

THE COURT OF APPEAL, FIJI
[ON APPEAL FROM THE HIGH COURT]

Civil Appeal No. ABU 044 of 2020
(HBM No. 003 of 2019)

BETWEEN : SUN INSURANCE COMPANY LIMITED

Appellant

AND : JAITUN BI

Respondent

Coram : Almeida Guneratne, JA

Counsel : Ms. L. Vaurasi for the Appellant

: Mr. A. Sen for the Respondent

Date of Hearing : 05 October 2020

Date of Ruling : 06 November 2020

RULING

[1] This is an out of time application for leave to appeal the judgment of the High Court dated 28th May, 2020 and for a stay of the order made by Court for costs in a sum of \$3,000.00 pending the final determination of the intended appeal.

[2] By that judgment the High Court made the following Orders:-

- a. *"The defendant's application for strikeout of this action sought by notice of motion filed on 14 January 2020 is dismissed.*
- b. *The defendant's application for a stay of this action sought by notice of motion filed on 14 January 2020 is refused.*
- c. *This action will continue as if begun by a writ of summons in terms of Order 28 Rule 9 of the High Court Rules. The plaintiff will file and serve on the defendant a writ of summons within 28 days of this ruling. The matter is to take its normal course after the filing of the writ.*
- d. *The registrar is directed to submit a report on the status of traffic case No. 234 of 2014 in the Magistrate Court of Savusavu.*
- e. *The defendant is directed to pay the plaintiff costs summarily assessed in a sum of \$3000 within 14 days of this ruling".*

Background to the present Application

- [3] The Plaintiff / Respondent above named (hereinafter referred to as the Respondent) instituted action under Section 11 of the Motor Vehicles (third Party) Insurance Act, Cap 177, by originating summons supported by the Respondent's Affidavit dated 2nd September, 2019.

Affidavit of Respondent

"2. **THAT** I was the plaintiff in Labasa High Court Civil Action No. HBC 40 of 2016 where judgment was entered for me.

3. **THE** defendants in the said action No. 40 of 2016 were Edward Bernet and Ragendra Prasad. Edward Bernet through his negligent driving of Ragendra Prasad's motor vehicle registration No. FA 745 (hereinafter referred to as the said vehicle) had collided with me on a pedestrian crossing in Savusavu and had caused me serious injuries.

4. **THAT** the defendant s in the High Court Civil Action did not defend their case in a timely manner and I entered default judgment against them.

5. **THE** defendants thereafter through their solicitors namely Samusamuvodre Sharma Law made application for setting aside of the default judgment. Their application was unsuccessful and the matter proceeded to assessment of damages.

6. **AT** the time of the accident, Ragendra Prasad in the said High Court Civil Action No. 40 of 2016 had a valid certificate policy of insurance from the defendant in this action being an approved insurance company a policy of insurance and a certificate of insurance was delivered under the provisions of Motor Vehicles (Third Party Insurance) Act.

7. **AT** the time of the accident, the certificate of insurance delivered to Ragendra Prasad was valid and the defendant herein was required to satisfy any judgment in respect of such liability as it was covered by the policy.

8. **THE** policy of insurance delivered by the defendant under the provisions of Motor Vehicles (Third Party Insurance) Act covered the liability of Ragendra Prasad.

9. **THE** decision on my assessment of damages was given by Master Bull on 13th March 2018 which were as follows:-

a) That the defendant do pay to Messrs Maqbool & Company on behalf of the plaintiff the full judgment sum and costs entered in plaintiffs favour on 13th March 2018 by the Lahasa High Court in Civil Action No. HBC 40 of 2016 which are as follows:-

(a) Special Damages:-	
b) Transportation and Medication	\$1,000.00
c) Past loss of earnings	\$1,800.00
d) Massage	\$ 500.00
e) Caregiver	\$1,760.00
f) Food	<u>\$ 50.00</u>
	<u>\$5,110.00</u>

i) **General Damages:-**

a. Pain and Suffering	\$37,000.00
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iii) Interest:

- a. For special damages:- 3% per annum, from the date of the accident (19 September 2014) to the date of Judgment (13 March 2018)
- b. For general damages:- 6% per annum from the date of service of writ (20 September 2016) to the date of assessment of damages (13 November 2017)

ii) Costs:

For the plaintiff in the sum of \$1,500.00.

(I annex hereto marked as annexure "A" a copy of the Judgment of the High Court).

10. **THE** said decision of Master Bull was never appealed by the defendants in the High Court Civil Action.

11. **THE** defendant in this action is required under Section 11 of the Motor Vehicles (Third Party Insurance) Act to satisfy the said judgment of the High Court under the provisions of the policy issues to Ragendra Prasad in respect of motor vehicle registration No. FA 745.

12. **MY** solicitors upon receipt of the decision of the Master of the High Court made various communications to the solicitors for the defendant and to the defendant.

a. **I** annex hereto marked as annexure B1 – B3 copies of the correspondence.

13. **THE** defendant is a large multinational corporation and is behaving in a reprehensible manner to deny the fruits of my judgment of the High Court.

14. **DURING** the course of the proceedings, the defendant and its solicitors had deployed various devious tactics to undermine my claim and delay the same as long as possible.

15. **THE** behavior of the defendant and its solicitors is an attempt to seriously undermine the judgment of the High Court and make me suffer with my injuries because I am reduced to a pauper and penniless.

16. **I** have been advised by my solicitors and do verily believe that the defendant in this action has displayed similar characteristics in many other cases and had outrightly refused to settle the claims through delay and deception.

17. **IT** is mandatory for the defendant to satisfy my judgment in accordance with the statutory requirements of Section 11 of the Motor Vehicles (third Party Insurance) Act and its outright disregard of the law in this country must attract indemnity costs.

18. **WHEREFORE** I humbly pray for the following respective reliefs:-

a) That the defendant do pay to Messrs Maqbool & Company on behalf of the plaintiff the full judgment sum and costs entered in plaintiffs favour on 13th March 2018 by the Labasa High Court in Civil Action No. HBC 40 of 2016 which are as follows:-

(a) Special Damages:-

a. Transportation and Medication	\$1,000.00
b. Past loss of earnings	\$1,800.00
c. Massage	\$ 500.00
d. Caregiver	\$1,760.00
e. Food	\$ 50.00
	<u>\$5,110.00</u>

(b) General Damages:-

a. Pain and Suffering	\$37,000.00
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(c) Interest:

a. For special damages:- 3% per annum, from the date of the accident (19 September 2014) to the date of Judgment (13 March 2018)

b. For general damages:- 6% per annum from the date of service of writ (20 September 2016) to the date of assessment of damages (13 November 2017)

c. Costs:

For the plaintiff in the sum of \$1,500.00".

- [4] The Defendant – Appellant (hereinafter referred to as the Appellant) filled an application to strike out the Respondent’s claim as per the Appellant Company’s Assistant Claims Manager, Binay Dutt’s affidavit dated 18th November 2019.

Affidavit of Binay Dutt

“4. The Plaintiff's proceedings has been commenced contrary to the High Court rules and ought to be struck out with costs. The action ought to have been commenced by using a Writ of Summons. The same has already been decided by the High Court Judge Justice Seneviratne in Civil Action NO. HBM 06 of 2018, the previous action relating to the same parties.

5. I admit paragraphs 1 and 2 of the said affidavit.

6. I refer to paragraphs 3 to 5 and say that the Defendant was not a party to the action. The Defendant was made aware through its research and inquiries into the matter. I believe the judgment obtained was in default of the appearance of the defendant in Civil Action No. HBM 05 of 2018.

7. I refer to paragraph 6 of the said affidavit and say that the said Rajendra Prasad (insured) had a Third Party Insurance Policy No. Z763860 which was valid from 9th November 2013 to 9th November 2014. A copy of the Renewal Certificate and Sample Policy document are annexed and marked with letters 'B' and 'C' respectively. The original Policy is with the insured, Rajendra Prasad which was tendered to him at the time of renewal.

8. All the Defendant's Third Party Policies have the same terms and conditions as the sample annexed hereto.

9. I deny paragraphs 7 and 8 of the said affidavit and say that whilst the insurance policy is valid, the Insured or any driver of the said Vehicle Registration Number FA 745 needed to abide by the conditions of the said Policy.

10. I refer to paragraph 9 of the said affidavit and say that the Defendant is aware that there is a judgment by Master Bull assessing damages claimed by the Plaintiff against the owner and driver of Motor Vehicle Registration No. FA 745.

11. I refer to paragraph 10 of the said affidavit and say that the Defendant is unaware whether the matter was appealed or not.

12. I deny paragraph 11 of the said affidavit and say the Defendant is obliged to satisfy the judgment should the Policy be valid and the terms and conditions of the policy is abided by and complied with.

13. I deny paragraphs 12 to 17 of the said affidavit and say that the driver of FA745, Edward Bernet at the material time was under the influence of intoxicating liquor and has been charged of 2 counts.

First Count

DRIVING A MOTOR VEHICLE WHILST THERE WAS A PRESENT IN THE BLOOD A CONCENTRATION OF ALCOHOL IN EXCESS OF THE PRESCRIBED LIMIT:- Contrary to section 102(1)(a) and 114 of Land Transport Act 35 of 1998.

Particulars of Offence

Edward Bernet on the 19th day of September, 2014 at Savusavu in the Northern Division drove a Motor Vehicle registration number FA745 along Lesiaceva Road, Savusavu Town whilst there was present in 100 milliliters of his blood a concentration of 191.4 milligrams of alcohol which was in excess of prescribed limit namely 90 milligrams of alcohol per 100 milliliters of blood.

Second Count

DANGEROUS DRIVING *Contrary to Section 98(1) and 114 of Land Transport Act 35 of 1998.*

Particulars of Offence

Edward Bernet on the 19th day of September, 2014 at Savusavu in the Northern Division drove a Motor Vehicle registration number FA745 along Lesiaceva Road, Savusavu Town in manner which was dangerous to the public have regards in all circumstances of the case.

A copy of the charge sheet is annexed hereto marked with Letter 'D'.

14. *The Police testing on the day of the accident confirmed that the driver, Edward Bernet was intoxicated.*

15. *The said Edward Bernet is defending the charges and the charges have still not been heard. In the said circumstances this action ought to be stayed pending the judgment in the Magistrates Court as the findings are absolutely crucial to*

this case. The defendant is unable to tender the police findings in relation to the alcohol testing as it is statutorily impeded by Regulations 9(2) of Land Transport (Breath tests and Analyses) Regulations 2000 which reads as follows: "The fact that a person has undergone a breath test or submitted to a breath analysis and the results of a breath test or breath analysis are not for the purpose of any contract of insurance, admissible as evidence of the fact that the person was at any time under the influence of a or affected by alcohol or incapable of driving or of exercising effective control over a motor vehicle, but nothing in this regulation precludes the admission of any other evidence, including evidence of a conviction under Section 102(1) or 105(1) of the act to show any such fact" and must rely on the judgment in the traffic case.

16. The Police questioned Edward Bernet, the Driver on the 29th September 2014 and he admitted to drinking 5 to 6 bottles of Fiji Gold Beer alone. The driver admitted driving the vehicle after drinking the said beer and breaking the law. Copy of the Police caution interview is annexed hereto marked "E".

17. The said Insurance Policy had conditions, one of which read:-

CONDITIONS

- 2. The person insured shall not use the motor vehicle nor shall the owner permit or suffer any person to use such motor vehicle ---*
 - a)*
 - b)*
 - c)*
 - d) whilst any such person as aforesaid*
 - i) is under the influence of intoxicating liquor or*

As the insured's driver was intoxicated at the time of the accident the condition of the policy was breached. The Defendant is entitled to be exempted from Third Party liability.

18. The Plaintiff is not entitled to be paid by the Defendant and should instead seek payment from the insured and his driver.

19. I therefore pray that this action be struck out with indemnity costs to be paid to the Defendant by the Plaintiff. Further as the facts of the case are disputed, and the High Court has already ruled that the action ought to be commenced by way of a Statement of Claim¹⁵.

- [5] After hearing, the learned High Court Judge delivered the impugned judgment referred to at paragraph [2] above against which the Appellant has sought leave to appeal notwithstanding the lapse of time for appealing urging the following grounds of appeal,

Notice and Proposed Grounds of Appeal urged against the Judgment of the High Court and the reliefs prayed for

- [6] The Appellant sought to have the said judgment set aside and/or revised and/or varied in the first instance and sought the following orders in lieu of the same:-

“(a) That the Labasa High Court Miscellaneous Action No. HBM 3 of 2019 be stayed either conditionally or unconditionally pending the final determination of the Savusavu Magistrate Court Traffic Case o. 234 of 2014.

(b) That the Respondent/Plaintiff be directed to pay costs of the High Court judgment delivered on 28th May 2020 to the Appellant/Defendant in the sum of \$1,500.00.

(c) That the Respondent be ordered to pay costs of this Appeal in the sum of \$3,000.00.

AND FOR A FURTHER ORDER *that the costs of the appeal be paid by the Respondent to the Appellant AND FOR SUCH FURTHER ORDERS as the Court of Appeal deems just.*

AND TAKE FURTHER NOTICE that the grounds of Appeal are:-

1. *THE Learned Judge erred in law and in fact in granting costs against the Appellanti in the sum of \$3,000.00, which in all the circumstances was excessive.*
2. *THE Learned Judge erred in law and in fact in not holding that the filling of the Originating Summons by the Respondent was an abuse of process nor penalized the Respondent as to costs.*
3. *THE learned Judge erred in law and in fact in granting costs to the Respondent when the whole of the Ruling followed the Appellant Submissions and did not adhere to the Respondent's Submissions at all.*
4. *THE Learned Judge erred in law and in fact in not granting stay to the High Court Miscellaneous Action No. HBM 3 of 2019 either conditionally or unconditionally when the Learned Judge himself held that any traffic conviction could be led in evidence.*
5. *THE Appellant reserves the right to alter or add further grounds of appeal on the availability of the copy record".*

Consideration of the submissions made by Counsel on the several issues arising in relation to the judgment of the High Court

- [7] I shall consider first the Appellant's contention as to the procedure adopted by the Respondent and then the Respondent's counter based on Order 5 of the High Court before I look at the response of the learned High Court Judge.

Procedure followed by the Respondent

- [8] (Ms.) Vaurasi for the Appellant submitted that, proceedings having been invoked by originating summons, the claim being one pertaining to negligence and for damages, the matter could not have been commenced by originating summons but ought to have been by way of Writ.

[9] In counter, (Mr.) Sen for the Respondent, adverting to Order 5 of the High Court Act and Rules (Cap 13A), submitted that, the Summons could be converted to a Writ.

[10] On that issue, the learned High Court Judge responded thus:

18. Order 5 of the High Court Rules 1988 deals with the mode of beginning civil proceedings. Rules 2, 3 & 4 respectively set out the proceedings which must be begun by writ, originating summons or either by writ or originating summons. Rule 4 (1) & (2) is relevant and is reproduced below:

(1) "Except in the case of proceedings which by these rules or by or under any Act are required to be begun by writ or originating summons or are required or authorised to be begun by petition, proceedings may be begun either by writ or by originating summons as the plaintiff considers appropriate".

(2) "Proceedings-

(a) in which the sole or principal question at issue is, or is likely to be, one of the construction of an Act or of any instrument made under an Act, or of any deed, will, contract or other document, or some other question of law or

(b) in which there is unlikely to be any substantial dispute of fact, are appropriate to be begun by original summons unless the plaintiff intends in those proceedings to apply for judgment under Order 14 or Order 86 or for any other reason considers the proceedings more appropriate to be begun by writ."

19. Halsbury's Laws of England 4th ed. vol. 37 at paragraph 559 states:-

"Where it appears to the court at any stage of proceedings begun by originating summons that they should for any reason be continued, as if begun by writ, it may order proceedings to continue as if so begun, even if the cause or matter in question could not in fact have been begun by writ."

[11] While I endorse His Lordship's analysis of the statutory provisions on that issue, I shall hold back my final assessment thereon which I shall express in my determination.

The impact of the High Court decision on the previous action bearing number HBM 5 of 2018

[12] Linked as it were to the previous issue and/or as an adjunct thereto, (Ms.) Vaurasi relied on a previous action hearing number HBM 5 of 2018 wherein the High Court had dismissed the Respondent's action to recover damages awarded in Civil Action number 40/2016 on the ground that the originating summons (as to the form prescribed in the High Court Act: form 5) and the other impacting rules of the Act. (Order 5 Rule 2, Order 7 Rule 2, Order 6 Rules 1 and 2) had not been complied with. In that decision the High Court had also considered the impact of the Land Transport Act and the Land Transport (Breath Test and Analysis) Regulation of 2000.

[13] As against (Ms.) Vaurasi's contention, (Mr.) Sen submitted that, while the Appellant's grievance is the wrong reference to 'form 5', letters from the Appellant Insurance Company showed the nature of the claim and the cause for it of which the Appellant company had knowledge of and therefore no evidence was required to be adduced thereon. Thus, the Respondent's said claim was justified in the context of the provisions of Order 5 of the High Court Act and Rules.

[14] The learned High Court Judge having given his mind to that issue under consideration had initially opined thus:

"10.Regulation 9 (2) states: "The fact that a person has undergone a breath test or submitted to a breath analysis and a result of a breath test or breath analysis are not, for the purposes of any contract of insurance, admissible as evidence of the fact that the person was at any time under the influence of or affected by alcohol or incapable of driving or of exercising effective control over a motor vehicle, but nothing in this regulation precludes the admission of any other evidence, including evidence of a conviction under section 102(1), 103(1) or 105(1) of the Act to show any such fact".

11. It seems clear, therefore, that notwithstanding regulation 9 (2), the defendant would not be precluded from leading evidence of the fact of intoxication. A simple

instance of this would be an admission of intoxication before the Magistrate by the driver of the vehicle. Such an admission, and any resulting conviction, may be led in evidence in resisting payment under an insurance policy. Regulation 9 (2) only renders inadmissible evidence relating to the use of the breath test and its analysis.

16. In my view, with respect, the ratio of Sun Insurance v Chandra in contradistinction to the decision in Q.B.E Insurance v Prasad expresses the correct position of the law. For these reasons, I am satisfied that the defendant is entitled to rely upon the evidence related to intoxication in the proceeding against the driver in the Savusavu Magistrate Court. But, I am not convinced that a stay of this action is necessitated by the pendency of the Magistrate Court proceeding. This action could proceed, with suitable directives to the Magistrate Court to expedite its proceeding against the driver.”

[15] Having opined thus, in his conclusion the learned Judge held as follows:-

20. I have already opined that evidence of intoxication before the Magistrate Court of Savusavu could be relevant in this action. Therefore, the plaintiff would have been better advised to have begun this action by writ; it is a possibility though that the plaintiff was unaware of the Magistrate Court proceeding against the driver at the time of instituting this action. In these circumstances, Order 28 Rule 9 of the High Court Rules 1988 becomes operative.

21. Order 28 Rule 9 states inter alia:

(1) Where, in the case of a cause or matter begun by originating summons, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.

(2) Where the court decides to make such an order, Order 25, rules 2 to 7, shall with the omission of so much of rule 7(1) as requires parties to serve a notice specifying the orders and direction which they require and with any other necessary modifications, apply as if there had been a summons for directions in the proceedings and that order were one of the orders to be made thereon.

(3) This rule applies notwithstanding that the cause or matter in question could not have been begun by writ.

22. The court is vested with the discretion to continue the action as if it was begun by a writ, and, accordingly, I will make order to proceed after the filing of pleadings as in the case of a writ, as such a course seems to be proper in the circumstances of this case. In making such an order, I am fortified by several decisions including Prasad Ltd v Quest Apartment Hotels (NZ) Ltd[5], Dharam Singh and others v Hardayal Singh and others[6] and Reserve Bank of Fiji v Gallagher[7]. The defendant's notice of motion filed on 14 January 2020 is dismissed with costs."

- [16] I pause here to make some interim observations before I proceed to make my determination and orders.
- [17] To begin with I agree with (Ms.) Vaurasi's lament that there is an apparent inconsistency with what the learned Judge had initially opined as recapped above at paragraph [14] and what he concluded thereafter which I have reproduced in paragraph [15] above.
- [18] I had regard to what His Lordship said at paragraphs 20 to 21 of his Ruling as well in that context.
- [19] I also took note of (Ms.) Vaurasi's argument that, in view of what the learned Judge himself had opined at paragraph 10 of his ruling, (awaiting a Report on

the intoxication allegation against the driver of the vehicle involved) whether that was not sufficient to have granted a stay.

[20] In those circumstances, was the awarding of costs against the Appellant Justified?

[21] I found both those questions to be relevant and reasonable.

[22] Furthermore, as (Ms.) Vaurasi contended, the law allows the “breathalyser test” to come in and a conviction by the Magistrate’s Court as well in consequence, in order to visit liability on a third party insurance claim against the insurer having regard to the terms of standard form contracts on Motor Insurance which was applicable to the instant case.

The Issue on the present application for leave to appeal and extension of time to appeal and reasonable prospects of success should leave be granted to appeal

[23] This is the final issue I was obliged to address.

[24] The Appellant conceded that it was out of time. By “one day” it was said but what is material to be looked into was whether there is a reasonable prospect of success in appeal should leave be granted.

[25] In that regard (Mr.) Sen in his characteristic style argued that, the most important (if not decisive) criterion of “prospects of success on appeal” has not been addressed by the Appellant.

[26] I have earlier re-capped the grounds of appeal. A number of grounds have been urged therein.

[27] But the matter at hand in this application is if the said grounds are to be sustained, it would depend on a future date after evidence is lead at a trial.

[28] Although (Mr.) Sen (as recapped by me at paragraph [13] above) suggested otherwise, he questioned the objective behind the Appellant's present application. "What was the Appellant's present application venturing for?" he asked. "Isn't the appellant asking for a trial which the Judge (High Court) has in fact given?"

[29] I felt inclined to agree with (Mr.) Sen. It stands to both reason and logic.

Overall Assessment and Determination

[30] In the overall conspectus of the matter the impugned judgment of the High Court in the circumstances of the instant case may be construed as:

"...having regard to the provisions of the High Court Act an action commenced by way of originating summons may be continued by way of writ of summons. (Vide: Order (c) of the High Court)"

[31] I affirm the said order subject to necessary modifications as to time lines stated therein.

[32] Thus, the Appellant being vindicated to that extent I do not think the Appellant ought to have been liable to pay any costs. Accordingly, I make order striking off Order (e) of the High Court Judgment acting in terms of Section 20(1) (k) of the Court of Appeal Act.

[33] Orders (a), (b), (c) and (d) of the High Court Judgment are affirmed.

[34] On the basis of the aforesaid reasons I proceed to make my orders as follows:

Orders of Court:

1. *The Appellant's application for leave to appeal the Judgment of the High Court dated 28th May, 2020 is refused and accordingly dismissed.*
2. *Order 1, above is however subject to what I have stated at paragraph [32] above, that is, Order (e) of the High Court Judgment is struck out.*
3. *The Respondent (Plaintiff) shall file and serve on the Appellant (Defendant) a Writ of Summons within 28 days of this Ruling and take steps to proceed with the Action (if this has not been done already as ordered by Order (c) of the High Court Judgment).*
4. *There shall be no order as to Costs of this application.*



Justice G. G. Gunaratne

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Almeida Guneratne
JUSTICE OF APPEAL