

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 72 of 2012

BETWEEN : **JOSAIA DEGEI** of Nagado Village, Sabeto, Nadi, Farmer as the Administrator of the Estate of Sera Vakarau Waqanivere of Nagado Village, Sabeto, Nadi, Market Vendor, Deceased, Intestate
PLAINTIFF

A N D: **SHAIREEN KHAN** of Nakurakura, Nadi

1ST DEFENDANT

A N D: **PENI NAYAGO** of Sikituru Village, Nadi, Driver

2nd DEFENDANT

Counsel : Mr. E. Maopa for the Plaintiff
Mr. D. Gordon for the Defendants
Date of Hearing: Ruling on Paper
Date of Ruling : 08 November 2019

R U L I N G

INTRODUCTION

1. On 23 August 2011, Sera Vakarau Waqanivere ("**Sera**") died from personal injuries she sustained when she was run over by motor vehicle registration number DZ 226 which was being driven by Peni Nayago ("**Nayago**"), the 2nd defendant. Shaireen Khan ("**Khan**"), the first defendant, was the owner of DZ 226.

2. New India Assurance Company Limited (“NIACL”) was the third-party insurer.
3. In 2012, Josaia Degei (“Degei”) (Sera’s surviving husband and personal representative of her estate) instituted the current writ action against Khan and Nayago seeking compensation.
4. As is clear from the affidavit of Wasu Pillay, Degei did serve NIACL a copy of the proceedings within seven days of commencement.
5. Meanwhile, in a separate related proceeding (“other proceeding”) filed in 2012 after the current one (see New India Assurance Co Ltd v Degei [2017] FJHC 667; Civil Action 150.2012 (6 September 2017)), NIACL by originating summons, was seeking a declaration from this court that it (NIACL) was entitled to avoid liability of Third Party Insurance pursuant to section 11(3) of the Motor Vehicle (Third Party Insurance) Act.
6. NIACL’s decision to pursue those declaratory orders in that other proceeding was made after it had taken steps in the current proceedings to assume the defence of Degei’s case against Khan - by instructing Gordon & Company to file an acknowledgement of service, and, later, a statement of defence.
7. Apparently, after NIACL had filed the acknowledgment of service and statement of defence in the current proceedings, it engaged a private investigator to investigate the accident.
8. The investigation report would reveal that Nayago was driving DZ 226 on the day of the accident carrying fee paying passengers from Denarau to the Airport pursuant to an arrangement he had with a Mohammed Janif. This, as NIACL is arguing, is a breach of a condition of the third party policy which entitles NIACL to avoid the policy
9. This revelation, in fact, was what triggered NIACL to pursue the declaratory orders in the other proceedings.
10. There is an affidavit filed in the other proceedings by a Mr. Janif who I gather is Khan’s husband by which Janif deposes *inter alia* that the policy which NIACL is

trying to avoid is not the correct one. Janif annexes to his affidavit another policy which, on its face, does not exclude the carriage of fee paying passengers. Janif annexes to his affidavit another policy which, notably, includes a stipulation allowing DZ 226 to be used for carrying passengers for hire or reward.

11. The affidavits filed are also contradicting each other as to whether or not Nayago was really carrying fee-paying passengers on the fateful day.
12. Because there were triable issues, I did dismiss NIACL's application in the other proceedings.
13. This then prompted NIACL to file the current Summons on 29 March 2019 seeking the following Orders:
 - 1) that NIACL be joined as a party either as an additional Defendant or as a third Party.
 - 2) that Mohammed Janif be joined as a party either as an additional Defendant or as a Third and/ or fourth Party.
 - 3) that Mesake Turuva be joined as a party either as an additional Defendant or as a third and/or fifth Party.
 - 4) that the issues in Lautoka High Court Civil Action Number 150 of 2012 that were not decided in that action be decided in this action on oral evidence and be decided as a preliminary issue and/or finding before the Plaintiff's claim(s) against the current Defendants.
 - 5) that the affidavits filed in Lautoka High Court Civil Action Number 150 of 2012 stand as pleadings as between NIACL, Shaireen Khan, Peni Nayago, Mohammed Janif and Mesake Turuva or alternatively the parties file formal pleadings and/or summons for directions and/or as directed by the Honorable Court.
 - 6) that Shaireen Khan, Peni Nayago, Mohammed Janif and Mesake Turuva be given notice of the orders made on this application and the further conduct of these proceedings so as to be afforded an opportunity to participate in and/or defend these proceedings and in particular the preliminary issue(s) that were not decided in Lautoka High Court Civil Action Number 150 of 2012, to be decided on oral evidence and be decided as a preliminary issue and/or finding before the Plaintiff's claim(s) against the current Defendants.
 - 7) that Gordon & Co. be granted leave to cease acting for the Defendants when the issues as between NIACL and Shaireen Khan, Peni Nayago, Mohammed Janif

and Mesake Turuva are decided, namely whether the insurance policy was breached and/or whether the New India Assurance Company Limited is liable to indemnify the current Defendants in respect of any successful claim by the Plaintiff as against the current Defendants.

- 8) such further or other orders and/or relief that this Honorable Court may deem fit, just, expedient and necessary in the circumstances. That the Defendant intends to rely upon the affidavit of Wasu Pillay filed in support of the application.
14. The application is filed pursuant to Order 15 and Order 16 of the High Court Rules 1988 and under the inherent jurisdiction of the Court. It is supported by an affidavit sworn by Wasu Pillay.
15. The plaintiff opposes the application by an affidavit he swore on 11 June 2019 and filed on 12 June 2019.

AFFIDAVIT OF WASU PILLAY

16. Wasu Pillay swears that his firm Gordon & Company are solicitors on record for the defendant in these proceedings. However, they were never directly retained or instructed by the defendants, nor have they received any payment whatsoever from the defendants for legal services in these proceedings. Rather, the firm is under instructions from NIACL who are the third party insurers for the motor vehicle that was involved in the collision.
17. Under the now-repealed Motor Vehicle (Third Party Insurance) Act (“the Act”) which was applicable at the time of the collision, NIACL had the right to defend these proceedings on behalf of and/or in the shoes of the defendants. This is because in the event the plaintiff were to succeed in his claim, NIACL would have to bear liability as third-party insurer.
18. Pillay confirms that the plaintiff had complied with the Act by having served NIACL a copy of the proceedings within seven days of commencement, following which NIACL, through its solicitors, filed an acknowledgement of service and later a statement of defence *“in order to protect itself from any default judgment”*.

19. After filing those documents, NIACL then commissioned an investigation into the accident in question according to standard practice and procedure. The Investigation Report revealed that the defendants had breached the third party insurance policy.
20. Accordingly, as Pillay deposes, NIACL should not be liable to indemnify the defendants.
21. It was then that NIACL filed separate proceedings in Civil Action HBC 150 of 2012 where it sought a declaration that (i) it was not liable to indemnify the defendants and (ii) that the insurance policy had been breached.
22. That summons was dismissed on the basis that the issues were raised were triable.
23. Pillay deposes that the issues are therefore still alive and need to be decided first on oral evidence first before any determination of the plaintiff's case can be made.
24. He says that the current proceedings are the best and appropriate proceedings within which to decide the issues rather than issuing a separate writ action, which if issued would have to be consolidated with this action in any event.
25. To achieve that, it is necessary to add as parties to this case NIACL and/or Mohammed Janif and Mesake Turuva and that leave be granted to Gordon & Company to cease action for the defendants.
26. These parties need to be added to determine whether or not the third party policy in question had been breached.
27. Pillay, by way of opinion, deposes that if, in the event the Court were to find that the insurance policy was breached, and that NIACL was not liable to indemnify the defendants, then the defendants would then have to engage their own legal representation in these proceedings to defend the claim.
28. Yet, in the event the Court were to find that the insurance policy was breached and that NIACL is liable to indemnify the defendants, then NIACL will continue to defend these proceedings on behalf of the defendants and indemnify the defendant if the case comes to that.

AFFIDAVIT OF JOSAI DEGEI

29. Degei sets out in his affidavit some advice which he received from his solicitors. These advice include the following:
- (i) that everything that Pillay has deposed in his affidavit relate to the other civil action HBC 150 of 2012.
 - (ii) that case was dismissed on 06 September 2007 and cannot be consolidated with this current action as this court is functus officio now.
 - (iii) the onus is on the first defendant to add NIACL as Third Party and any other interested persons who have a stake in the matter.
 - (iv) after the Ruling on Civil Case HBC No: 150 of 2012 was pronounced, the solicitors for the plaintiff informed the Court that they would file an appeal.
 - (v) later they informed Court that they wanted to settle the matter but failing to progress further if any settlement despite offers written to them.
 - (vi) this matter was adjourned on three to four occasions to allow the defendant's solicitors to file the application for consolidation. Their delay has led to the plaintiff incurring substantial costs.
 - (vii) the application for consolidation must be refused and the matter proceed to trial.
 - (viii) I will object to the Counsel representing the Insurance Party as Conflict of Interest.

DIRECTIONS

30. For a party to be joined to proceedings already afoot, that party must either be someone who may be entitled to claim some interest or relief in the subject matter, or who may be prejudicially affected by any decree passed in the matter, or who bears some potential legal responsibility or liability over the subject matter.
31. The insurance policy in question exposes NIACL to responsibility over any liability that may be imposed on Khan. On that basis, I am convinced that NIACL should be joined as a party. Having said that, I must say that, in any event, a liability insurer such as NIACL has the right to defend an insured, which right is concomitant to the fact that it will eventually be liable for any award made against the insured. An insurer's right to conduct and control the defence of an insured is tied to its contractual obligation to pay judgement.

32. As to whether Mohammed Janif and Mesake Turuva should be joined either as an additional defendant or as a third and/or fifth party, I agree with Mr. Maopa that NIACL and/or the defendant should file third party proceedings against them. NIACL's issues with Janif and Turuva are of no concern to Deceit. Third party proceedings would place the onus on NIACL to set out clear in the third party claim what they allege against Janif and Turuva.
33. I agree that the issues raised in Civil Action Number 150 of 2012 were not decided in that case. They are triable issues. There is no reason why they cannot be raised in this case. However, because those issues are irrelevant to Degei's case, whether or not they can be raised in this case will have to depend on whether NIACL will join Janif and Turuva in third party proceedings – assuming there are no limitations issues.
34. Whether the decision by NIACL to exercise its right to defend Khan, amounts to a waiver by conduct or estoppel, or whether it does not necessarily affect its right to avoid liability under the policy – assuming there had been a breach – is a question I must reserve for trial – and on which I would prefer not to comment further.
35. As regards the affidavits filed in Lautoka High Court Civil Action Number 150 of 2012, I would rather that NIACL make an application at the trial of this matter that these affidavits be read into evidence by the deponents, subject of course to cross-examination and objection.
36. As to whether Shaireen Khan, Peni Nayago, Mohammed Janif and Mesake Turuva should be given notice of the orders made on this application, I am prepared to grant Order in terms only that Shaireen Khan and Peni Nayago be served with the sealed Orders, but not Janif and Turuva.
37. As to whether Gordon & Co. should be granted leave to cease acting for the defendants when the issues as between NIACL and Shaireen Khan, Peni Nayago, Mohammed Janif and Mesake Turuva are decided, that decision will have to be made if and when such an application is actually made.
38. As of now, NIACL must decide whether it wants to exercise its right to control the defence of its insured or surrender that right at its own risk. I am not here to manage that risk for NIACL. If Gordon & Company wishes to cease acting for Khan and Nayago now, then it should file an application to cease acting now. Surrendering

control of the defense may deprive NIACL of a key part of its bargain with its insured in this case, and its ability to control the defence of the case. That is a decision it must make.

39. Costs to the plaintiff which I summarily assess at \$1,000-00 (one thousand dollars only). Case is adjourned to 15 November for mention at 10.30 a.m.




Anare Tuilevuka
JUDGE
Lautoka