

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

CIVIL APPEAL NO. ABU 136 of 2016
**(On appeal from the High Court of Fiji at
Lautoka in Civil action No. HBC 121 of 2013)**

BETWEEN : **PACIFIC VALLEY RENTALS LIMITED** *Appellant*

AND : **NEW INDIA ASSURANCE COMPANY LIMITED** *Respondent*

Coram : Basnayake JA
Lecamwasam JA
Guneratne JA

Counsel : Mr. A. K Narayan (Jnr.) for the Appellant
Mr. V. S. Sharma for the Respondent

Date of Hearing : 16 May 2018

Date of Judgment : 1 June 2018

JUDGMENT

Basnayake JA

[1] The appellant (plaintiff) is seeking in this appeal to have the judgment of the learned High Court Judge dated 25 November 2016 set aside. By this judgment the learned Judge

has ordered to strike out and dismiss the appellant's writ of summons and the statement of claim with costs.

The Facts

[2] The appellant filed this action against the respondent insurer on a motor vehicle insurance policy. The claim is based on an accident. As a result of the accident, the Plaintiff's vehicle was damaged beyond repair. The Plaintiff lodged a claim with the respondent. The respondent declined stating, inter alia, that the policy did not respond as the driver at the time of the accident did not have a valid driver's license.

[3] The appellant instituted the present action by way of a writ of summons to claim indemnity. The respondent contends that the appellant is not entitled to indemnity and that the policy is void and does not offer protection to the appellant inter alia that;

- The vehicle was registered with a private license and not as a rental vehicle;
- The appellant made false statements and lodged a fraudulent claim by giving a false name as driver;
- The appellant had failed to state that the driver was intoxicated and had fled the scene after the accident;
- The driver was not licensed to drive which was a breach of exclusion No. 3 of the policy.

[4] In reply the appellant stated inter alia that the cause of the accident was not due to the fact that the driver did not have a valid driver's license but due to road conditions. The appellant admitted that the driver of the vehicle did not possess a valid driver's license. There was no dispute with regard to the rest of the facts as well; namely, possession of a valid insurance policy and the loss.

Grounds of Appeal

- [5] (i) *The Learned Trial Judge erred in law and in fact by misapplying section 25 of the Law Reform Act and took into account irrelevant matters, such that his Lordship fell into the error of dismissing the Appellant's (Plaintiff's) submission that the Respondent (Defendant) was not entitled to rely on exclusionary clause number 3 (i.e. that the driver at the material time was unlicensed) to decline indemnity under the relevant policy of insurance.*
- (ii) *The Learned Trial Judge erred in law and in fact in holding that the Appellant (Plaintiff) was "caught up under exclusions 2(iii) and (iv) [of the policy] since the Appellant's (Plaintiff's) authorized driver PW3 failed to permit a specimen of blood or breath test to be taken after having been lawfully required to give such a specimen under the terms of the LTA Act 1998 or any statutory provision passed in substitution thereof and was under the influence of 'intoxicating liquor' when this was neither an issue to be determined nor a pleaded defense to the claim, and in view of the fact that there was no evidence to support the driver being 'under the influence of intoxicating liquor.'*
- (iii) *The Learned Trial Judge erred in law and in fact in holding that the cause of the accident was that the driver had been "driving the vehicle senselessly at a very excessive speed due to intoxication" and that "he was an unlicensed driver" when this was contrary to the Respondent's (Defendant's) own evidence, the evidence in totality led at Trial and in the absence of any evidence to the contrary to support such a finding.*
- (iv) *The Learned Trial Judge erred in law and in fact in dismissing the Appellant's (Plaintiff's) submission that the cause of the accident was the road condition at the material time and that the Defendant had failed to investigate and rebut the allegation thereof.*
- (v) *The Learned Trial Judge failed to properly and/or adequately evaluate all the evidence whereby His Lordship fell into the error of dismissing the Appellant's (Plaintiff's) submission that section 25 of the Insurance Law Reform Act disentitles the Respondent (Defendant) from declining indemnity under the policy on Exclusionary Clause No.3 therein (i.e. the driver at the material time being unlicensed).*
- (vi) *The Learned Trial Judge failed to consider or to give any or any sufficient weight and/or to provide any or any sufficient reasons for not dealing with and evaluating or not accepting the principles enunciated by the New Zealand Court of Appeal in **The New Zealand***

Insurance Company Ltd v Harris (1990) 6 ANZ Insurance Cases 60-952; [1990] 1 NZLR 10, such that his Lordship fell into the error of dismissing the Appellant's (Plaintiff's) submission that the Respondent (Defendant) was not entitled to decline indemnity under the policy on Exclusionary Clause No 3 therein (i.e. the driver at the material time being unlicensed).

- (vii) *The Learned Trial Judge failed to consider or to give any or any sufficient weight and/or to provide any or any sufficient reasons for not dealing with and evaluating or not accepting the principles enunciated by the Fiji Court of Appeal in Ashok Kumar v Sun Insurance Company Limited* [2005] FJCA 63; ABU 0072 of 2004S (11 November 2005) and the legal test for driving under the influence of intoxicating liquor, such that his Lordship fell into the error of holding that the driver at the material time was intoxicated and in breach of a policy condition.
- (viii) *The Learned Trial Judge erred in law and in fact by misapplying the principles enunciated in Tappoo Holdings Ltd v Stuchberry* [2006] FJSC 1; CBV003u.2005s (15 February 2006) to the evidence led at Trial, such that the said authority was distinguishable and otherwise irrelevant to the present action.
- (ix) *The Learned Trial Judge failed to properly and/or adequately direct himself on the shifting onus and standard of proof in relation to the Appellant's (Plaintiff) submission that section 25 of the Insurance Law Reform Act disentitles the Respondent (Defendant) from relying on Exclusionary Clause No. 3 (i.e. that the driver at the material time was unlicensed) such that his Lordship fell into the error of dismissing the Appellant's (Plaintiff's) said submissions and misapplying the law.*
- (x) *The Learned Trial Judge erred in law by identifying issues (such as intoxication driving under the influence, unlicensed driver, failing to give specimen of blood or breath test etc) in the absence of pleadings or relevance or evidence to the actual issues calling for determination being driving without a valid driver's license having already made findings of fact and having dismissed the other defences raised by the Respondent (Defendant)."*

[6] Although 10 grounds were urged, all those grounds revolve around section 25 of the Insurance Law Reform Act 1996 (ILRA).

Submissions of the learned counsel for the appellant

[7] The learned counsel submitted that the key issue is section 25 of the ILRA. He submitted that the cause of the accident was not the fact that the driver did not have a driver's license. He also submitted that section 25 precludes the respondent from relying on the exclusion clause that the driver did not have a driver's license. He relied on the judgment of State Insurance Ltd v Electronic Navigation Ltd (1992) 7 ANZ Insurance case 61-115. The learned counsel submitted that whether the driver was intoxicated or not was relied on to reject the claim of the appellant. The learned counsel also submitted that the driver was not found fault with for driving under the influence of liquor.

[8] State Insurance Limited v Electronic Navigation Limited (High Court of New Zealand) (1992) 7 ANZ Insurance Cases 61-115

In this case a van owned by the respondent (insured) and driven by an employee of the respondent was involved in an accident, in which the employee was found 90% at fault. The insurer of the van declined to indemnify the respondent because at the time of the accident the driver was not the holder of a driver's licence which was in full force and effect. The driver had been disqualified for a period of six months after a conviction which period would have expired two weeks after the accident. The driver was driving with the permission of the respondent, who was led to believe that the disqualification period had lapsed. The issue was whether the respondent (insured) had proved that the loss in respect of which it sought to be indemnified was not caused by the existence of the circumstances in the exception. The Judge held that the fact that the driver was not at the time of the accident the holder of a licence in full force and effect did not, on the facts of what occurred here, cause or contribute to the loss. The appellant's (insurer) appeal was dismissed and the respondent (insured) was entitled to be indemnified by the appellant.

[9] According to the above authority the onus is on the insured to prove that the loss in respect of which it seeks to be indemnified was not caused by the existence of the circumstances in the exception.

Section 25 of the Insurance Law Reform Act 1996

[10] “Certain exclusions forbidden

25. Where-

(a) the provisions of a contract of insurance the circumstances in which the insurer is bound to indemnify the insured against loss are so defined as to exclude or limit the liability of the insurer to indemnify the insured on the happening of certain events or on the existence of certain circumstances; and

(b) in the view of the court or arbitrator determining the claim of the insured the liability of the insurer has been so defined because of the happening of such events or the existence of such circumstances was in the view of the insurer likely to increase the risk of such loss occurring –

The insured shall not be disentitled to be indemnified by the insurer by reason only of such provisions of the contract of insurance if the insured proves on the balance of probability that the loss in respect of which the insured seeks to be indemnified was not caused or contributed to by the happening of such events or the existence of such circumstances.”(Emphasis Added)

Exclusion Clauses

[11] The exclusions clauses are as follows under the heading “WHAT YOU ARE NOT COVERED FOR (Exclusions) (pgs 315-318 at 317 of RHC) states:

You have no protection under this policy, at the time the loss or damage occurs, your vehicle (or any other vehicle this policy states it will cover):

“1). Use of Vehicle

Is being used for other purpose than stated in the proposal and policy. In case of commercial vehicles, use for private purpose is however allowed.

2). **Alcohol and Drugs**

(Being driven by any person who (i) and (ii) not reproduced.

iii) following an event giving rise to a claim under this Policy fails or refuses to permit a specimen of blood or breath test to be taken after having been lawfully required to give such specimen under the terms of the LTA Act 1998 or any Statutory provision passed in substitution thereof or (emphasis added).

(iv) is under the influence of intoxicating liquor or drugs.

3). Unlicensed Drivers

Is being driven by a person at the time of accident (Paragraphs (i) and (ii) are not reproduced as they are not relevant.

(iii) Who is not licensed to drive under the relevant Laws, By-Laws and regulations;

(iv) Who does not hold a valid and current driving license.

Judgment

[12] The learned Judge held that the ***“onus is on the Plaintiff (appellant) to prove both limbs of Section 25 of ILRA. Because, the Plaintiff shall not be disentitled to be indemnified by the Defendant only when the Plaintiff proves on the balance of probability that the loss in respect of which the insured seeks to be indemnified was not caused or contributed to by the happening of such events or the existence of such circumstances”*** (emphasis added).

[13] Here the question is whether the appellant discharged that burden. In order to discharge that burden evidence should have been adduced as to how the accident occurred. In order to reap the benefit of section 25 the appellant should have proved that the accident occurred not due to the fact that the driver was not in possession of a driver’s license and/or under the influence of intoxication. The learned counsel for the appellant submitted that intoxication was not an issue.

[14] To submit that intoxication was not an issue is a misleading statement. The judge has considered intoxication under a separate heading as, **“Issue of Intoxication”**. On perusal of the judgment it is apparent that paragraphs 93 to 116 have been devoted to consider the issue of intoxication. The learned Judge states in paragraph 93 that, *“The Plaintiff’s witness PW-3 who was driving the vehicle at the time of the accident clearly said that he had been drinking Kava for about an hour before he went to Night Club. Then he had gone to Night Club with few of his friends and has started “drinking” with two Indian girls. He said in cross-examinations that what he referred to “drinking” was drinking 5 glasses of unmarked beer within a period of 30 minutes before he was asked to drive the vehicle.”*

[15] In paragraph 96 the learned Judge states that, *“It is then as clear as day light that the Plaintiff is caught up under exclusions 2 (iii) and (iv) above since the Plaintiff’s authorized driver PW-3 failed to permit a specimen of blood or breath test to be taken after having been lawfully required to give such specimen under the terms of the LTA Act 1998 or any Statutory provision passed in substitution thereof and was under the influence of intoxicating liquor.*

[16] The most pertinent question is whether the appellant had discharged the onus as required by section 25 to its benefit. The appellant’s witness No. 3 was the driver of the vehicle that got damaged. He had given the cause of the accident as the slipperiness of the road. The appellant relied on this evidence. Was this evidence sufficient to discharge the onus required under section 25? It was this same witness who testified to having consumed alcohol and that he was drunk. Another admitted fact is that he was not in possession of a driver’s license.

[17] The learned counsel for the appellant submitted that the respondent did not plead that the driver was under intoxication. The learned Judge has reproduced paragraphs 6 and 9 of the statement of defense to disprove it. It was the appellant’s own witness who was the driver of this vehicle that testified (pgs. 229-244 RHC) that he had ‘kava’ and thereafter went to a club and consumed five glasses of beer within half an hour before taking the wheel. I reproduce un-contradicted evidence of this witness at page 243;
“VS. *So you were drunk Mr. Lalavanua when the accident occurred?*
PW 3. Yes”.

He further said that the distance that he had to drive was about 10 minutes. With him there were six persons in the vehicle. His speed was about 80-90 km per hour. At a bend he could not control the vehicle as the road was slippery and he lost control. He said he felt the vehicle which tumbled 3 times and rolled into the water. It was a Mitsubishi Pajero. He said he opened the doors and ran away and the police found him about three months later.

- [18] Could the learned Judge disregard the above un-contradicted evidence and hold the respondent liable for indemnity? The onus was clearly on the appellant if the appellant is to seek any benefit under section 25. I am of the view that the appellant has failed to discharge this burden. I am also of the view that the learned Judge has correctly used the evidence relating to intoxication.
- [19] With regard to the issue concerning intoxication I am of the view that the learned Judge was right in deciding in favour of the respondent for the reason that in order to come under section 25 the appellant should have proved that the exclusion clauses were not the cause of the accident. *“With regard to the exclusion clauses relating to the driver not having a driver’s license and the driver failing to subject himself for a blood test; The driver admits to having runaway after the accident. The police found him after three months.”* This is un-contradicted evidence of the appellant’s own witness. I am of the view that the evidence relating to exclusion clauses were properly used by the learned Judge.
- [20] As the appellant has failed to discharge the onus under section 25 the exclusion clauses stand and the respondent is able to rely on them.
- [21] The learned counsel for the appellant submitted that the learned Judge only relied on the exclusion clause relating to the driver not having a driver’s license. The learned Judge states as follows in paragraph 117. *“Therefore, on the forgoing reasons I decide that the Defendant had the absolute right to decline the Motor Vehicle Claim lodged by the Plaintiff based on the reasons mentioned in exhibit P-6 and as pleaded in its pleadings”*. P6 is at page 326 RHC. According to this document the claim was declined on the basis that the driver was not in possession of a valid driver’s license. However on perusal of the judgment it appears that the learned Judge had used two exclusion clauses, namely, clauses Nos. 2 and 3 (Those are the clauses relating to Alcohol and Drugs and Unlicensed Drivers) to decide this case and to strike out the writ of summons. Therefore I see no merit in the arguments of the learned counsel for the appellant.

[22] Therefore I am of the view that this appeal is without merit and is dismissed with costs in a sum of \$5000.00.

Lecamwasam JA

[23] I agree with the reasoning, conclusion and proposed orders of Basnayake JA.


Guneratne JA


[24] I agree with the judgment of Basnayake JA.


Orders of the Court are:

1. *Appeal dismissed.*
2. *Costs in a sum of \$5,000.00 payable to the respondent by the appellant.*




Hon. Mr. Justice E. Basnayake
JUSTICE OF APPEAL


Hon. Mr. Justice S. Lecamwasam
JUSTICE OF APPEAL


Hon. Mr. Justice Almeida Guneratne
JUSTICE OF APPEAL