

IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA

Civil Appeal No. HBC 155 of 2012

BETWEEN : **SUN INSURANCE COMPANY LIMITED** a limited liability company
having its registered office at Grnd & Level 1 Sun Insurance
Kaunikuila House, Laucala Bay, Suva, Private Mail Bag, Suva.

PLAINTIFF

AND : **GITA VIKASHNI REDDY**, of Toko, Tavua, Domestic Duties in her
personal capacity and as the Administratrix of the Estate of
RAMENDRAN GANGAIYA late of Rarawai, Ba, Fiji, Sales Boy,
deceased.

DEFENDANT

Appearances: Mr Narayan for **Plaintiff**

: Mr Prakash for **Defendant**

INTERLOCUTORY JUDGEMENT

Introduction

1. By summons dated 9th November 2012 the defendant sought the following Orders:-
 - (i) The Order dated the 16th day of July, 2012 be set aside and dissolved.
 - (ii) The statement of claim be struck out with costs on the grounds that it is frivolous and vexatious and that is an abuse of the processes of this Court.
 - (iii) The Plaintiff SUN INSURANCE COMPANY LIMITED a limited liability company having its registered office at Ground & Level 1 Sun

Insurance Kaunikuila House, Laucala Bau, Suva, Private Mail Bag, Suva be ordered to pay the sum of \$97,133.95 (Ninety Seven Thousand One Hundred Thirty Three Dollars and Ninety Five Cents) together with \$2,000.00 (Two Thousand Dollars) costs as security into Court being the judgement sum ordered in Civil Action No. HBC 216 of 2007;

- (iv) That the costs of this application be paid by the Plaintiff to the Defendant.
- 2. The defendants application is supported by an affidavit of Nitesh Madwan a Law Clerk sworn on 8th November 2012.
- 3. The plaintiff has opposed the said application by filling an affidavit in reply of its branch Manager, Western namely Avendra Kumar sworn on 31st March 2013
- 4. When this matter was taken up for hearing on 17th April 2014 Counsels made oral submissions and tendered written submissions with the leave of Court.

Background to the Application

- 5. (i) That on 10th July 2007 the defendant in this matter instituted action No HBC 216/2007 in Lautoka High Court seeking for compensation for the death of her husband Ramendra Gangaiya which occurred as a result of an accident involving vehicles CH 328 and EX 570 on 27th August 2006. The defendant was the Administratrix of the Estate of her late husband.
- (ii) Action No 216/17 was filed against Ronil Rohitesh Devand (1st Defendant) Ronil Rohitesh Devand and Asha Manisha Devi Deven (2nd Defendants) Samisoni Nasautamata (3rd defendant) and Samisoni Nasautamata and Sailasa Kaibau (4th defendants) alleged to be the owners and drivers of the two vehicles involved in the accident.
- (iii) On the 13th of June 2012 Justice Fernando delivering the judgement in Action no 216/17 ordered the defendants to jointly and severally pay the plaintiff the sum of \$97133.95 and costs in the sum of \$2000.00 after a full hearing.
- (iv) Half of the judgement sum being \$48,566.97 was to be deposited into Court in Minors account in the name of Minor A.A. Reddy and the balance to go to the plaintiff as Administratrix of the estate of Ramendra Gangaiya.
- (v) The Plaintiff in this Action "Sun Insurance Company Limited" being the insurer of both vehicles involved in the accident was served with a

writ in the above action within seven days of the issue of writ as is required by the Third Party (Motor Vehicle) Insurance Act.

- (vi) Upon receiving the claim defendant's Solicitors (plaintiff in action No 216/2007) and the driver and owners of vehicle CH 328 were informed by the solicitors of Sun Insurance that there is no liability attached in respect of the third party policy for vehicles due to the following reasons.
 - a) Due to a breach of policy conditions relating to the driving of vehicle CH 328 by Samisoni Nasautamata without a driving license.
 - b) Due to the deceased being a passenger in vehicle EX 570 and a close relative of driver and owner.
- (vii) The plaintiff in the present action Sun Insurance has refused to indemnify the insured and driver of vehicle CH 328 accordingly.
- (viii) The defendants Solicitors on 25th June 2012 issued and served by fax on the plaintiff a Winding Up Notice under provisions of the Companies Act Cap 247 and the said Notice was based on the Judgement obtained by her in Action No 216 of 2007 against the defendants of the said action.
- (ix) That following receipt of the Winding Up Notice, various correspondence were exchanged between the Plaintiffs Solicitors and the Defendants Solicitors, Plaintiffs solicitors highlighting that the demand was illegal, unlawful and there being no liability attached under the respective Third Party Policies.
- (x) That following the refusal by the defendant to withdraw the Winding Up Notice, the Plaintiff filed this Writ of Summons and Statement of Claim and an Ex-parte summons for Injunction Orders supported by an Affidavit sworn by Arvendra Kumar on 12/7/2012.
- (xi) That the application for injunctive order came up on ex parte basis before his Lordship Mr Justice Yohan Fernando on 13th July 2012 and the following injunctive order was made;

"That there be an injunctive Order of this Honourable Court restraining the Defendant by herself and or through her Solicitors, Messrs Mishra Prakash and Associates, Solicitors of Lautoka, Ba and Suva and or her servants and agents relatives from proceeding any further under the Winding Up Notice

dated 25/06/2012, served on the Plaintiff and or proceeding with the presentation of any form of Winding Up Petition against the Plaintiff and subsequently advertising the petition in any newspaper in circulation in Fiji until the final determination of this Action or until further Order of this Honourable Court."

6. The defendants by their summons dated 9th November 2012 are seeking that the orders mentioned in paragraph 1 hereof to set aside and dissolve the injunctions granted on 16th July 2012 and to strike out the statement of claim with cost alleging that it is an abuse of the process of the Court. They also seek an Order for the payment of the judgement sum together with costs into Court as security.

Application to set aside and dissolve the Injunction

Law and Analysis

7. The Court in determining whether to exercise its discretion to grant an injunction or not should consider the principles laid down in **American Cyanamid Co V Ethicon (1975) AC 396**

The said principles are as follows:

- i) Is there a serious question to be tried?
 - ii) Are damages an adequate remedy?
 - iii) Where does the balance of convenience lie?
8. Hence the same principles should be considered in deciding whether the injunction granted *ex parte* should be dissolved or not.

Is there a serious question to be tried?

9. The defendants solicitors issued and served on the plaintiff a Winding Up Notice under the provision of the Companies Act Cap 247 and the said Notice was based on the Judgement obtained by her against the defendants in Action 216 of 2007.
10. In the affidavit and the written submissions filed on behalf of the defendant it is stated:
- i) That the Writ in civil action 216/2007 was served on the plaintiff within seven days of the date of the issue of the Writ and there has been no declaration sought by the Plaintiff or action commenced as

provided in Section 11 (3) of the Motor Vehicle (Third Party) Insurance Act for a declaration.

- ii) That a search of Truck no EH 328 at Land Transport Authority revealed that the Plaintiff Company was the insurer and the Winding Up Notice under Section 221 of the Companies Act was served on the company accordingly.
 - iii) That the defendant is not aware whether the driver of the truck who was driving without driving licence or owner of the truck does not have any criminal conviction against them nor is there any evidence by the plaintiff of the two relevant persons being charged and convicted of the same and or driving a motor vehicle without a third party policy being in place or in contravention of third party policy conditions.
 - iv) That the cane truck was stationery when the accident occurred.
11. In the affidavit and the written submission filed on behalf of the plaintiff it is admitted that both vehicles involved in the accident had valid third party policies at the material time and was governed by the Motor Vehicle (Third Party) Insurance Act, the insurer being the plaintiff company.
12. The plaintiff has raised the following issues in respect of denying the liability on the said policies.
- (i) That EX 570 was owned by Ronil Rohitesh Davend and Asha Monica Devi and CH 328 as per LTA registration records was registered in the name of Pauliasi D Sautamata. However the defendant (plaintiff in action 216/07) had pleaded that the truck was registered in the name of Samisoni Nasautamata and Sailasi Kaibu an incorrect and improper facts with wrong party being sued as the insured.
 - (ii) That in respect to vehicle No EX 570 under section 6 (1) proviso (a) (iii) of the Motor Vehicle (Third Party) Insurance Act, cap 177, there was no liability attached to the Policy as the deceased Ramendra Gangaiya was a close relative of the driver and owner and was also a passenger of the said vehicle, not being a Third Party within the ambit of the said Act.
 - (iii) (a) That in respect to vehicle no CH 328, the following conditions was to be followed/complied with the owner and driver of the said vehicle at all material times

"PERSONS OR CLASSES OF PERSONS ENTITLED TO DRIVE AND INSURED UNDER THIS POLICY

- a. The owner, and
- b. Any person who is driving on the owner's order or with his permission.

Provided that the person driving holds a licence permitting him to drive a motor vehicle for every purpose for which the use of the above motor vehicle is limited under paragraph (5) above or at any time within the period of thirty days immediately prior to the time of driving has held such a licence and is not disqualified for holding or obtaining such a licence."

- (b) That upon receipt of the claim in action no HBC 0217/2007 the plaintiff as the Third Party Insurer had an investigation carried out surrounding the circumstances of the incident and the investigation report revealed that the CH328 was parked on the side of the road loaded with cane as the rear tyres had blown up and immediately before the said parking, the truck was driven by Samisoni Nasautamata who did not ever hold a driving license at all and as such there was a breach of the Policy condition by the driver and owner of the said truck. That the truck was parked with the front and rear lights on indicating that caution was required to be exercised by all passing vehicles.

13. From the facts stated by the Plaintiff as above and the letter sent by the plaintiffs solicitor to the defendants solicitor dates 20th June 2012 (marked I) it is evident that plaintiff is denying the liability to indemnify the insured parties on the following grounds.

- i) That registered owner of the truck No. CH 328 was Pauliasi Sautamata according to the Land Transport Vehicle Registration Certificate (Marked B) and not Samisoni Nasautamata and Sailasa Kaibu as alleged by the Writ; Therefore action No 216/2007 has been filed against wrong parties not the insured.
- ii) That prior to the parking of the said truck it was driven by one Samisoni Nasautamata who had no driving license and thus there was a breach of Policy condition by the driver of the said vehicle CH 328.

- iii) That in respect of vehicle No. EX 570 plaintiff will not indemnify in respect of the death of the deceased because the deceased was a relative of the 1st Defendant (1st defendant in action No. 216 of 2007) pursuant to section 6(1) proviso (a) (111) of the Act.
14. In addition to the above grounds in denying the liability to indemnify the defendants the plaintiff has also taken up another issue that a Winding Up Order under the companies Act of an Insurance Company is not possible unless the defendant (Petitioner in the Notice) produces certain evidence as required by the Insurance Act, 1998 and in particular in section 104 of the said Act.
15. Opposing the plaintiffs contention the defendant by her affidavit and her counsels submission submits that the plaintiff had failed to obtain a declaration under section 11 (3) of The Motor Vehicles (Third party) Insurance Act within three months from the commencement of the tort proceedings and therefore it is now statute barred from denying liability.
16. Section 11 of Subsection 3 states
- "That no sum shall be payable by an approved insurance company of any action commenced before or within three months after the commencement of the proceedings in which the judgement was given, the insurance company has obtained a declaration that, apart from any provision contained in the policy, the company is entitled to avoid it on the ground of non-disclosure of a material factor by a false representation in a material particular by the insured."***
17. In considering the above provision of the Insurance Act I am of the view that three months period does not apply where the insured is relying on any provision contained in the policy and breach of such conditions. Section 11 (3) in my view is applicable only if the insured had obtained a policy by non disclosure of material fact or by false representation of a fact in a material particular.
18. In this matter, Insurer the Plaintiff is alleging that the insured had breached the conditions of the Policy by allowing a person without a valid driving license to drive truck no CH 328 and also filing Action No 216/2007 against persons who were not the insured Registered owners of the said vehicle.
19. The defendants counsel citing two authorities has submitted to court that the insurer is bound to pay a third party even when there is a breach of policy conditions by the Insured:

The authorities cited are:

(i) **QBE Insurance (Fiji) Ltd V Prasad [2011] FJSC 14 CBV 003 2009 (18th August 2011)**

(ii) **Sun Insurance V Pranish Prakash Chand Civil Appeal No CBV 0005 of 2005.**

20. In QBE Insurance the insurer is denying liability alleging misrepresentation by the Insured party in her proposal form. It has been decided that QBE, relying on Section 11 (3) was wholly invalid if QBE failed to give statutory notice of alleged misrepresentation relied on against Insured party to the defendant.
21. QBE case is authority on the statutory notice under section 11 (3) of the act when the Insured party has misrepresented facts in obtaining a policy of insurance under the Act which is not applicable to this matter, as determined by me in above paragraphs.
22. In **Sun Insurance V Chand**, the Supreme Court held that Sun Insurance could have recourse to recover what it had been ordered to pay the defendant Chand from the Insured irrespective of any breach of policy conditions by the Insured.
23. The principal laid down in Sun V. Chand in paying a 3rd party irrespective of a breach of conditions of the policy by the Insured party is discussed in **Sun Insurance Company Ltd V Chandra [2012] FJSC 8; CB V0007 2011 (9 May 2012)**
24. At paragraph 50 of the said Judgement Supreme Court made clear the statutory position in relation to insurance against Third Party risk.

Paragraph 50 states;

In view of the increasing incidents resulting in damages and injuries being caused to third parties it would be important to lay down the statutory position in relation to insurance against third party risks:

- (a) *Under the Statue the Insurer can impose certain conditions in the insurance policy. If the conditions stipulated in S.10 are included in the insurance policy and the vehicle is used in contravention of those conditions, and where a third party has suffered death or bodily injuries as a result of same, liability of the insured can be met by the insurer vis-a-vis third party. In such circumstances the insurer has a right to claim the sum paid to the third party from the insured.*

- (b) *A policy stipulating conditions other than those contemplated in S.10 can be included in the policy and the particulars of such conditions should be incorporated in the certificate of insurance issued in conformity with the Schedule set out in Regulation 3 of the Act.*
- (c) *The Certificate of Insurance prescribed in the Schedule gives two categories of conditions namely (a) **person or class or persons entitled to drive and (b) limitations as to use. If the vehicle is used in breach of any of the conditions coming under these categories, the insurer is exempted from third party liability.***

[Emphasis added]

25. In this matter as the Insurer is alleging breach of Policy condition namely persons or classes of persons entitled to drive. If that fact is proved the Insurer will be exempted from third party liability according to the statutory position laid down in Sun Insurance V Chandra and will not require the insurer to get a declaration under Section 11 (3) of the Insurance Act.
26. The other issue raised by the plaintiff in this matter is whether a Winding Up Order under the companies Act of an Insurance Company is possible without the defendant (Petitioner in the Notice) producing certain evidence as required by Insurance Act, 1998, and in particular the provisions contained in Section 104 of the said Act.
27. A Winding up Notice is brought under section 221 of the Companies Act on the presumption that a company is insolvent and unable to pay its debts in this case the debt being the judgement sum.
28. Section 104 (2) of the Insurance Act 1998 states

104 (2) "For the purpose of Part VI of the Companies Act, an insurer is deemed to be unable to pay its debts if at any time the margin of solvency specified in Section 31 is not maintained."

Section 104 (3) states

104 (3) "For the purposes of proceedings under the Companies Act for the winding-up of the affairs of an insurer, evidence that the insurer was insolvent at the close of the period to which the accounts and other statements last prepared under section 60 (1) relate is evidence that the insurer continues to be unable to pay its debts, unless the contrary is proved."

29. Section 31 (2) (c) refers to the margin of solvency for general insurer minimum capital and solvency requirements.

31 – (2) An insurer licensed to carry on any class of general insurance business must maintain at all times –

(c) If the insurer is incorporated in the Fiji islands, a surplus of assets over liabilities of

(i) \$1,000.00

(ii) 20% of net premium income derived during the last 12 months

or

(iii) 15% of net claims outstanding provision whichever is greater

30. Therefore it is my view in order to make an application to wind up an Insurance company incorporated in Fiji a petitioner has to establish that the Insurer at the current time, is not maintaining the margin of solvency specified in Section 31(2) of the Insurance Act and not on a debt owed by the Company to a Petitioner.

31. Furthermore, the Preamble to the Insurance Act states:

“TO PROVIDE FOR THE REGULATION OF THE BUSINESS OF INSURANCE, FOR THE LICENSING AND SUPERVISION OF INSURERS AND INSURANCE INTERMEDIARIES AND FOR RELATED MATTERS.”

32. Part II of the Act deals with “ADMINISTRATION” of the Act.

Under the said Part Section 3 (1) Vest the power and responsibility of administering the Act with the Reserve Bank of Fiji. In other words, Reserve Bank of Fiji is the regulating body of licensed Insurance Companies of Fiji.

33. In considering the above provisions of the Insurance act it is very clear that the Legislature of Fiji has vested. the regulatory powers of Insurance Companies incorporated in Fiji with the Reserve Bank to ensure the rights of citizens who obtain Insurance Policies. Therefore, it is my view that an insured party whose claim is denied by an Insurance Company (whose supervision is vested with the Reserve Bank of Fiji) is not at liberty to invoke the provisions of the Companies Act to make an application for Winding Up of the Company ignoring the provisions of the Insurance Act in respect of the solvency requirement of such a company.

34. As such, whether the plaintiff company could be wound up without considering the provisions in the Insurance Act is also a serious question to be tried in this matter.
35. Furthermore, in re **Tweed Garages Ltd Chancery Division[1962] page 406 at page 407** it was held that the only qualification required of the petitioner in a Winding Up petition was a creditor; and that, where there was no doubt that the petitioner was a creditor for a sum which would otherwise entitle in a Winding Up Order.
36. In this matter plaintiff does not admit the liability under the Insurance policy and also alleges that the defendant has filed action No 216/2007 against wrong parties who were not covered by the policy. Plaintiff Company was also not a party to Action No 216/2007. Therefore, there is a doubt as to whether the defendant is a creditor of the plaintiff company.
37. Considering all of the above I am of the view that there are serious questions to be tried by Court in this matter with the plaintiff company having a prima facie probability of success.

Whether damages are adequate Remedy

38. In respect of the issue of suffering irreparable loss and damages it is evident from the disclosure statement of the plaintiff company annexed to the affidavit of Avendra Kumar sworn on marked 'A' that the plaintiff is a well established Company subject to the monetary supervision of the Reserve Bank of Fiji.
39. If the defendant proceed to present a petition to wind up the Plaintiff Insurance Company and then advertise the petition in newspapers the plaintiffs business reputation will be badly effected and would be subject to directives of the Reserve Bank whereas many clients will withdraw their business dealings with the Plaintiff.
40. Furthermore, many insurance policy holders would request for cancellation of their insurance policies which will adversely affect the general public and will have a serious impact on the Economy of Fiji.
41. The defendant has not deposed of any assets of hers in her affidavit to indemnify such a loss or damage that may be caused to the Plaintiff.
42. Considering all of the above, I am of the view that if the injunction is dissolved and the winding up of the plaintiff company proceeds irreparable loss and damage will be caused to the plaintiff company. If the defendant becomes entitle to execute the judgement against the plaintiff without

resorting to the winding up process she will be entitled for interest on the principal sum as such the damages could be quantified and will not irreparable.

43. Therefore, it is my view that damages will not be an adequate remedy to compensate for the irreparable loss the plaintiff will suffer as mentioned in the above paragraphs if the injunction is dissolved.

Balance of Convenience

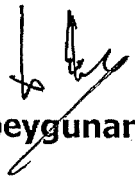
44. In view of all of the above, I find that the balance of convenience is in favour of the Plaintiff company who is opposing the desolution of the Injunction granted Ex-Parte.

Striking out a Claim

45. The defendant by Summons dated 9th November 2012 is seeking an order to strike out the Plaintiffs claim with costs on the grounds that it is frivolous and vexatious and that it is an abuse of the process of Court.
46. Having considered the evidence and the submission of both parties and deciding that there is a serious question to be tried in this matter, I cannot accede to the submission of the defendant that the plaintiff claim is frivolous and vexatious and therefore refuse to strike out the summons.
47. By the summons filed, the defendant has also sought an order to pay the judgement sum in HBC 216/2007 together with costs as security into court. As the plaintiff has satisfied the principles laid down in American Cyanamid case for injunctive relief question of the judgement sum and costs being deposited into court does not arise.

Final Orders

- (a) The defendants summons dated 9th November 2012 struck out and dismissed.
- (b) The defendant must pay to the plaintiff costs summarily assessed at \$1,000.00.
- (c) Orders Accordingly.


L.S. Abeygunaratne
Judge

30/04/2014

