

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 11 of 2016
(High Court HBC 244 of 2006)

BETWEEN : **SUN INSURANCE COMPANY LIMITED**

Appellant

AND : **PRAVEEN LATA**
MOHAMMED NASIB
SHEIK AMZAD SAHEB

Respondents

Coram : **Chandra RJA**

Counsel : **Mr. A. K. Narayan (Jnr) for the Appellant**
Mr. N. R. Padarath for the 1st Respondent
2nd and 3rd Respondents in person

Date of Hearing : **22 January 2018**

Date of Ruling : **7 May 2018**

RULING

- [1] The Appellant/Applicant (hereinafter referred to as “the Applicant”) by summons dated 4th February 2016 sought leave to institute an appeal as an interested party, time to file notice and grounds of appeal be extended for a further 14 days after leave is granted, an order for stay of execution of the judgment of 5th August 2015, pursuant to Order 3 Rule

4, Order 15 Rule 4 and Order 15 Rule 6 of the High Court Rules, Sections 13 and 20 of the Court of Appeal Act, Orders 6, 22, 26, 27 and 34 of the Court of Appeal Rules and the Inherent Jurisdiction of the Court.

[2] The said application was supported by the affidavit of Arvendra Kumar, Assistant Claims Manager of the Applicant.

[3] In the said affidavit the deponent deposed as follows:

- “(a) that the 1st Respondent (Plaintiff) had instituted action on 16th August 2006 in the High Court at Lautoka seeking compensation for injuries she had suffered in an accident which occurred on 2nd June 2006. The 1st Respondent had been run over a by a truck, registration no. BW 132 driven by the Third Respondent (2nd Defendant), Sheik Amzad Saheb. Mohamed Nasib (2nd Respondent) was the 2nd Defendant in that action as the alleged owner of the truck at the material time.*
- (b) The Applicant was the insurer of the 2nd Respondent under a Compulsory Motor Vehicle Third Party Police under the Motor Vehicle (Third Party) Insurance Act, 1948 covering the period within which the accident occurred.*
- (c) That during their investigation the Applicant had discovered that the truck had been sold by the 2nd Respondent to the 3rd Respondent prior to the accident and therefore the Applicant was not required to provide an indemnity to the 2nd and 3rd Respondents nor to satisfy any judgment the 1st Respondent may obtain against them.*
- (d) The Applicant's Solicitors, who had been instructed to represent the 2nd and 3rd Respondents, had on 15th June 2010 issued a notice on behalf of the Applicant to them and subsequently ceased acting as Solicitors for them.*
- (e) Thereafter the 2nd and 3rd Respondents appeared in person and undertook the conduct of the defence of the 1st Respondent's action. That the trial had proceeded and a judgment had been delivered by the High Court on 5th August 2015 holding, amongst other things that the truck belonged to the 2nd Respondent and that both the 2nd and 3rd Respondents were jointly and severally liable for the 1st Respondent's injuries. That as a result of the said judgment, the Applicant may be required to provide indemnity to the 2nd and 3rd*

Respondent and to satisfy the judgment obtained by the 1st Respondent.

- (f) The Applicant which was not added as a party to the High Court action, has now become interested in the proceedings by virtue of Section 11 of the Act.*
- (g) That if the Applicant is given leave to be made a party and appeal the judgment it will have some impact on its liability under the Act.*
- (h) That the Applicant's position will be greatly prejudiced if the judgment is allowed to stand and it is not allowed to appeal as it may have to satisfy the judgment.*
- (i) That the Applicant was made aware of the judgment on 13th October 2015 after the 1st Respondent's Solicitors wrote to the Applicant directly.*
- (j) After becoming aware of the judgment, the Applicant required an opinion from its solicitors and on receiving the opinion, the board of directors/ management had to convene to discuss the issues and options. That the legal vacation fell during that period and it was not until 15th January 2016 that the Applicant instructed its solicitors to file the current application.*
- (k) That the 1st Respondent will not be prejudiced by any stay of the action as she has waited since 2006 and any delay can be compensated by way of interest.*
- (l) That he is advised by the Applicant's solicitors that the appeal raises both novel and important questions of law."*

[4] A proposed notice of appeal setting out the grounds of appeal was annexed to the affidavit of support.

[5] The 1st Respondent filed an affidavit in opposition and deposed as follows:

- “(a) That reference to the Applicant as Appellant was not an acceptance that the Applicant is entitled to appeal and that she opposes the application of the Applicant.*
- (b) That the Applicant had several opportunities to argue the issue that it was not required to indemnify the 2nd and 3rd Respondents, but it chose not to do so.*

- (c) *That the Applicant had participated in the proceedings and filed defences raising the issues raised in the present application and that though the trial took about 9 years to complete, that the Applicant did nothing to obtain any orders that they were not required to indemnify the 2nd and 3rd Respondents.*
- (d) *That the Appellant unilaterally decided that they had no legal obligation to indemnify either the 2nd or the 3rd Respondents when it was clear from the evidence that any alleged transfer had not been completed.*
- (e) *That on or about 2nd of June 2006 that Motor Vehicle number BW 132 driven by the 3rd Respondent as the servant and/or agent of the 2nd Respondent collided with me while she was a pedestrian on the main street of Ba town.*
- (f) *That the vehicle was insured with the Applicant as Third Party Insurers.*
- (g) *That Mishra Prakash and Associates were engaged by the Applicant to defend the claim filed on her behalf, that they had filed a defence and subsequently sought leave to amend the statement of defence, which was filed on 4th April 2007.*
- (h) *On 20th September 2007 the Applicant through their solicitors Mishra Prakash and Associates sought leave to withdraw acting as counsel for the 2nd and 3rd Respondents.*
- (i) *On 25th October 2007 a notice had been filed regarding change of solicitors whereby Suresh Maharaj and Associates came on record on behalf of the 2nd and 3rd Respondents.*
- (j) *On 9th August 2011 the Applicant's lawyers foiled a summons seeking leave to withdraw on the grounds that there was no liability attached to the third-party policy on the basis that the vehicle which was insured had been sold and transferred outright on 21st November 2005.*
- (k) *On 10th February 2011, the Applicant's lawyers acting on behalf of the 2nd and 3rd Respondents again filed an application to cease acting on behalf of the 2nd and 3rd Respondents which was allowed on 2nd March 2011.*
- (l) *The On 17th July 2013, AK Lawyers, Solicitors were appointed to act for the 2nd and 3rd Respondent. Subsequently they withdrew on the basis that had filed the notice of change of solicitors by error.*

(m) *The cases proceeded to trial and judgment was entered in her favour on 5th August 2015.*”

[6] The 2nd Respondent filed an affidavit in opposition and deposed that the Applicant’s application for leave is out of time and that leave should not be granted as they were duly informed of the proceedings.

[7] The 3rd Respondent filed an affidavit in opposition and deposed as follows:

- “(a) That he was the authorized driver of Vehicle BW 132 at the time of the accident.*
- (b) That the Applicant’s advice of not being aware of the judgment is incorrect as Mr. Nawa, a Claims Officer with the Applicant was subpoenaed but he chose not to appear.*
- (c) That the Court found that the 2nd Respondent was the registered owner of the vehicle.*
- (d) That the application of the Applicant should be dismissed.”*

Consideration of the application of the Applicant

[8] The application of the Applicant is two-fold, it is an application to be added as a party and following on it is an application seeking leave to appeal out of time. At the hearing, the Appellant stated to Court that it did not wish to proceed with prayer 3 of the application which was regarding a stay of execution of the judgment.

Application to be added as a Party

[9] There is no specific provision in the Court of Appeal Act (Cap 12) regarding addition of parties. However, Section 13 provides that the Court of Appeal has the same powers as the High court in such matters. S.13 provides:

“13. For all the purposes of and incidental to the hearing and determination of any appeal under this Part and the amendment, execution and enforcement of any order, judgment or decision made thereon, the Court of Appeal shall have all the power, authority and jurisdiction of the [High] Court and such power and authority as may be prescribed by rules of Court.”

[10] This Court is not aware of any appeal being filed against the judgment in favour of the 1st Respondent by any of the parties to that action. The application of the Applicant is to add itself as a party and appeal against the said judgment.

[11] Order 15 Rule 6(2) of the High Court Rules 1988 provides that a party may be added at any stage of the proceedings, the relevant provision being:

“(2) Subject to the provisions of this rule, at any stage of the proceedings in any case or matter the Court may on such terms as it thinks just and either of its own motion or on application –

(a)

(b) Order any of the following persons to be added as a party, namely

–

(i) any person who ought to have joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or

(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.”

[12] Order 15 Rule 6(3) set out the nature of the application that has to be made for addition as a party and provides thus:

“An application by any person for an order under paragraph (2) adding him as a party must, except with the leave of the Court, be supported by an affidavit showing his interest in the matters in dispute or, as the case may be, the question or issue to be determined as between him and any party to the cause or matter.”

[13] In support of its application for addition as a party, the Applicant has cited **re Securities Insurance Company** [1894] 2 Ch 410 and relies on the comments made by Kay L.J to

the effect that a party could be allowed to appeal against an order where he was aggrieved even though he was not a party on the record with leave of court. This is a general proposition and the addition of a party would depend on the particular circumstances of each and every case. The question in the present case is whether leave should be granted to the Applicant.

- [14] The Applicant also cited the decision in **Bubble Up Investments Ltd v. National MBF Finance Ltd** [19990 FJCA 38; ABU0021d.98S (5 August 1999) where Rule 6 of the Court of Appeal Rules and Order 15 Rule 6 of the High Court Rules had been considered by Justice Byrne in an application similar to the one made by the Applicant.
- [15] In that case, the Bank of Baroda's application to be added as a party to participate in the appeal was allowed. There the Bank was not a party to the proceedings and it was affected because its securities were affected by the judgment in the case. However, the facts and circumstances in the present case are quite distinguishable from the position in that case, which will be dealt with later in this Ruling.
- [16] The Applicant also cited the decision in **Chandrika Prasad v. Republic of Fiji & Attorney General** [2000] HBC 0217/00L. There an application made to delete certain parts of the judgment referring to the Applicant who sought to be added as a party was disallowed as there was no nexus between the parties. Even though the principles regarding addition of parties were discussed in this case, this authority does not assist the Applicant.
- [17] In the present case, the Applicant was not a party cited as a defendant. The 2nd Respondent had taken a third party insurance policy in respect of the vehicle which was involved in the accident. The Applicant had at first instance retained solicitors to appear on behalf of the 2nd Respondent as well as the 3rd Respondent and had even proceeded to file a statement of defence.

- [18] The Solicitors who appeared at first withdrew and they were replaced by another firm of Solicitors who also withdrew after some time. A further notice of change of solicitors was made and that too was withdrawn. Therefore this was not an instance where the Applicant was not aware of the institution of the action. They had very much been involved in the proceedings up until the case was taken up for trial.
- [19] The Applicant had not availed itself of the possibility of seeking a declaration regarding their position, if as they contended that the policy was not applicable since there had been an alleged transfer of the ownership of the vehicle by the 2nd Respondent. They did not avail themselves of the provisions in Section 11(3) of the Motor Vehicles (Third Party) Insurance Act, 1948 where they could have obtained a declaration within three months of the institution of the action against the 2nd and 3rd Respondents.
- [20] Further, when the Applicant's claims officer, Mr. Naua, was subpoenaed by Court, he failed to appear in Court, which matter was set out in the judgment of the High Court.
- [21] It is seen therefore that the Applicant had not availed itself of the opportunity of asserting its position regarding the application of the policy in question and sought to address its mind only after the judgment was delivered and that too after receiving same from the Solicitors of the 1st Respondent.
- [22] The manner in which the Applicant has acted in the present case is certainly not one where they were not aware of their responsibility in the event that the Court were to hold that the 2nd Respondent was the owner of the vehicle. In such an event the policy was applicable and it had to indemnify the 2nd and 3rd Respondent who were held to be liable jointly and severally on the basis of vicarious liability.
- [23] In these circumstances I am not inclined to grant leave to the Applicant to be added as a party and the application to be added as a party is refused.

Application regarding leave to appeal out of time

[24] Since I have decided to refuse the Applicant leave to be added as a party the question of granting extension of time for leave to appeal does not arise.

[25] But, having read the affidavit of the Applicant regarding the reasons for the delay, which delay is substantial, I am not convinced with the reasons set out therein. The Applicant has not been diligent in dealing with the matter and has taken a long time to decide to appeal.

[26] The proposed grounds of appeal are:

- “1. *The learned Trial Judge erred in law and in fact in formulating and determining the issue of liability of the Second Respondent [1st Defendant] for vicarious liability for the negligent driving of the Third Respondent [2nd Defendant] on the fact of ownership of the vehicle registration number BW 132 [paragraph 70 of the Judgment] and failed to consider or to properly consider that:*
 - [i] any presumption of vicarious liability based on ownership was rebutted by the evidence that there was an unconditional sale of the truck by exchange;*
 - [ii] evidence that the Third Respondent [2nd Defendant] was in possession of the truck;*
 - [iii] the Second Respondent [1st Defendant] had parted with the possession of the truck;*
 - [iv] the absence of any evidence to show that the Third Respondent [2nd Defendant] was driving for any purpose of the Second Respondent [1st Defendant].*
2. *The learned Trial Judge’s finding that the Second Respondent [1st Defendant] was vicariously liable for the negligence of the Third Respondent [2nd Defendant] was otherwise contrary to the principles of vicarious liability in the absence of a master/servant or any agency relationship between the Second Respondent [1st Defendant] and Third Respondent [2nd Defendant].*

3. *The learned Trial Judge erred in law and in fact in finding that vicarious liability arose between the Second Respondent [1st Defendant] and Third Respondent [2nd Defendant] as the transfer, which had been given to the Third Respondent [2nd Defendant] by the Second Respondent [1st Defendant], had not been registered and the vehicle registration number BW 132 remained in the records of the Land Transport Authority in the name of the Second Respondent [1st Defendant] when registration was not conclusive as to ownership of the said vehicle.*
4. *The learned Trial Judge erred in law and in fact in failing to hold that the evidence established (in the absence of any rebuttal) that a sale had in fact been concluded without any reservation of passing of title in the vehicle registration number BW 132 to the Third Respondent [2nd Defendant] and that no issue of vicarious liability of the Second Respondent [1st Defendant] arose or could be found nor was there any other legal basis in view of the sale to ground liability against the Second Respondent [1st Defendant].*
5. *The learned Trial Judge failed to make any finding that the Third Respondent was driving with the permission or authority of the Second Respondent.”*

[27] The grounds of appeal urged by the Applicant are all relating to questions of fact which have been adequately dealt with by the learned High Court Judge in his judgment and have no merit.

[28] This application has caused serious prejudice to the 1st Respondent, who suffered serious injuries and who went through a period of almost 10 years to get the judgment in her favour. It has taken almost a further three years, and still she has not been able to reap the benefits of the judgment in her favour.

[29] In view of the above reasons, the application of the Applicant is refused.

Orders of Court:

(1) *The application of the Applicant/Appellant is refused;*

(2) *The Applicant/Appellant shall pay \$2500 as costs to the 1st Respondent within 14 days.*





Hon. Justice S. Chandra
RESIDENT JUSTICE OF APPEAL