

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA (CIVIL JURISDICTION)**

Action No. 150 of 2012

**BETWEEN** : **NEW INDIA ASSURANCE COMPANY LIMITED** a limited liability company having its registered office at Harifarm Centre, 2<sup>nd</sup> Floor, Corner Renwick and Greig Street, Suva, Fiji

**PLAINTIFF**

**AND** : **JOSAIA DEGEI** of Nagado, Village Nadi farmer as the Administrator of the Estate of Sera Vakarau Waqanivere of Nagado Village, Nadi deceased intestate.

**1<sup>ST</sup> DEFENDANT**

: **SHAIREEN KHAN** aka SHAIREEN NISHA of Nakurakura, Nadi

**2<sup>ND</sup> DEFENDANT**

: **PENI NAYAGO** of Sikituru Village Nadi Driver

**3<sup>RD</sup> DEFENDANT**

: **MOHAMMED JANIF** of Nakurakura, Nadi

**4<sup>TH</sup> DEFENDANT**

: **MESAKE TURUVA** of Namotomoto, Nadi, Driver

**5<sup>TH</sup> DEFENDANT**

## **R U L I N G**

### **INTRODUCTION**

1. The plaintiff is an insurer registered under the Insurance Act 1998.
2. It had issued a Compulsory Third Party Insurance Policy for motor vehicle registration no. DZ226.
3. DZ226 is owned by the second defendant, Shaireen Khan. On 23 August 2011, DZ226 was being driven by Peni Nayago, the 3<sup>rd</sup> defendant, when it allegedly ran over Sera Vakarau Waqanivere who died as a result of injuries she sustained.

4. The plaintiff seeks, by originating summons, various declaratory orders. At the heart of all these, is the declaration that the plaintiff is entitled to avoid liability of Third Party Insurance pursuant to section 11(3) of the Motor Vehicle (Third Party Insurance) Act.
5. The plaintiff relies on the affidavit of Avinash Rai. The defendants filed opposing and contradicting affidavits.

#### **WHY PLAINTIFF IS SEEKING TO AVOID THE POLICY**

6. The plaintiff seeks to avoid the policy based on the following grounds:
  - (i) The material parts of the policy (clauses 1, 2 and 3(1)(c)) stipulate that only the owner and any person driving with the owner's order or permission are insured; that premium is paid for the use of DZ226 as a private car for social, domestic or pleasure; that the insured shall not use the vehicle nor shall the owner permit or suffer any person to use such motor vehicle to carry passengers for hire or reward.
  - (ii) statements that Pani Nayago (3<sup>rd</sup> defendant) had given to the police which admit to the following:
    - (a) At the time of the accident, DZ226 was being driven by Peni Nayago (3<sup>rd</sup> defendant) for hire and reward. Nayago was transporting fee-paying passengers from Nakurakura to Nadi Airport. He had been doing that since 10.00 a.m. on the day in question until very late that day.
    - (b) Nayago had admitted in statements he gave to the Police that he had hired DZ226 from Mesake Turuva (5<sup>th</sup> defendant) and that he paid \$50-00 per day for that. He had hired DZ226 on many occasions in the past. He also understood that Turuva had, himself, hired DZ226 from the 4<sup>th</sup> defendant, Mohammed Janif.

- (iii) statements made by Mohammed Janif to a Private Investigator hired by the plaintiff which admit to the following:
  - (a) that in June or July 2011, Janif (4<sup>th</sup> defendant) and Turuva (5<sup>th</sup> defendant) had an arrangement whereby Turuva would lease the car for \$300 per month, and which monthly lease payment was also being credited towards a fixed sale price for the car and that, once the sale price was paid in full, the car would be formally transferred to Turuva. Janif understood that Turuva would pay for the lease (and purchase price) from proceeds he would get from using the car for hire and reward in Denarau.
- (iv) statements by Turuva (4<sup>th</sup> defendant) to the Private Investigator confirming all in paragraphs (ii) and (iii) above.

### **OBSERVATIONS**

- 7. The above allegations are disputed by the defendants. In an affidavit sworn on 03 August 2012, Janif deposes inter alia that the relevant policy over DZ2226 is not the one that the plaintiff had exhibited in his affidavit. Rather, it is one which he annexes to his affidavit and which, notably, includes a stipulation allowing DZ2226 to be used for carrying passengers for hire or reward.
- 8. Then in a supplementary affidavit he swore on 10 August 2012, Janif annexes a statement from the Plaintiff's investigator which Janif says – **“clarifies the third Defendant's stance that he did not hire the vehicle but borrowed the vehicle”**.
- 9. Notably in the same statement to the investigator, the third defendant denied that he ran over the deceased on the day in question. This same sentiment is expressed in an affidavit he swore on 08 August 2012.

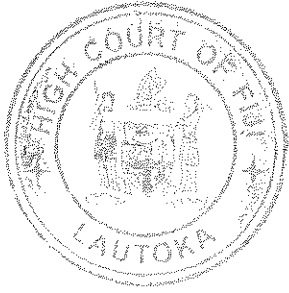
10. An affidavit in reply sworn by Avinesh Rai on 16 October 2012, he confirms that the policy that Janif exhibits is a printout from the plaintiff's computer system. However, he sets out in detail how Janif had, fraudulently procured an employee of the plaintiff company to amend the details of the coverage from that which is exhibited in Rai's affidavit to one that is exhibited in Janif's affidavit.
11. Against that background, it would appear that the issue as to which of the two policies is the correct one, must be a triable one.
12. Because of that, and given the nature of the allegations against Janif, and also given that the current application by the plaintiff appears to be premised largely on the allegation that the policy forbade the use of DZ2226 for hire or reward, I would agree with the submissions of Mr. Maopa that the issues are ill suited to be determined by way of affidavit evidence and are best dealt with in a trial.
13. I accept the authority of Bingham LJ in **Bhogal -v- Punjab National Bank** [1988] 2 ALLER 296 at 303 which Mr. Maopa cited:

But the correctness of factual assertions such as these cannot be decided on an application for summary judgment unless the assertions are shown to be manifestly false either because of their inherent implausibility or because of their inconsistency with the contemporary documents or other compelling evidence."

14. The Court of Appeal in **Ambika Prasad f/n Ram Piyare v. Santa Wati f/n Kali Charan, Bissun Deo f/n Jag Deo** (Civ. App. No. 38/95s – FCA Repts 98/130) said:

Whether or not the appellant had an equitable interest and whether or not there was fraud by the respondent in the manner alleged are matters which are disputed by the respondent in their affidavits. These are clearly issues which cannot be resolved by affidavit evidence and ought to go to trial.

15. Accordingly, I dismiss the application. Parties to bear their own costs.



A handwritten signature in black ink, appearing to be "Anare Tuilevuka", written over a horizontal dotted line.

**Anare Tuilevuka**  
**JUDGE**  
**Lautoka**

06 September 2017