

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

Civil Action No. 12 of 2016

BETWEEN : **PRAVINA WATI PRASAD** of 8 Madho Crescent, Golf Lin,
Lautoka, Machinist.

PLAINTIFF

AND : **SHIVA KRISHNA GOUNDAR** of Waimalika road, Sabeto, Nadi
(Occupation unknown to the Plaintiff)

1ST DEFENDANT

AND : **VIJAY KRISHNA** of Waimalika Road, Sabeto, Nadi, (Occupation
unknown to the Plaintiff.

2ND DEFENDANT

Counsel Appearing : Mr. Diven Prasad for the Plaintiff
Mr. R.R Gordon for the Defendants

DIRECTIONS

BACKGROUND

1. On 19 April 2015, the plaintiff, Pravina Wati Prasad (“**Pravina**”) was a passenger in motor vehicle registration number ED 054. ED 054 was travelling from Lautoka towards Nadi Airport along the Queens Road. At Sabeto junction, ED 054 collided with motor vehicle registration number DI 583. As I gather from the statement of claim, DI 583 was proceeding along the Queens Road from Nadi. At the Sabeto junction, which is about halfway between Nadi and Lautoka, DI 583 was turning right when it collided head on with ED 054. ED 054 was coming straight through the junction from the opposite direction.
2. According to the statement of claim, the accident happened because of the negligence of Shiva Krishna Goundar (1st defendant, “**Shiva**”). Shiva was driving DI 583.
3. Pravina sustained injuries as a result of the accident. She sues both Shiva and the owner of DI 583 who was Vijay Krishna (2nd defendant, “**Krishna**”).

SUMMONS TO STRIKE OUT

4. The case was set down for a three day trial from 25 to 27 July 2018. However, on 16 July 2018, Gordon & Company, acting for New India Assurance Company Limited (“**NIACL**”) filed a Summons to strike out the claim pursuant to Order 25 Rule 7(3) and Order 38 Rules 1 and 3 of the High Court Rules 1988.

5. Arguments on the striking out application were heard on 25 July 2018 as a preliminary point. I thereafter, vacated the trial and invited counsel to file written submissions on the issues raised.

AFFIDAVIT IN SUPPORT OF STRIKING OUT

6. The affidavit of Avinesh Chand Rai (“**Rai**”) sworn on 13 July 2018 is filed herein support of the striking out application. Rai is a Claims Officer with NIACL. He deposes *inter alia* as follows:

- (i) that NIACL is the third party insurer for DI 583 (third party policy Z 123 805).
- (ii) the accident happened on 19 April 2015.
- (iii) Pravina then issued proceedings in the Lautoka High Court as well as at the Nadi Magistrates Court on 03 February 2016.
- (iv) Pravina served the proceedings on NIACL within 7 days of issue.
- (v) NIACL then instructed Gordon & Company to file an Acknowledgement of Service and Statement of Defence on 18 February 2016 and 24 May 2016 respectively.

7. At paragraphs 9 to 27 of Rai’s affidavit, he deposes further as follows:

- (i) Krishna (2nd defendant) actually died on 21 January 2015. This was some 88 days or so prior to the accident.
- (ii) Shiva (1st defendant) actually emigrated to Australia on 21 January 2016. This was some 13 days or so before the proceedings were actually instituted on 03 February 2016.

8. At paragraph 18 of his affidavit, Rai deposes that NIACL was not at all aware of the above facts until June 2018 when it was preparing for trial. It only came to know of these facts during its inquiries whilst preparing to subpoena Krishna and Shiva for the trial.

ISSUES RAISED

9. Gordon & Company raises the following issues.

- (i) since Krishna had been dead for some 88 days or so prior to the accident, he was no longer the owner of DI 583 at the time of the accident. Accordingly, it is simply not possible to find as a fact that Krishna had given authority to Shiva to drive DI 583 on 19 April 2015.

- (ii) since Krishna had been dead for about a year or so before the proceedings were issued, and since there is no evidence that probate or letters of administration has been granted over his estate, service of the originating process could not have been effected properly over his estate.
 - (iii) since Shiva had in fact emigrated to Australia some 13 days or so before the proceedings were issued, he too was not duly served with the originating process. To lawfully serve Shiva, Pravina and her solicitors would have had to first seek the leave of this court to issue proceedings out of jurisdiction. There is no evidence from the Court records that Pravina and/or her solicitors ever did apply for such leave, let alone, that she did obtain leave.
10. Mr. Prasad for Pravina appears to concede as fact that Krishna had predeceased the accident and that Shiva had emigrated to Australia before the proceedings were issued. I get the impression that Mr. Prasad only came to know of these facts when Mr. Gordon raised them on the eve of trial in July this year.
11. Mr. Prasad however highlights the following:
- (i) that Gordon & Company had filed Acknowledgement of Service and a subrogated Statement of Defence of NIACL for both defendants.
 - (ii) Gordon & Company, at no stage whatsoever, ever raised the above issues but continued to represent the defendants up until 18 July 2018 on the eve of the trial.
 - (iii) NIACL failed to carry out any investigation after it was served with the originating process.
 - (iv) had NIACL conducted its investigations, it would have found out about the demise of Krishna and the fact that Shiva had already emigrated to Australia.
 - (v) instead, NIACL instructed its solicitors and continued to defend the defendants.
 - (vi) it is incumbent upon NIACL to carry out investigations once put on notice and upon finding any breach, to take steps to avoid indemnity under the Motor Vehicles (Third Party Insurance) Act.
12. Mr. Prasad argues for Pravina that the Acknowledgement of Service and Notice of Appointment of Solicitors filed by NIACL cures any lack of service on the defendants. He adds that, in any event, lack of service on the defendant does not nullify proceedings in terms of Order 10 Rule 4 of the High Court Rules 1988. Mr. Prasad also argues that the fact of the death of Krishna was not made known by his family or the personal representative(s) of his estate to the Land Transport Authority.

13. Mr. Prasad submits that an action against Krishna is still maintainable under Order 85 Rule 1 of the High Court Rules 1988.

COMMENTS

14. Order 6 Rule 6 (1) provides as follows:

Issue of writ (O.6, r.6)

6. No writ which is to be served out of the jurisdiction shall be issued without the leave of the Court:

15. However, there is a proviso to Order 6 Rule 6(1) that if the claim in the writ is one which the High Court has power to hear and determine under an Act of Parliament, then the requirement for leave to issue writ shall not apply.

Provided that if every claim made by a writ is one which by virtue of an enactment the High Court has power to hear and determine, notwithstanding that the person against whom the claim is made is not within the jurisdiction of the Court or that the wrongful act, neglect or default giving rise to the claim did not take place within its jurisdiction, the foregoing provision shall not apply to the writ.

16. The writ in this case deals with a claim for personal injuries arising out of a motor vehicle accident. The claim is against a driver and the owner of the motor vehicle. It appears to me that the plaintiff has not been able to serve the driver and the owner of the motor vehicle in question. The reasons for her inability to effect service, it seems to me, is because she has not been able to locate either of them.
17. It would appear that, when the plaintiff could not locate the two gentlemen for service, she then served the originating process in this case on the insurer, NIACL.
18. Mr. Gordon has gone to great lengths to submit that the plaintiff has failed to serve the originating process on the either Shiva or Krishna. With regards to Shiva, Mr. Gordon submits that the plaintiff had failed to obtain leave under Order 6 Rule 6(1) and that failure nullifies the writ. No authority is cited for that proposition.
19. As for Krishna, Mr. Gordon highlights that the fact that Krishna had been dead for 88 days prior to the accident and about a year or so before the Writ of Summons and statement of claim were issued, means that Krishna could not have been served personally pursuant to Order 10. It also means that Krishna could not have given authority to Shiva to drive DI 583 on the day of the accident. The first point raises a procedural issue under the High Court Rules 1988. The second point raises some substantive issues:

- (i) whether, the third party policy cover would apply in the circumstances given that Krishna was long dead at the time of the accident, and therefore, could not have authorised Shiva to drive DI 583, which at all material times, was still registered in Krishna's name.
- (ii) does the third party policy terminate upon the death of the policy holder even if the term of the policy has not lapsed?

LAW APPLICABLE

- 20. Both counsel have gone to great lengths with legal argument to convince me as to why the irregularities in the service of the process and the fact of the demise of Krishna is fatal (or curable) in this case. I prefer to use the Insurance Law Reform Act 1996 as my starting point.
- 21. Section 10 of the Insurance Law Reform Act 1996, in its part relevant to this case, would allow a third party to institute proceedings directly against an insurer where the insured has died, provided that the insured is liable to the third party under a contract of liability insurance and that the contract provides insurance cover in respect of the liability.

PART III - THIRD PARTY INTERESTS
Rights of third party to recover against insurer

10.-(1) Where-

- (a) the insured under a contract of liability insurance is liable in damages to a person (in this Section called the "third party");
 - (b) the insured has died or cannot, after reasonable enquiry, be found; and
 - (c) the contract provides insurance cover in respect of the liability,
- the third party may recover from the insurer an amount equal to the insurer's liability under the contract in respect of the insured's liability in damages.
- (2)
 - (3)
 - (4) This Section applies to or in relation to contracts and proposed contracts to or in relation to which the Workmen's Compensation Act, Cap 94, applies and to or in relation to which the Motor Vehicles (Third Party Insurance) Act, Cap. 177 applies.

- 22. That Krishna (insured) is deceased is established by the Death Certificate annexed to Pravina's affidavit. Whether or not Krishna is liable to Pravina, is to be determined at the trial of this matter. This ultimately depends on whether the claim for negligence against Shiva succeeds.
- 23. Whether the contract provides insurance cover in respect of liability, it is clear that the policy in question is a third party policy issued pursuant to the Motor Vehicles (Third Party Insurance) Act. Whether the third party policy applies, depends on (i)

Shiva's liability which is to be tried and (ii) the main questions posed in paragraph 19 above and all associated minor questions. It is at this stage of the inquiry when it is open to the insurer to raise arguments to void the policy. This is where all the issues raised by Mr. Gordon will have to be considered. I prefer to deal with these at the trial proper of this matter.

CONCLUSIONS

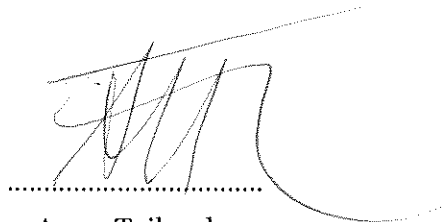
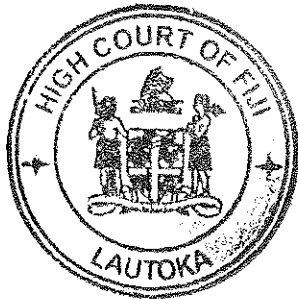
24. It is clear to me that the insured (Krishna) is deceased. In my view, this would entitle Pravina to invoke section 10 of the Insurance Law Reform Act 1996 and to seek recovery directly from the insurer NIACL, provided Pravina satisfies all the other requirements of section 10.
25. That section 10 applies also to contracts in relation to the Motor Vehicles (Third Party Insurance) Act, Cap. 177 is established by section 10 sub-section 4 of the
26. As for the alleged failure to comply with Order 6 Rule 6(1), I am of the view that this can be excused under the proviso under this Rule which I have set out above in paragraph 15. The High Court has power to hear and determine the claim in this case under the Insurance Law Reform Act 1996 together with the Motor Vehicles (Third Party Insurance) Act, Cap. 177. As such, the requirement for leave to issue writ may not be applied strictly.
27. In my view, the appropriate way to take this case forward is as follows:
 - (i) as the writ is now stale against the 1st defendant, the plaintiff may need to apply for renewal of the writ against the 1st defendant. For the record, I may or may not grant leave and I keep an open mind on this at this time.
 - (ii) the plaintiff should also consider whether or not to amend the statement of claim to plead section 10 of the Insurance Law Reform Act 1996 and the relevant sections of the Motor Vehicles (Third Party Insurance) Act, Cap. 177. Again, for the record, I may or may not grant leave yet and I keep an open mind for the time being on this.
 - (iii) If, assuming, both applications above are successful, the plaintiff may then serve the writ to the first defendant abroad without leave of the court pursuant to Order 11 Rule 1(2):

(2) Service of a writ out of the jurisdiction is permissible without the leave of the Court provided that each claim made by the writ is a claim which by virtue of

any enactment the High Court has power to hear and determine notwithstanding that the person against whom the claim is made is not within the jurisdiction or that the wrongful act, neglect or default giving rise to the claim did not take place within its jurisdiction.

- (iv) once service is completed, the matter may then take its normal course towards a trial of the matter.
- (v) it is for the defendant of course to consider how and to what extent and in what capacity it wishes to defend (if at all) this action. I do not think it appropriate for me to say anything further on this at this stage.

28. Parties to bear their own costs. Case adjourned to Thursday 08 November 2018 for mention.



Anare Tuilevuka
JUDGE
02 November 2018