

IN THE HIGH COURT OF FIJI
AT LABASA



CIVIL JURISDICTION

Civil Action No. HBC 018 of 2005

Between: VUNIMOLI SAWMILL LIMITED
Plaintiff

And : LABOUR OFFICER for and on behalf of Abdul Khan f/n Pooran Singh
1st Defendant

And : DOMINION INSURANCE COMPANY LIMITED
2nd Defendant

Before: Master Udit

**Counsel: Mr S. Shah for the Plaintiff
Mr H. Rabuku for the 1st defendant
No Appearance for the 2nd defendant**

Date of Hearing: 14th June & 6th July, 2006
Date of Decision: 22nd December, 2006

DECISION

Introduction

[1] I have before me an interlocutory application by the Labour Officer for and on behalf of Abdul Khan f/n Pooran Singh of Labasa, seeking a payment-out of all the funds deposited in Court pursuant to an order.

Historical Background

- [2] Before embarking on to the merits of this application, it is important to transgress into the history relating to this suit. This is a desolate case of suffering by a workman. Late Abdul Khan was an employee of **Vunimoli Sawmill Limited**. He was injured during and in the course of employment; *Section 5 of the Workmen's Compensation Act (Cap 94) (the Act)*. As a result of the injury, the workman lost one of his legs below the knee. The workman is a brother of the managing director and shareholder of the private company. One would have thought that this close relationship would have been a catalyst for a quick and an amicable resolution of the claim. It was too true to be. Conversely, the action has stretched for almost a decade in the judicial system and Labour ministry's bureaucratic machinery. The employer not only failed but tenaciously opposed paying any compensation. If anything, the delay took its toll as the workman passed away before receiving any compensation. The injury had to be reported to Ministry of Labour by the workman. After necessary investigation, the ministry concluded that the workman was eligible for compensation under the Act. A notice was issued to the employer for compensation. An emphatic denial of liability was the response to the notice.
- [3] This resulted in commencement of a workmen's compensation lawsuit at the Labasa Magistrates' Court; *WCC Action No. 2/1994*. A judgment for a sum of \$13,500-00 was given in favour of the workman. Then, he was alive. For avoidance of any doubt, the judgment was delivered after a trial, in which the plaintiff company (*respondent in that action*) actively participated. However, the *Dominion Insurance Company*, (*which was for most part inactive*), appealed the decision after it was unsuccessful in having the judgement against it for indemnification set aside. Eventually, the judgement

was overturned by the High Court on a technicality. After some delay, a fresh action was filed on behalf of the workman by the Labour Office. This was action No. 1/2002. This latter action was scheduled for hearing in the Magistrate's Court on the 3rd of June 2004.

- [4] Instead of a trial, a judgment by consent was entered in favour of the workman against the employer *as opposed to the insurance company*. It was for a sum of \$13,500-00. When the consent judgment was entered, the employer was represented by a solicitor, *Mr. Mohammed Rafiq* of Kohli Singh & Associates. Twenty eight days was given to the plaintiff to pay the judgement sum.
- [5] In spite of the consent judgment, the employer failed to pay. The Labour officer proceeded to execute the judgment by winding-up the company. To resist the execution, the plaintiff instituted this action against the Labour officer as well as the Dominion Insurance Company Limited.

Originating Summons

- [6] It is important for me to discuss the originating summons at some length. The initial originating summons filed on 17th of May 2005 was against the Labour officer as well as the Dominion Insurance Company. The relief *inter alia* sought were as follows:

- i) *for an order that the statutory demand under section 221 of the Companies Act issued by or on behalf of the Labour Officer of the 1st Defendant and all further proceedings in respect thereof or enforcement of judgment dated 3rd June 2004 be stayed.*

- ii) *For declaration that the plaintiff is entitled to be indemnified by Dominion Insurance Company Limited in respect of whole sum and costs under judgment dated 3 June 2004 and the plaintiff's costs.*
- iii) *For an order that the plaintiff's claim for set-off be determined by this court and/or by Magistrates' Court Labasa*
- iv) *costs.*

[7] As to paragraph 3 of the relief, it is alleged by the company that it had advanced Abdul Khan \$10,000 as part of any compensation which he in future may be entitled to or receive under the Act. This sum was to be setoff from the anticipatory compensation; (see para 6 of affidavit of Bashir Kahn filed on 17th may, 2005). For the matter of record, I note that issue is mentioned for the first time. I may add further that when the judgment by consent was entered in the Magistrate's Court, there was no reference at all of any such payment made in advance. Let alone, it be deducted from any future award, which he had continuously opposed. In any event, had it been the case the consent judgment ought to have reflected this.

[8] Subsequently, on 1st December 2005, the originating summons was amended in which the relief sought was substantively varied. The amended relief sought was as follows:-

- i) *For an order the Dominion Insurance Company Limited do forthwith pay to the plaintiff \$15,000 to indemnify the plaintiff under Workmen's Compensation Insurance Policy Number 314958WCA003 in respect of judgment or orders made against the plaintiff.*
- ii) *The Dominion Insurance Company Limited do pay \$5,750 - 00 costs incurred by the plaintiff.*

There was no supporting affidavit filed with the amended summons.

[9] I pause here to stress, that the relief in relation to the alleged funds advanced to the workman was excluded. The entire action and the ensuing relief are directed solely against *Dominion Insurance Company Limited* pursuant to insurance policy number 314958WCA003.

[10] A little later, in February this year, the originating summons there re-amendment. From the court record, which is also confirmed by the counsel, this is the final amendment intended for adjudication by court. In this latest amendment the relief *inter alia* sought are:-

- i) *For an order that the defendant Dominion Insurance Company Limited indemnify the plaintiff to fully satisfy judgment entered against the plaintiff in Workmen Compensation Claim No. 2 of 2002 on 21 September 2004 for \$12,000.00 and costs and interest as claimed in that action.*
- ii) *Alternatively the defendant Dominion Insurance Company Limited be ordered to pay the plaintiff \$12,000.00 being judgment amount and costs and interest.*
- iii) *That the defendant Dominion Insurance Company limited pays costs incurred by the plaintiff in the sum of \$6,700.50.*

[11] Once again, the relief against the Labour Officer for and on behalf of the workman was omitted or for the want of a better terminology; **abandoned**. Obliterated from the relief sought is also the alleged advance of \$10,000.00. To the contrary in paragraph (ii), which is in the alternative, the plaintiff is seeking an order against the insurance company to pay the

judgment sum. *Why is he now seeking this order, when as alleged he has already paid \$10,000-00?*

- [12] Perhaps, it may be fitting at this juncture, to reiterate that the plaintiff had dissented payment of any compensation to the workman. As the result, recover action in court was resorted to. Needless, to mention it took 2 years from its commencement to finalisation. In light of the wretched history of the subject matter of this action, a belated assertion of an advance payment of \$10,000.00 is manifestly intriguing.

Depositing of the Money in the Court

- [13] The aforesaid judgment sum was deposited in this court, pursuant to an order, primarily to stay any further proceedings or execution of the judgment one of which was the winding-up of the company. This order for payment into court was made by His Lordship, Mr. Justice Jitoko. An *Ex-tempore ruling* was delivered by His Lordship on 12 November 2005. I will refer to this later in my decision. His Lordship ordered that a sum of \$13,500.00 be paid into court within 14 days of the delivery of the decision. Actually, the said sum was paid into court which in turn has stayed execution.
- [14] Subsequently, there was an application by the Labour Officer for the release of the said funds. On 23rd February 2006, His Lordship Mr. Justice Coventry ordered an interim payment as follows:-

- i) *\$4,000 to be paid out of court to Labour Officer for the beneficiaries for costs of payments to be agreed by a magistrate.*

ii) \$1,500 to be paid to the Labour Officer for costs. He then adjourned the matter to 27 March 2006 at 9.30 a.m. to consider the application by Mr. Rabuku in relation to release of the entire funds.

[15] Ultimately, after a couple of adjournments the application was listed before me. Mr Rabuku has continuously been seeking an order that the balance sum deposited in court be paid-out to the Labour officer so that it is distributed in accordance with the Act to the widow and issues of deceased workman.

Submissions of the parties

[16] Mr Rabuku submitted that the amended originating summons that does not disclose any cause of action nor any specific relief against the Labour officer. That being the case, there is no basis for holding the money in court.

[17] On the other hand, Mr Shah, on behalf of the defendant submitted that the money ought not to be paid out until determination of this action. The solitary ground advanced was that in the event if the plaintiff succeeds, it will not be able to recover the money from the workman's family. No basis for the purported success was submitted. However, Mr Shah when faced with the pleading and the facts conceded that the present action was exclusively between the plaintiff as the insured and the insurance company as the insured pursuant to an insurance policy. Therefore, the plaintiff's liability under the judgement remained unaffected.

Consideration of the Issues

- [18] Having carefully considered all the surrounding facts and submissions of the counsel, in my view the issue pertaining to the release of funds can be dealt with in two different ways. The first is a pertinent one, which is to look at the cause of action against the Labour Officer as pleaded in the originating summons. Secondly, to look at the principles upon which a stay of execution or proceeding is granted. I will now proceed to consider these issues.

Is there a cause of action against the Labour Officer?

- [19] I have at length dealt with the chequered history of this compensation claim, including the fundamental successive amendments. As already stated, after the final amendment of the originating summons, the plaintiff seeks no relief or remedy against the Labour Officer for and on behalf of the workman. In fact, as the case turned out, the relief sought is directed solely against the Insurance Company under an insurance policy. It is an action between the plaintiff and Insurance Company ~~in respect of the exclusion of the Labour officer or workman.~~ I will add to the exclusion, the mysterious \$10,000-00. *What is the eventual effect of this?*
- [20] Firstly, the general principles governing the effect of amendment of pleadings was comprehensively discussed by **Lord Justice Hudson in Warner –v– Sampson [1959] 1 Q B 297 at 321** as follows:-

*“Once pleadings are amended what **stood before amendment is no longer material before the court and no longer defines the issues to be tried.**”*

(emphasis added)

Ordinarily, an amendment should be allowed to ensure the determination of real questions in controversy between the parties. Thus applying this rationale the last amended originating summons (*filed on 21 February 2006*) is the one which is before this court for determination.

[21] Mr. Rabuku submitted that post amendment the plaintiff is seeking no relief against the Labour Officer or workman. He stressed that the residual effect is that there is no reasonable cause of action against the Labour Officer or workman. Mr. Shah also conceded that the dispute is now between the insured and insurer. Neither the Labour officer nor the workman has anything to do with it. I concur with Mr. Shah's candid and pragmatic concession.

[22] But the Labour officer is still a party to this proceeding. There is a material amendment to the originating summons. The ultimate effect of the amendment is that there is no issue for determination between the Labour Officer and the plaintiff company in this action. Even though the Labour Officer had remained a party to this proceedings in so far as the pleadings is concerned, the relief sought is entirely against the insurance company for indemnification. Be that as it may, since there is no cause of action, in particular against the Labour Officer, the money deposited in court should rightfully be paid out to the workman through the Labour Officer. I see no merit in holding this money on this ground alone. However, if I am wrong in my conclusion there are other justifiable reasons why the money must be paid out.,

[23] Secondly, there is no dispute that the plaintiff's liability to the workman was by virtue of the Act. Bashir Khan *in paragraph 4* of his affidavit, admits "***that the said Abdul Khan was injured in the course of his employment with the plaintiff***". That case was concluded by a consent judgment. The order was:-

"...IT'S ORDERED that the Respondent do pay to the applicant within 28 days:-

- (1) the sum of \$12,000.00 being the amount now due in respect of the liability established against the Respondent under the Workmen's Compensation Act (Cap 94) and*
- (2) Costs of this application summarily assessed at \$1,500.00".*

(emphasis added)

[24] The general rule is a judgment by consent once passed and entered cannot *ex post facto* be set aside, even if it was entered by mistake; **Ainsworth -v- Wilding [1896] 1 Ch 673**. Further neither an appeal nor a fresh action was filed to set aside the consent judgement. Consequently, the consent judgment stands. The plaintiff is now estopped from litigating issues pertaining to the judgment of the magistrate's Court.

[25] Thirdly, when the consent judgment was entered, the plaintiff did not seek a counter-claim or a set-off for the \$10,000.00. This post judgment allegation is much to be desired because the plaintiff has always denied paying any money. Patiently waiting for compensation, the injured workman who lost a leg below the knee passed away. One wonders when and to whom was the money paid? The widow of the deceased workman filed an affidavit in the magistrates court (*civil action No 5/2002*) which is annexed to the affidavit of Malakai Rakoti filed on 24 August 2005. She vehemently denies any such payment. In any event, such payment should have been made with the necessary sanction of the Permanent Secretary for Labour; *S 16 of the Act*. No such evidence was adduced.

[26] Fourthly, and of most importance is the plaintiff voluntarily admitted liability and unconditionally entered judgment against it and not Dominion Insurance Company Limited. The order itself made no reference to the insurance company or indemnification. No question of indemnification arises. In so far as the compensation is concerned, the late workman's beneficiaries are entitled to the fruits of the judgment.

[27] Finally, even if credence was to be given to the plaintiff's version of the claim, it is arguable whether the workman or his family can be denied the fruits of the judgment in *WCC No. 1/2002*. Any such claim must be instituted and proved in court. Without a judgment, it remains no more than a mere allegation. For that the originating summons is an inappropriate procedure. There is also a difficulty with the jurisdiction. Since the alleged advance is less than \$15,000-00, it must be commenced in the Magistrate's Court. Yet, there is another inherent difficulty with any such action. The money was allegedly advanced to the workman, who is now deceased. No action for money lent and advanced can be instituted against him by virtue of *Section 2 (1) of the Law Reform (Miscellaneous) (Death and Interests) Act (Cap 25)*. Any such action only survives against the estate, as opposed to the deceased person. There is no evidence before the court of any such action either in contemplation or instituted.

[28] For the foregoing reasons, I have reached a conclusion that the plaintiff has no reasonable cause of action, or even an arguable one to resist payment out of all monies to the Labour Officer to be paid out to the workman's family in accordance with the Act.

What is the purpose of this proceeding in so far it relates to money?

[29] The sole purpose was to withhold payment of the money to the

Labour Officer, primarily to deny the fruits of the judgments to the rightful recipients. Technically, it was a stay of execution of judgment pending the *outcome of this action*. To that His Lordship, Mr. Justice Jitoko on 22nd November, 2005 *held* that:-

“There are no legal grounds to support a stay of the winding-up proceedings which the company seeks in winding-up case No. 1/2005 or the plaintiff in his originating summons in C/A 18/2005”.

(emphasis added)

- [30] His Lordship also *held* that, *“...the plaintiff’s application in civil action No. 18/2005 through an originating summons to stay the enforcement of judgment through winding-up process is to abuse the court process”*. Not only that, His Lordship also categorically decided that the indemnification by insurance company does not diminish the plaintiff company’s liability and obligation under the judgment. Leave was granted to the plaintiff to amend the summons to pursue proceedings against the insurance company only. This necessarily implied that the action against the Labour Officer was to be abandoned or discontinued.
- [31] Following, His Lordship’s decision, the originating summons was amended, by eliminating any relief against the Labour Officer. Despite Justice Jitoko’s order, Labour Officer has still remained as a party when in fact the action against him should have been terminated.
- [32] I concur with His Lordships findings in respect of the stay. No fresh evidence was adduced by the plaintiff for me to consider the issue of stay *de novo*. The principles for granting of stay are well settled. I do not intend to regurgitate them. The discretion should not lightly be invoked to deny the

fruits of the judgment. *Sir W. Page Wood LJ in Walford –v- Walford [1863] 3 L R Ch App 812* at 814 aptly said:-

“The usual course is to stay proceedings pending an appeal only when proceedings would cause irreparable injury to the appellant. Mere inconvenience and annoyance is not enough to induce the court to take away from the successful party the benefit of his decree”

(emphasis added)

[33] To this I will add the remarks of Cotton LJ in *Polini –v- Gray [1876] 12 Ch.D 438* at 446, where he respectfully observed:-

“This jurisdiction (‘to suspend the right of the party, who has so far as the litigation has gone, has established his rights’) ought, no doubt to be very carefully exercised and so as not to encourage any one to present an appeal for the mere purpose of delay”

(emphasis added)

[34] This action is a disguised form of an appeal against the consent judgment. In the words of *Sir W. Page Wood LJ*, it is instituted for ‘*inconvenience and annoyance*’. Or in *Cotton’s LJ* description for ‘*the mere purpose of delay*’.

[35] After, Justice Jitoko’s decision, the continuation of the action against the Labour Officer was not viable at all. However in defiance it was so done but at the plaintiff’s own peril. Any such action was doomed to fail; *Domer -v- Gulf Oil (Great Britian) [1975] 119 SJ 392*. The continuation of this proceeding against the Labour Officer, tantamount to an abuse of the court process. This resulted in unnecessary expenditure to the Labour Officer for which he needs to be fully compensated.

Costs

[36] In light of His Lordship, Mr Justice Jitoko's decision and the defiant continuance of this proceeding against the labour Officer calls for an order for costs. Pursuant to the rules cost can be awarded on a standard or indemnity basis; *order 62 rule 12 of High Court rules 1988*. As to indemnity costs also see the Court of Appeal decision; ***Police Service Commission Beniamino Naiveli Civil Appeal No. ABU 0052u/95s***. Indemnity costs are not to punish the reprehensible conduct of the party, but it is to compensate the party which has had to incur expenditure unnecessarily.

At least following 22nd November, 2005 the Labour Officer was unnecessarily required to defend this action. In my view these type of cases call for an indemnity costing. In exercise my discretion, I find that the facts of this case warrants an indemnity cost against the plaintiff, payable to the Labour Officer . An indemnity cost in favour of in-house solicitors is determined in accordance with the same principles to that of the private solicitor's; ***Dildar Shah -v- FIRCA & Attorney General, J/R No. 42/2001***. The decision on taxation of costs was delivered on 11 May, 2006.

[37] I will summary asses the cost at \$1, 000 - 00.

Conclusion

[38] To conclude, it is hereby ordered that:-

- (a) all the monies deposited in court to be paid out to the Labour Officer for distribution under the Act. The Principal Accounts Officer through the Chief Registrar is directed to ensure that payment is effected within 21 days hereof.

- (b) Further the plaintiff to pay an indemnity costs with effect from 22nd November, 2005 to the Labour Officer, which is summarily assessed at \$1,000.00. This sum is to be paid into court within 14 days hereof.

Accordingly, so ordered.



[Handwritten Signature]

M. Udit

Master