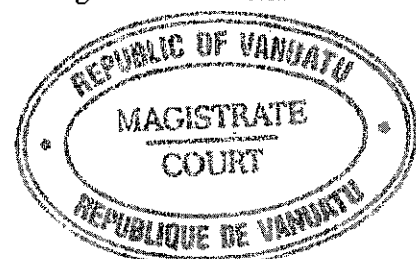
6. The claimant alleges, and as summarized below, that:

6.1. The defendant had offered to sell his vehicle to the claimant because he was in a financial need.

6.2. The defendant being a long-time owner of Hyundai vehicle, and knows very well about the condition of his vehicle, did not properly inform the claimant of the need to fill in water at all times or the consequences thereafter if it were to run without water.

6.3. That due to the bad condition of the vehicle, it had stopped two times on the road within a week after purchase and which the claimant alleges that had the defendant informed him of the vehicle's situations prior to the verbal sale and purchase agreement, the claimant would not have purchased the defendant's vehicle.

6.4. That he had returned the vehicle in question to the defendant with all the keys, and the defendant had agreed to refund the claimant the sum of VT 750,000, but later he wrote to the claimant ("Annexure PLBTM1"), stating that the claimant is



responsible for any subsequent liability in respect of the car's reported conditions, and that he will not refund the claimant.

Defense and Counterclaim

7. The defendant stated that the claimant had acquired possession of the vehicle in good condition.

8. That the claimant did not provide dates from when he had possession of the Hyundai vehicle in question, to when the claimant had started the allegations of the bad conditions of the vehicle.

9. That he is not liable for any damages because possession of the said vehicle had already passed on to the claimant under the claimant company's name "Nambawan Water".

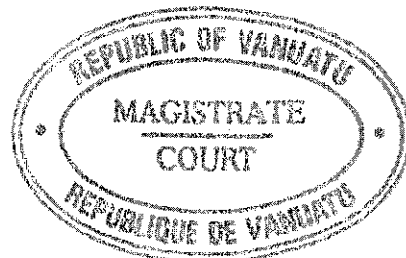
10. That as the vehicle was a second hand one, all the problems and consequences related to the vehicle rests with the claimant, because the claimant bought the vehicle "as is".

11. That the verbal agreement remains valid and that under no circumstances did he misrepresent the claimant.

12. That in counterclaim, he says that while he was responsible for the safe keeping of the vehicle registration number 18399 in his premises from the 16th of August, to date when the vehicle was registered under the ownership of the claimant, the defendant is entitled to storage fee and costs.

The Law/Issue

13. The following main issues needed to be determined in order for the court to decide on the claim of misrepresentation by the Claimant and the defendant's counter-claim for storage fee and damages accordingly:



- (1) Whether or not the defendant sold a second hand vehicle to the claimant in good condition. And if he did, does it amount to misrepresentation?
- (2) Whether or not the verbal agreement is still enforceable?
- (3) Whether or not the Claimant is liable for Storage fee and costs?

Burden and Standard of Proof

14. It is for the Claimant to proof his claim on the balance of probabilities.

Evidence

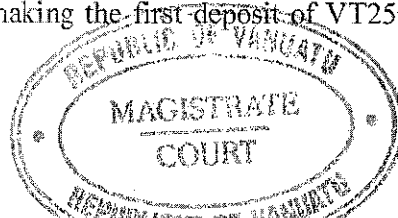
Evidence by the Claimant as summarised

15. The Claimant Mr Pako Lin Titongoa Muri (hereinafter referred to as “Mr Muri” or “The Claimant”), relied on his sworn statements filed on the 03rd of November 2017, and was cross-examined accordingly by Mr Botleng.

16. Mr Muri also relied on sworn statements of his witnesses, Mr Hilton Matamlele, filed on the 24th of November, 2017, and Mr Albert Wisely filed on the 17th of October, 2017 respectively.

17. Mr Muri in his evidence in chief under oath stated that he had entered into a verbal agreement with the defendant on the 25th of July 2017, regarding a purchase of a second hand Korean hyundai vehicle for an agreed price of VT 750,000. That he was to make a first payment of VT250,000 to the defendant, so he could have possession of the vehicle and make necessary payment in respect of road tax to customs as well as for road worthy checks with the Public Works Department (hereinafter referred to as “PWD”) on the same day.

18. The claimant further testified that while he knew he was purchasing a vehicle that was second-hand, he had trusted that the defendant was selling to him a vehicle that was in good condition. That after making the first deposit of VT250,000 with

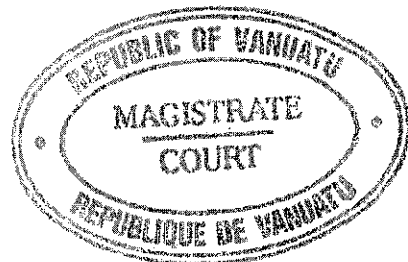


the vehicle given to him, he went to customs to sort out road tax payment at an amount VT47,000, and was told by Customs officer to go the PWD to first get his vehicle passed for road worthy certificate before he can be issued a road tax sticker for 2017.

19. Mr Muri further stated in evidence in chief that on the same day, the 25th of July 2017, he took the vehicle to the PWD for road worthy inspection by Mr Hilton Matamlele. when he was issued with a paper (claimant was referred to Mr Hilton Matamlele sworn statement filed on the 24th of November, 2017 and as "Annexure "HML3" in respect of the Vehicle Road worthiness defects report) containing a list of some defects that needed to be fixed before PWD could pass the vehicle for road worthiness. He then brought this information to the attention of the defendant who said he will fix the defects.

20. On the 27th of July, 2017 the claimant stated he took the vehicle back to the PWD for further check, when he was again informed by Mr Matamlele that there were still some defects to be fixed and again a further paper was issued (Claimant was referred to "Annexure HML4" of Mr Matamlele's sworn statement), in respect of defects, which he had instructed defendant to have fixed. He took the vehicle back to the defendant to have it fixed again. On the 1st of August, 2017, the vehicle went back to PWD, but could was not passed and it was returned to the defendant. Again on the 3rd of August, 2017 the vehicle went to the PWD for checks, and could not be passed because the PWD machines used for checking the vehicles was not working at that time, and it was driven back to the Defendant's garage.

21. On the 8th of August, the claimant further stated that he drove the vehicle back to PWD again, and was told that the it could not pass so he took the it back to the defendant and told him to fix the vehicle and take it to PWD. On the same day, the defendant checked the vehicle and took it to PWD, and had it passed. The claimant was informed of this and he paid the remaining balance of VT500,000 to the defendant for the vehicle, and went to customs to have the 2017 road tax sticker placed on it.

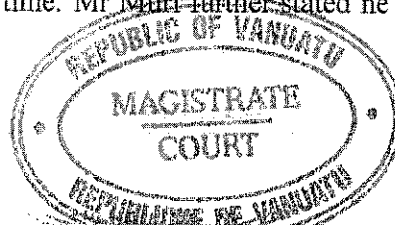


22. The claimant in evidence stated that 3 days after he made the final payment on the 8th of August, 2017, the vehicle stopped twice, first at La Parisienne area, and a mechanic employed by the Defendant (Defendant's witness Sailas Nalpini), was directed to the location to inspect it. And the second time, after 3 more days, and while driving to black-sands, his factory (Nambawan Water) and his house, it stopped again at Malapoa, Grace store. He reported this to the defendant, complaining as to why the vehicle had stopped on the road twice within a week of purchase. He left the keys to the vehicle with the defendant and told the defendant to refund the VT750,000 paid him, who had agreed to refund his money, however, since 16th of August, 2017 to date, with the vehicle being in possession of the defendant the defendant had not refunded his money.

23. The claimant further under cross examination stated that he had had ownership of the vehicle in question since the 25th of July 2017, and since then to the 08th of August 2017, he had never opened its bonnet. That he was never aware of the missing parts of the vehicle, namely the Fan, Condensor and air conditioning pipe that was later reported by Supercool staff, Mr Albert Wisely, of having gone missing on the 12th of August, 2017.

24. He further stated under cross examination that the defendant never told him of the missing parts, only that the defendant told him the vehicle was second hand and that it was in good condition and he trusted the defendant. He further stated that although he did not mention exact dates in the claim as to when the parts went missing, he remembered later on after being questioned when trying to recall the date he drove the vehicle to supercool for inspection of its air-conditioning. That he had informed the defendant of the missing parts.

25. Further evidence by Mr Muri was adduced in relation to inspection of the vehicle where he gave evidence that the defendant was with him when he checked the car on the 25th of July 2017. That the defendant first went into the vehicle and started it for about a minute while he waited outside. Then Mr Muri went into the vehicle and started the car, for less than a minute and went back outside. They walked around the vehicle, opened the back of the car (containing ice box), it looked good. The air condition was not on at that time. Mr Muri further stated he saw rust



on the car and asked the defendant to do panel beating on it. That apart from these checks, they did not check any other parts of the vehicle. That a quick inspection of the vehicle was made before he paid for it.

Evidence by Mr Hilton Matamlele as summarized

26. Mr Matamlele as a Mechanic and Electrician by profession and employed at the PWD workshop gave evidence in cross for the claimant that he only did checks on the body of the Hyundai car in question, in respect of brakes, steering, wheels, lights, etc...and that he did check the claimant's vehicle for road-worthiness but did not open its bonnet. That he only checks the car engines if after starting it, he hears any sounds that tells him he needs to check the engines, then he checks it. But when he started the car, he heard the noise from the engine was stable, so he did not check the engine of the vehicle.

27. Mr Matamlele was referred to paragraph 9 of his sworn statement filed 24th of November, 2018, and which was tendered in as evidence, to which he confirmed that he did the first check on the claimant's vehicle in question on the 25th of July 2018, and that at the time it was brought to him (to PWD) by a defendant's workboy (Salas Nalpini), however, Mr Nalpini did not inform him that day of any prior defects or any problem with the engine. That after inspecting the claimant's vehicle, he noted and listed down some defects, and explained them to Mr Nalpioni to be fixed

28. He was referred to paragraph 10 of his sworn statement and he confirmed that the vehicle was brought to him for the second check on the 27th of July 2018, by the Claimant himself, and did a follow-up check on that date on the defects he last reported (attached to his sworn statement as "Annexure HML3") and record new observations as reported and annexed to his sworn statement as "Annexure HML4". That having observed further defects on the second visit, he informed the claimant of same.

29. He was further referred to paragraph 8 of his sworn statement by Mr Botleng, and his earlier evidence on the normal standard procedure ~~he follows~~ in respect of



vehicle inspection, to which he confirms he does not need to check the car engines unless there is a leakage or when he hears the engine sound is not normal, then he checks the engine. That the claimant never asked him to check his car engine.

30. Under re-examination, Mr Matamlele gave a detailed explanation of his inspection routine of the claimant's vehicle. That he drove it around the PWD compound and there was no noise or pulsing from the car engine. He further confirmed that when there is no noise heard from the engines, it means the car was OK or in good condition.

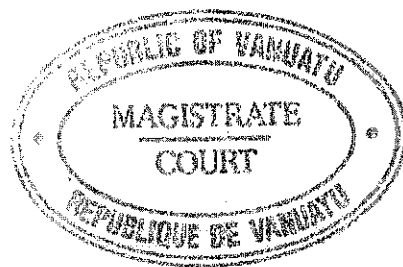
31. He further gave evidence that on the last check of the vehicle in question on the 8th of August, 2017, the Defendant's work boy brought the vehicle back to him for inspection. And that if there was any issue with the engine at that time, the boy should have informed him, but he did not.

32. He further stated under re-examination in reference to paragraph 8 of his sworn statement, that the air condition pipe, condenser and fan have nothing to do with the car engine, but are cooling systems that produce air conditioning in the car. That even if the three parts went missing, the car could still run. However if the cooling system of the engine (radiator) is not in good condition, it can cause smoke and damage to the engine.

Evidence by Albert Wisley as summarized

33. Mr Albert Wisely was the officer from the Supercool company who gave evidence under cross by Mr Botleng on behalf of the claimant. In reference to his sworn statement filed on the 17th of October, 2017, he confirmed that he checked the vehicle in question and noticed the three parts, evaporator fan, air conditioning pipe and condenser were missing. He did not remember the exact date as to when he made the observation, because he did not record that date, however under re-examination he remembered it was during the month of August. That he did inform the claimant of the missing parts.

Evidence by the Defendant as summarized



34. The Defendant (hereinafter referred to as "Mr Shin" or "the Defendant") relied on his evidence by sworn statements filed on the 6th of December 2017 and 10th of November 2017, and tendered as Exhibits DF1 and DF2 respectively. He was also cross-examined by Mr Yawha accordingly. The Defendant also relied on the evidence of Mr Silas Nalpini by his sworn statement filed on the 13th of November, 2017.

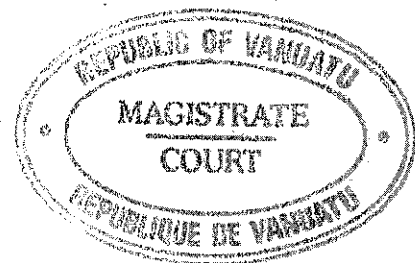
35. Under Examination in chief, Mr Shin stated that he had been undertaking business of selling second hand vehicles and spare parts and fixing cars for 10 years since 2008.

36. He agreed that he entered into a valid binding agreement orally with the claimant, and he has not received any calls from the claimant in respect of a termination of the said agreement.

37. He stated that on the 25th of July 2018, the vehicle was checked in the presence of himself, the claimant and his work boy Mr Sailas Nalpini, and everything was in good condition. That they checked the engine by starting the vehicle, the sound was good, and they checked the air condition, and checked around the body of the car, and opened the car bonnet. That the claimant had complaint about small scratches on front of the car bonnet which he had panel beated to fix and painted over it over the next 2 or 3 days.

38. That on the same day, the 25th of July, the claimant took possession of the car and had it transferred into his company name "Vanuatu Water" and later in the afternoon, the claimant deposited VT 250, 000 for the car.

39. Mr Shin further stated that they had agreed that he will be selling a second hand vehicle to the claimant that was in good condition. He further confirmed the vehicle had gone through checks with the PWD and thereafter to his garage to have the reported defects fixed, although he could not recall the first date the vehicle came to his garage for fixing after PWD first check.



40. Under cross examination, Mr Shin further stated that customs did not want to renew his business name so he changed his business license from Woorin Motors to Go-Van Global Trading in 2016. That he had a business licence with him when he sold the vehicle to the claimant on the 25th of July 2017.

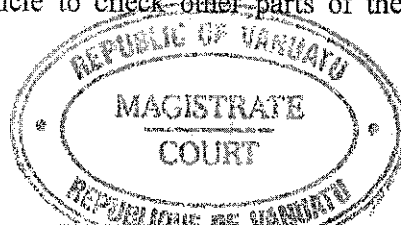
41. That he had agreed with the claimant to sell the vehicle in question for VT750,000 with a first installment payment of VT250,000. That he did not produce a receipt of the first payment because the Claimant did not get his permission to transfer the vehicle to Nambawan Water. That he will only provide receipt after the complete payment of VT750,000.

42. Further under cross, Mr Shin stated that when he made the agreement with the claimant it was agreed that the claimant was buying a second hand car that was in good condition. And when asked to elaborate on how he defines good condition the defendant stated that he checked the car in the presence of the claimant by turning on the car engine to check that it was good, opened all doors and it was in good condition. That Mr Muri only complained of rust on the front of the vehicle which he had fixed.

43. Mr Shin was referred to "annexure HML3" of Mr Matamlele's sworn statement where in relation to the defects listed, where he referred to the defects reported by PWD as not being major problems – defects are minor problems – and that they are objects that can be brought by his company and fixed very quickly.

44. Mr Shin further maintained the vehicle was in good condition when sold to the claimant on the 25th of July 2017 despite the defects reported by PWD. However later on in his evidence, he agreed that he did not carry out a proper check of the vehicle on the above mentioned date.

45. His further evidence under cross examination in respect of the inspection of vehicle carried out in the presence of the claimant on the 25th of July 2017, was that he went into the vehicle, switched on the car engine, with the air conditioning on, switched it off and left the vehicle for the claimant to get back in after him for inspection. They also walked around the vehicle to check other parts of the car



before he returned into the vehicle. He further stated that he never opened the car bonnet during inspection with the claimant because he was not asked to do so. This evidence clearly was contradictory to what he stated earlier in his evidence in chief.

46. Further under re-examination, he confirmed he did the inspection first before claimant paid for first deposit on the 25th of July 2017, and the claimant transferred ownership of the car without his consent.

47. His evidence was also that on the 25th of July, the Fan, condenser and air conditioner pipe were in the vehicle which is why the air con was working that day during inspection.

Evidence by Mr Sailas Nalpini as summarised

48. Mr Nalpin, a Mechanic employed by the Defendant, in his evidence under oath stated that he works for Mr Shin as a Mechanic. He was being referred to paragraph 10 of his sworn statement to elaborate on same, and he stated that on the 8th of August 2018, when he checked the car for the last time, the air conditioner pipe, fan and condenser were all present in the car. He also confirmed he helped in fixing the defects reported by the PWD.

49. Mr Nalpini also adduced evidence in respect of a CCTV coverage of the 8th of August 2017, of the car inspection in the presence of the himself, Claimant and another boy by the name of Saki. He stated that he opened the vehicle bonnet at that time, and that the three missing parts were in the car.

50. That he was first called to check on the vehicle on the 8th of August 2017 when he received report that it stopped outside La Parisienne roadside. His findings was that the car battery was flat so he had to jump start it by connecting the vehicle with another car with jumper cables in order to apply power to the claimant's vehicle. That he knew the battery was flat from hearing that the engine was weak. He then drove the vehicle to the defendant's garage, and informed the claimant of his findings.

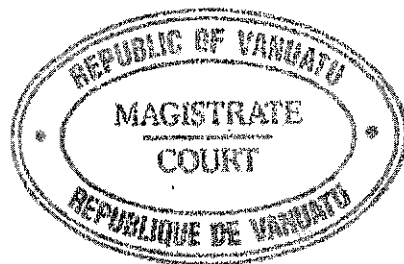


51. He stated that the camera in the vehicle used up the battery, because when the vehicle is running the camera is also turned on, until when the vehicle engine is turned off, the battery also goes off.

52. He further stated that he had further instruction from the defendant to attend to the vehicle again which had stopped for the second time on the 16th of August 2017 on the road in front of Grace store at Malapoa. He opened the car's bonnet at that time because he was informed of smoke coming out of the car. He checked the radiator and saw that there was no water. He then got water from Grace store employees and filled up the radiator with about 4 and half plastic of water. He further stated that he drove the vehicle from Malapoa to the defendant's garage, where he heard vibrating sounds coming from the engine due to the bad condition of the radiator because there was no water in it. This he stated in evidence, was due to damaged engine gasket that was causing vibrating sounds from the engine of the car. He also stated that as part of his job, he makes sure that every oils (break and engine oils), water and all parts of the vehicle must be checked before a car is being sold and his boss (the defendant) makes sure he does these checks.

53. Under cross examination, as to his qualification as a mechanic, the defendant did not seem to understand his own level of qualification, however he gave a sound explanation of technicalities of water shortage and consequences associated with this in any vehicle.

54. Mr Nalpini further stated that after the first check to PWD the claimant did return the vehicle to the defendant's garage and informed them that it was not good, and needed fixing. That it remained in the garage for the whole day when the claimant came back and took it back for a second check to the PWD. The Claimant returned again with the vehicle for further fixing of its hand-break and centre bearing. Although no specific dates were given in evidence in respect of the second check, or further checks, he admitted to a final checking and fixing of the vehicle on the 8th of August, 2017 before he drove it with one Jacky back to the PWD for a final and passing of roadworthy check.



55. Mr Nalpini further stated in evidence that he had not received any report from the claimant on any leakage, from the 25th July to the 8th of August, when the vehicle was in the defendant's garage for fixing and taken to the PWD for road worthy checks.

56. He further agreed that the claimant had possession of the vehicle from the 8th to the 13th of August, because on the 14th of August, it had stopped at Malapoa road for the second time, and the 15th day of August was a Public Holiday and he only attended to the car at Malapoa on the 16th of August when he resumed duties that day.

57. Further under cross examination Mr Nalpini stated in respect of the smoke coming out from the vehicle, that there was no problem with the car's thermostat at that time when it broke down at Malapoa road, and if there was a problem with the thermostat, it would not cause smoke to come up from the vehicle.

58. He further stated in evidence that on the 8th of August, he had checked the water tank and it was full, however he further testified that the water tank was broke. He was challenged by Mr Yawha as to the truthfulness of his evidence and was referred to paragraph 39 of his sworn statement, where he stated that he observed the water tank was damaged on the 16th of August, although he had stated he had not received any report of leakages when he made a final check of the vehicle on the 8th of August in the presence of the Claimant.

59. Mr Nalpini further testified that there were no complaints made to him about the missing parts- evaporating Fan, condenser and air conditioner Pipe, on the 8th of August 2017, and he confirmed his sworn statement that the parts were present in the vehicle on this date. That he only checked the oil, water, engine, breaks, and steering oils that the oils must be at the desired levels. It was further put to him that according to the CCTV footage, it took about 13 seconds for him to do the check, which is not long enough for him to properly check that the air conditioner pipe given its position (location). However he maintained in his evidence that everything was in the car and easy to notice.



60. Further in evidence, he testified that on the 25th of July 2017, the vehicle was in good condition, but later stated that after the first PWD check, the claimant returned to them with the list of defects, which defects he had been aware of prior to the PWD check. And that he agreed he did not inform the claimant of the defects as well as his boss (the Defendant), however the air conditioner pipe, the evaporating fan and condenser were present at that time.

61. Further under re-examination, Mr Napini stated that it is not usual for him to keep things (report on defects) from his boss (the Defendant). And that he had fixed all the reported defects by PWD.

Submissions

Claimant's submission

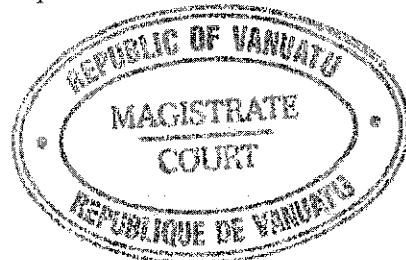
62. The claimant relying on their written submission filed on the 17th of July 2018, submitted through his counsel that the defendant did sell him a second hand vehicle that was not in good condition.

63. The claimant also relied on the evidence of Mr Matannele, Mr Wisely, the claimant himself, as well as evidence of the Defendant and Mr Napini in presenting their submissions.

64. The claimant also cited a court of Appeal case No. *B2/2014/2971 & B2/2015/0879 Salt v Stratstone Specialist Ltd/A Stratstone Cadillac New Castle*.

Defendant's Submission

65. The Defendant relying on their written submission filed on the 4th of July 2018, submitted through his counsel that the claimant had negotiated and agreed to the price of vehicle in question and is therefore prevented from raising the allegation, of misrepresentation and that the defendant misrepresented the condition of the second hand vehicle.



66. The defendant further submitted that there was no evidence that the defendant had taken advantage of the claimant and misrepresented the condition of the vehicle.

67. The defendant further submitted that the vehicle registration number 18399 was sold "as is", and that there is no evidence to prove that the legally binding verbal agreement between the defendant and claimant has been terminated, and so it remains enforceable.

68. The Defendant further relies on the case authorities of *Uluiyutia v Western Wreckers Ltd [2004] FJHC 330*, and *Brinks Incorporated v Brinks Pty Ltd [1997] PGNC 52*.

Findings:

69. Having considered all the evidence and submissions presented, I make the following findings in respect of the issues before me:

1. **That as to the issue of Whether or not the defendant sold a Second Hand vehicle to the claimant in good condition, and whether or not his act amounts to misrepresentation, I make the following findings:**

a. That the list of defects recorded by Mr Matamlele during the first check of the claimant's car at the PWD on the 25th of July 2017, and subsequent checks four times later are sufficient evidence that satisfies me on the balance of probabilities that the Korean Hyundai vehicle registration number 18399 was not in good condition to be sold to the claimant.

b. As to the evidence on the missing parts – namely the fan, condenser and air conditioner pipe, I do not accept the evidence of neither Mr Shin nor Mr Nalpini that the three parts were on the vehicle since the 25th of July to the 12th of August 2017, because first, there was no proper or thorough check made on the 25th of July before the claimant had possession of the car, and second, the claimant in his evidence even stated that he never opened the car

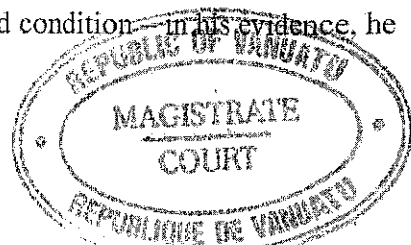


bonnet since he took possession of the car on the 25th of July to the 12th of August. Also between these dates, he only had possession of the car for about or less than a week, of which evidence I find trustworthy. The defendant and Mr Nalpini merely deny the parts were missing without evidence to prove that the parts were present on the 25th of July 2017, and so I therefore find their evidence lacked credibility.

c. On the contrary, I accept Mr Muri's evidence that the parts were not present in the vehicle since the 25th of July 2017, and that the defendant did fail to disclose this information to the claimant. That the claimant had reported to the defendant that the air conditioning was not on, and which I am satisfied that there had existed a defect in the cooling system of the vehicle which could only happen due to some of its main components missing and in this case, being the Fan, Pipe and Condenser. I am therefore satisfied of the circumstantial evidence showing that the fan, pipe and condenser had been missing since the 25th of July 2018.

d. That the claimant is not a mechanic and it is hard to even imagine him removing the missing parts and which according to Mr Nalpini, are quite visible and that would need some mechanical expert who knows where they are located, to remove them. Mr Muri seemed an honest witness, who gave detailed account of his evidence and I accept his evidence.

e. That on the defendant's submission for this court's consideration on the case of *Uluivutia v Western Wreckers Ltd [2004] FJHC 330* in respect of his position that the vehicle was sold on an 'as is where is' basis, I approach this with a degree of caution. The plaintiff in the cited case, *admitted* to the car being sold on an 'as is where is basis' and he being a driver and mini bus operator for years *knew the type of condition of the vehicle he was purchasing*. Where after inspection and on his own judgment, he purchased the said vehicle, and where the Judge found the factor of 'as is where is' appropriate in this case. However there is a clear contrast of the cited case to the case before us. In particular reference to Mr Shin's evidence, the defendant did agree to sell the second hand car to the claimant in good condition. ~~in his evidence, he~~

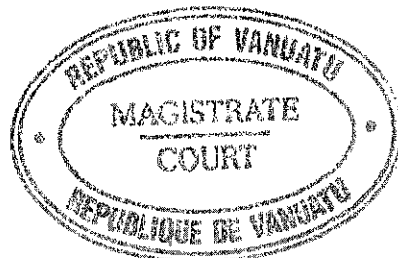


went on to elaborate on the *good condition* of the car (on the first date of inspection before on the 25th of July) being the vehicle's engine were good, and everything in the vehicle was ok, with no defects, and that it will function well on the road'. Evidence before me proved this otherwise. The report from the PWD's first check, showed that there did exist defects of which the defendant stated were minor problems and easy to fix, and Mr Nalpini stated he knew the defects existed in the car, and which defects he did not inform the claimant or defendant of, clearly contradicting what they had represented to the claimant in the first place that the car was in *good condition* when sold on the 25th of July 2017. I therefore refuse to accept evidence from the defendant and Mr Nalpini that the vehicle was sold to the claimant in good condition.

f. And so I find the case referred to by Defendant of no relevance to the situation in the case before us, and I also find that the term 'as is' is not appropriate for this case.

g. That the defendant in his profession sells parts and second hand vehicles to the public and I am sure as a well-known car dealer, he should know that any dealings he makes with his customers must be fair. In this case he took advantage of the trust established in his friendship with the claimant by selling a second hand vehicle that had some defects all along. In his position as a car dealer and mechanic he should have allowed for a thorough inspection of the car, than he did, on the 25th of July 2017. And I am sure any thorough inspection requires more than just the turning on of the engine and listening to its sound, or checking the outside form. He could have done more to assist the claimant in this case, but which he chose not to do. That the defendant being the owner of the car in question prior to the agreement, knew of the defects in the car, yet had failed to disclose this to the claimant.

h. That in respect of *Brinks Incorporated v Brings Pty Ltd [1997] PGNC 52*, it makes reference to the plaintiffs losing on their claim for damages as the Judge found there was no evidence of misrepresentation on their part against the defendant. A clear contrast to the case before us where evidence so far does prove there was misrepresentation by the defendant. I also do not see this case helpful to the defendant in this case.



i. Therefore in respect of the first issue, I find that the Hyundai vehicle registration number 18399 was not sold in good condition to the claimant, that the statement made by the defendant that the car was in good condition was false and not reflecting the true condition of the vehicle on the date of purchase (25th of July 2017), therefore amounting to misrepresentation.

2. On the issue of Whether or not the verbal contract is still enforceable:

a. I find that there was a valid agreement that had been entered into verbally between the Mr Muri and Mr Shin on the 25th of July 2017, with a final offer and acceptance of an agreed amount of purchase price at VT750,000.

b. That evidence shows the agreement was over the sale of a second hand Hyundai registration number 18399 that was in good condition.

c. That it was agreed fact that a first deposit of VT250,000 be made for the claimant to have possession of the vehicle and a final payment of VT750,000 following thereafter.

d. That Mr Muri relied on the defendant's representation of the second hand vehicle being in good condition, by effecting the first installment of VT250,000 on the 25th July 2017.

e. That the representation was false and which the claimant genuinely relied on, causing him loss and damages of which he is entitled.

f. That had the defects been disclosed to the claimant, he would not have agreed to the purchase in the first place or suffer the consequences from this purchase which he is now suffering.

g. That according to *No. B2/2014/2871 & B2/2015/0879 Geoffrey Alan Salt v Stratstone Specialist Ltd T/A Stratstone Cadillac Newcastle* and which



I find relevant to our case, although the defendant stated in evidence that he did not receive any calls from the claimant that he was terminating the contract, the claimant was entitled to rescind the contract on the 14th of August, 2017 because of the misrepresentation, and even while his company had ownership of the vehicle in question.

h. And so I find for this issue that the contract between Mr Muri and Mr Shin is terminated accordingly and no longer enforceable.

3. On the final issue of Whether or not the Claimant is liable for Storage fee and costs, I make the following findings:

a. That since the 14th of August, 2017, there was no longer in force any agreement in place between the parties.

b. That in light of all the findings raised in paragraphs (a) to (g) of the 2nd issue above, I find that the claimant is not liable for storage fee, and costs.

Conclusion:

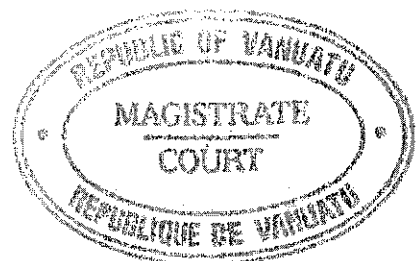
70. The end result is that the defendant did misrepresent the claimant in selling a second hand vehicle that was not in good condition.

71. That the verbal agreement had been terminated by the claimant when he returned the car keys to the defendant, due to the loss suffered from the defendant's misrepresentation of the vehicle's true condition.

72. That the claimant therefore is successful in his claim and entitled to the damages and costs sought accordingly.


73. That the defendant's counterclaim is hereby dismissed.

74. Costs on a standard basis as agreed or taxed.



DATED at Port Vila this 23rd day of July, 2018.

BY THE COURT


.....
Magistrate

