

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

HBC No. 22 of 2005

BETWEEN : RAVINDRA KISHORE (f/n Suruj Pal) of Verata, Nausori.

PLAINTIFF

AND : MOTOIULA NEMANI of Edinburgh Drive, Suva, Driver.

1ST DEFENDANT

AND : TEBARA TRANSPORT LIMITED of Edinburgh Drive, Suva.

2ND DEFENDANT

AND : DOMINION INSURANCE LIMITED of 231 Waimanu Road, Suva.

3RD PARTY

BEFORE: Acting Master Vishwa Datt Sharma

COUNSELS: Mr. Daniel Singh for the Plaintiff
Mr. Ritesh Naidu for the Defendant

Date of Hearing: 27th April, 2015

Date of Decision: 30th September, 2015

DECISION

INTRODUCTION

1. The Plaintiff filed a **Summons** together with an **Affidavit in Support** on 01st July, 2014 and sought for **An Order that an interim payment** be made herein to the Plaintiff.
2. The application was made pursuant to *Order 29 Rule 10 and Rule 11 (1) (c) of the High Court Rules, 1988*.
3. The **First and Second Defendants** filed an **Affidavit in Answer** on 25th August, 2014 to the Plaintiff's application seeking an order for an Interim Payment.

4. The matter was heard on 27th April, 2015.

BACKGROUND FACTS OF THE CASE

5. The Plaintiff commenced the substantive proceedings by a Writ of Summons against the Defendants on 20th January, 2005.
6. The Plaintiff claimed that he sustained multiple injuries in an accident and was admitted to the hospital. He therefore claimed for general damages for pain and suffering and loss of amenities of life; special damages; costs for future care; loss of future earnings; interest and costs.
7. The pleadings were completed in the proceedings and the matter remitted to the High Court Judge for hearing and determination.
8. The matter proceed to a full hearing and a decision was delivered on 01st June, 2012 as follows-

(i)	General damages for pain and suffering assessed at \$ 65,000-00	
(ii)	Interest on General Damages	at \$ 26,325-00
(iii)	Special damages	at \$ 43,979-00
(iv)	Interest on Special Damages	at \$ 12,153-62
(v)	Future Surgery	at \$ 25,000-00

TOTAL **\$172, 458-35**

9. Abovementioned order was sealed by the Defendant's lawyer on 06th July, 2012.
10. **Dominion Insurance Limited** named as the **Third party** in the within proceedings, filed a **Summons** and sought for an order for **stay of execution of the judgment** entered against the Third Party on 01st June, 2012, pending appeal before the Fiji Court of Appeal together with costs.
11. **Simultaneously**, the **Third Party** also filed an appeal with the Fiji Court of Appeal.
12. Before dwelling on to write my **ruling** on the **pending application** for an **Interim Payment**, I made an endeavor to inquire into both, **stay of execution** application filed in the High Court and the **appeal** application filed in the Fiji Court of Appeal.
13. The **pending appeal** was **abandoned** on 16th July, 2012 whilst the **stay application** was heard and a Ruling still pending to be delivered on notice.

LAW

14. The application is made pursuant to Order 29 Rule 10 and 11 (1) (c) of the High Court Rules 1988 which states as follows-

15. Interpretation of Part II (O.29, r.9)

In this Part of this Order-

"Interim payments", in relation to a defendant, means a payment on account of any damages, debt or other sum (excluding costs) which he may be held liable to pay to or for the benefit of the plaintiff; and any person who, for the purpose of the proceedings, acts as next friend of the plaintiff or guardian of the defendant.

16. Application for interim payment (O.29, r.10)

R.10.-(1) The plaintiff may, at any time after the writ has been served on a defendant and the time limited for him to acknowledge service has expired, apply to the Court for an order requiring that defendant to make an interim payment.

(2) An application under this rule shall be made by summons but may be included in a summons for summary judgment under Order 14 or Order 86.

(3) An application under this rule shall be supported by an affidavit which shall-

(a) verify the amount of the damages, debt or other sum to which the application relates and the grounds of the application;

(b) exhibit any documentary evidence relied on by the plaintiff in support of the application.

(4) The summons and a copy of the affidavit in support and any documents exhibited thereto shall be served on the defendant against whom the order is sought not less than 10 clear days before the return day.

(5) Notwithstanding the making or refusal of an order for an interim payment, a second or subsequent application may be made upon cause shown.

15. Order for interim payment in respect of damages (O.29, r.11)

R. 11.-(1) If, on the hearing of an application under rule 10 in an action for damages, the Court is satisfied-

(a) that the defendant against whom the order is sought (in this paragraph referred to as "the respondent") has admitted liability for the plaintiff's damages; or

(b) that the plaintiff has obtained judgment against the respondent for damages to be assessed; or

(c) that if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the respondent or, where there are two or more defendants, against any of them, the Court may, if it thinks fit and subject to paragraph (2), order the respondent to make an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the plaintiff after taking into account any relevant contributory negligence and any set-off, cross-claim or counterclaim on which the respondent may be entitled to rely.

ANALYSIS and DETERMINATION

17. Let me now deliberate on the pending application before this court wherein the Plaintiff is seeking an order for an interim payment to the Plaintiff after judgment has been entered in favour of the Plaintiff accordingly.
18. The present substantive proceeding was commenced against the Defendants on 20th January, 2005 and concluded on 01st June, 2012.
19. Judgment was entered against the Defendants in terms of Special and General Damages, future surgery and interests in the total sum \$172, 458-35. (As reflected at paragraph 7 hereinabove).
20. The English Court of Appeal Case of *Shearson Lehman Brothers Inc and Another v Maclaine, Watson & Co Ltd and Others* [1987] 1 WLR 480, discusses the construction and powers it confers in terms of Order 29 of the High Court Rules, 1988 with regards to interim payment :

'Part II of Order 29 of the High Court Rules, 1988, covering rules 9 to 18, contains a comprehensive interim payments code. It is noted that the Court has no inherent powers to order an interim payment. In Part II of Order 29, there are two separate rules authorizing the court to make an interim payment order: rule 11 and rule 12. Rule 11 enables such an order to be made if the Court is satisfied of the existence of any one of three sets of facts. Rule 12 enables such an order to be made if the Court is satisfied of the existence of any one of three other sets of facts. The point to note here regarding these rules , the Court can only make an interim payment order in exercise either of the power given to it by rule 11 or of the power given to it by rule 12. It is not legitimate to read the two rules as though they contained a single power. It is also relevant to note that the power given by each of the two rules is, in all material respects, a power of an identical nature. By both rules 11 and 12, the Court is authorized, if it thinks fit, to order the Defendant to make an interim payment of such amount as it thinks just, after taking into account any set off or counter -claim. Further, rule 11 concerned with actions for damages, limits the amount which may be ordered to a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the Plaintiff after taking into consideration any set off, and so forth.

Although the power given by each rule is a separate power, the underlying purpose of the two rules is the same: to mitigate hardship or prejudice to a Defendant which may exist during the

period from the commencement of an action to the trial. Further, the underlying task of the Court under each rule is same: ordering an interim payment of such amount as is just, having regard to all the circumstances.'

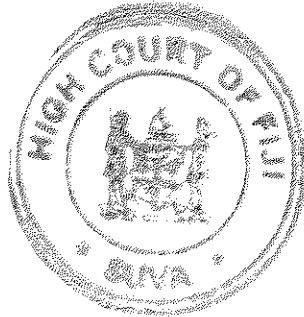
21. In summary, *Order 29 Rule 10 and 11* deals with an application for interim payment to the Plaintiff: *Order 29 Rule 10* in particular deals with an application for interim payment whereas, *Rule 11* deals with an Order for interim payment in respect of damages.
22. In order to qualify for any interim payment, the Plaintiff has to satisfy one of the following conditions-
 - (a) *that the defendant against whom the order is sought has admitted liability for the plaintiff's damages; or*
 - (b) *that the plaintiff has obtained judgment against the respondent for damages to be assessed; or*
 - (c) *that if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the respondent or, where there are two or more defendants, against any of them, the Court may, if it thinks fit and subject to paragraph (2), order the respondent to make an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the plaintiff after taking into account any relevant contributory negligence and any set-off, cross-claim or counterclaim on which the respondent may be entitled to rely.*
23. In relation to a Defendant, 'interim payment' means a payment on account of any damages, debt or other sum, excluding costs which he may be held liable to pay to or for the benefit of the Plaintiff. The essential features of an interim payment are-
 - (i) *That it is a payment on account of the damages, debt, or other sums, excluding costs, and*
 - (ii) *That the Defendant may be held liable to pay such damages, debt, or other sums to the Plaintiff or for his benefit.*
24. In this case, the Plaintiff made an application for interim payment pursuant to *Rule 11 (1) (c) of the High Court Rules, 1988* which states '*that if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the respondent.'*
25. The Plaintiff commenced proceedings against the Defendants, and after the service of the Writ of Summons, the Plaintiff may then have resorted to *Order 29 Rule 10 and 11* in particular in terms of *Rule 11 (1) (c)*, and therefore could have then sought for an order for interim payment before the conclusion of the trial proper.


26. It cannot be ascertained from the Court records whether the Plaintiff had earlier on sought for any interim order or payment after the commencement of the Writ action and before the conclusion of the hearing and or delivery of the Judgment.
27. The purpose of *Order 29 Rule 10 and Rule 11* is very clear and that can only be exercised before a **final decision** is made by the court with regards to the pending substantive claim for damages, as in this case.
28. The law in terms of *Order 29 Rules 10 and 11* do not allow for an application to be made wherein an interim payment can be sought after the court has determined the case and delivered a judgment accordingly.
29. Subsequent to the delivery of the judgment in this case, the **Third party** in the within proceedings, **Dominion Insurance Limited**, filed a **Summons** and sought for an order of **stay of execution of the judgment**, which was already heard by the Court, but to date is pending delivery of **decision**. It is also noted and have been ascertained from the Fiji Court of Appeal that the pending appeal lodged in the within action was also **deemed abandoned**.
30. The law is very clear that any **Appeal** and or **Stay of execution of judgment** application filed within any proceedings, including the present case, does not in itself act as an **'automatic stay of any execution of the judgment.'** The appeal is already deemed abandoned on 16th July, 2012 File reference ABU 47 of 2012.
31. Nothing in this case stops the Plaintiff from enforcing the judgment in monetary terms already successfully obtained through a full trial against the Defendants on 01st June, 2012 since there is non-existence of any stay of execution of the judgment order at this stage of the proceedings. The status quo of the judgment remains intact, that is judgment entered for the Plaintiff in the total sum of **\$172, 458-35**.
32. Since the Plaintiff has now obtained judgment on 01st June, 2012 in respect of his claim in terms of the Writ of Summons filed, he is at liberty to proceed with the enforcement proceedings to recover the total judgment sum, notwithstanding that a stay of execution of judgment in the proceedings is pending delivery of decision by the court upon notice.
33. For the aforesaid rationale, I refuse the Plaintiff's application for interim payment.
34. The file will now be remitted to the Senior Court Officer, High Court Civil Registry to be allocated to a Judge for further necessary action on the pending Ruling on the Third Party's stay of execution application accordingly.

FINAL ORDERS

- (i) The Plaintiff's Summons seeking an order for interim payment is hereby refused.
- (ii) File remitted to the SCO High Court, Civil for further necessary action.
- (iii) No order as to costs.

Dated at Suva this 30th Day of September, 2015




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VISHWA DATT SHARMA
Acting Master of High Court, Suva