

**IN THE HIGH COURT OF FIJI**  
**[WESTERN DIVISION] AT LAUTOKA**  
**CIVIL JURISDICTION**

**Civil Action No.: HBC 0084 OF 2008L**

**BETWEEN:**            **PACIFIC TRANSPORT COMPANY LIMITED** a limited liability company having its registered office at 169 Foster Road, Walu Bay, Suva.

**FIRST APPELLANT**  
**[ORIGINAL FIRST DEFENDANT]**

**AND:**                 **SURUJ RAM SHARMA** of Nukuloa, Ba, Serviceman

**SECOND APPELLANT**  
**[ORIGINAL SECOND DEFENDANT]**

**BETWEEN**            **NIRBHAY CHAND** of Simla Housing, Lautoka, Unemployed

**FIRST RESPONDENT**  
**[ORIGINAL PLAINTIFF]**

**BETWEEN:**            **NEW INDIA ASSURANCE COMPANY LIMITED** having its registered office at New India Assurance Building, 87 M.G. Road, Fort Mumbai- 400001 and having its principal place of business in Fiji at 2<sup>nd</sup> Floor, Harifam Centre, Renwick Road, Suva.

**SECOND RESPONDENT**  
**[ORIGINAL THIRD PARTY]**

**Appearances:**        Ms. Narayan S for 1<sup>st</sup> Appellant  
                              Mr. Chaudhry R for 1<sup>st</sup> Respondent  
                              Mr Krishna S for 2<sup>nd</sup> Respondent

**Date of Hearing:**     14<sup>th</sup> November, 2014

**Date of Judgment:** 28<sup>th</sup> November, 2014

**INTERLOCUTORY JUDGMENT**

1.     **Introduction**

- 1.1    By Summons dated 17<sup>th</sup> June, 2014 the Appellants (Original 1<sup>st</sup> & 2<sup>nd</sup> Defendants') seek the following reliefs from Court:

- (i) That the Ruling delivered and Orders made by Master of the High Court on 20<sup>th</sup> May, 2014 and all further proceedings and execution of the same be wholly stayed pending the determination of the appeal.
- (ii) That the Appellants be granted an enlargement of time to appeal the Ruling and Orders made by the Master of the High Court on 20<sup>th</sup> May, 2014.
- (iii) That leave be granted to the Appellants' to appeal the Ruling and Orders made by the Master of the High Court on the 20<sup>th</sup> May, 2014.
- (iv) That costs of the application be costs in cause.
- (v) Any other Orders.

1.2 The application is made pursuant to Order 59 Rule 9, 10 and 11 of the High Court Rules 1988 and under the inherent jurisdiction of the Court.

1.3 This application is supported by an Affidavit sworn by an employee of the 1<sup>st</sup> Appellant, Sunil Maharaj sworn on 18<sup>th</sup> June, 2014.

1.4 The first Respondent (Original Plaintiff) has filed an Affidavit sworn by him on 20<sup>th</sup> August, 2014; opposing the application.

1.5 An Affidavit sworn on 25<sup>th</sup> September, 2014 by Izyan Mohammed Shah, an employee of the 1<sup>st</sup> Appellant is filed in Reply to the Affidavit of the 1<sup>st</sup> Respondent.

## 2. Background

2.1 The Plaintiff in this matter is claiming from the Defendants' special damages, general damages or alternatively compensation under the Workmen's Compensation Act for injuries he suffered as a result of an accident. While the matter was pending the Plaintiff filed an application claiming the sum of \$6,115.20 as an interim payment from the 1<sup>st</sup> Defendant. This application was opposed by the 1<sup>st</sup> Defendant. On 20<sup>th</sup> May, 2014 the Master of the High Court delivered his Ruling on the said application by which the 1<sup>st</sup> Defendant was ordered to pay the sum of \$5,000.00 to the Plaintiff.

2.2 The Defendant filed the Summons dated 17<sup>th</sup> June, 2014 mentioned in paragraph 1 hereof pursuant to the said Order delivered by the Master.

3. The Law

3.1 The Ruling delivered by the Master on 20<sup>th</sup> May, 2014 is an Interlocutory Ruling as it did not finally dispose of the proceeding or determine the rights of the parties. Hence the Appellants are required to apply for the leave of a single Judge to lodge an appeal as per Order 59; rule 8(2) of the High Court Rules.

Order 59 Rule 8(2) is as follows:

8(1).....

*(2) No appeal shall lie from an Interlocutory Order or Judgment of the Master to a single Judge of the High Court without the leave of a single Judge of the High Court which may be granted or refused upon the papers filed.*

3.2 Under the Rule 11 of Order 59 an application for leave to appeal an Interlocutory Order or Judgment had to be filed and served within 14 days of the delivering of the Order or Judgment.

3.3 Order 59 Rule 10 (1) provides the procedure to enlarge time to file appeal.

Order 59 Rule 10(1) states:

*"An application to enlarge the time period for filing and serving a notice of appeal or cross-appeal may be made to the Master before expiration of that period and to a single Judge after the expiration of that period".*

3.4 It is clear from the above provisions that the Appellants in this matter had to file the leave to appeal application within 14 days of the delivery of the Order or Judgment; in this matter by 3<sup>rd</sup> June, 2014. Having failed to do so the Appellants filed the Summons dated 17<sup>th</sup> June, 2014, on 19<sup>th</sup> June, 2014 seeking an enlargement of time to appeal, 16 days after the deadline expired.

3.5 The factors the Court should consider in exercising its powers under Order 59 Rule 10(1) are stated in the Judgment of *Norwich and*

*Peterborough Building Society -v- Steed* [1991] 2 ALL ER 880 as follows:

*"In deciding whether to grant an extension of time the Court would take into account the length of and the reasons for the delay, the chances of the appeal succeeding if the application was granted and the degree of prejudice to the Respondent if the application is granted....."*

3.6 In *NLTB -v- Ahamed Khan and Anor* [2013] FJSC; CBV0002.2013; (15 March 2013) These factors were considered by the Supreme Court of Fiji in exercising its direction to grant an extension of time for filing and serving a notice of appeal.

#### 4. Length of the Delay

In this matter the delay in filing the present application for leave to appeal out of time is 16 days.

4.1 The view expressed by Thompson J A in a similar application in *Tevita Fa t/a Tevita Fa & Associates and Tradewinds Marine Ltd and Ocenic Developers Fiji Ltd (CIV App No. 40/94 FCA)* is cited in *Ist Deo Maharaj and Burns Phillip (South Sea) Company Limited in Civil Appeal No.: ABU 0051 of 1994S*.

Thompson J A said :

*"The application for leave to appeal was filed only 4 days after the end of the period of six weeks. That is a very short period but time limits are set with the intention that they should be observed and even lateness of only a few days requires a satisfactory explanation before an extension of time can properly be granted....."*

4.2 Therefore the Court could consider the delay of 16 days favourably only if the Appellants could satisfactorily explain the reasons for the delay.

#### 5. Reasons for the Delay

5.1 In the Affidavit sworn by the 1<sup>st</sup> Plaintiffs' [Appellants] employee Sunil Maharaj, it is stated that their Solicitors were not informed of the Ruling date of the Masters' Decision until late afternoon of 19<sup>th</sup> May,

2014, a day prior to the Ruling date, through a telephone call made by a Civil Registry Court Officer. It is stated further due to the short notice their Solicitors were neither able to attend Court on the date of Ruling nor instruct any agent Solicitor in Lautoka to appear on their behalf.

5.2 It is also stated in the Affidavit that:

- (i) The Court Officer has informed their Solicitor on phone that upon delivery of the Ruling, the copy of the Ruling will be placed in their Solicitors' file in the Court Registry, however no Ruling was forwarded to their Solicitors until 13<sup>th</sup> June, 2014.
- (ii) Their Solicitors managed to obtain a copy of the written Ruling from the Solicitors of the 1<sup>st</sup> Respondent via facsimile on the 13<sup>th</sup> June, 2014.
- (iii) Their Solicitors had attempted to make prior inquiries with the Court Registry regarding the written copy of the Ruling, however could not get in contact with the respective Court Officer within the required time.
- (iv) The sealed Order pertaining to the Ruling delivered on 20<sup>th</sup> May, 2014 was forwarded to their Solicitors earlier however without having the copy of the written ruling their Solicitors and their office could not consider their stance with respect to appeal and could not draw the grounds for appeal.

5.3 From the above mentioned facts deposed by Sunil Maharaj in his Affidavit, it is clear that their Solicitors were aware on 19<sup>th</sup> May, 2014 that the Ruling would be delivered on 20<sup>th</sup> May, 2014. It was the duty and responsibility of the Appellants Solicitors to instruct a Solicitor in Lautoka to appear in Court on the date of Ruling or else instruct a Solicitor to obtain a copy of the Ruling soon after it was delivered. Even if a Solicitor could not appear on 20<sup>th</sup> May, 2014, it is difficult to believe that the Solicitors for the Appellants were unable to obtain a copy of the Order until 13<sup>th</sup> June, 2014. The deponent state in the Affidavit that their Solicitors managed to obtain a copy of the written Ruling from the Solicitor for the 1<sup>st</sup> Respondent via a facsimile on the 13<sup>th</sup> June. Why did the Appellants Solicitors wait till 13<sup>th</sup> June to contact the 1<sup>st</sup> Respondents' Solicitor to get a copy of the Order? is a question which requires an explanation. They could have contacted

the 1<sup>st</sup> Respondents' Solicitors and obtained a written Ruling via fax or email soon after it was delivered.

5.4 Upon a careful consideration of the facts deposed in the Affidavit of Sunil Maharaj, I am not satisfied with the reasons given for the delay in Plaintiffs' Solicitors obtaining copy of the Order. Therefore I find that the reasons given for the delay is unacceptable.

## 6. Chances of the Appeal Succeeding

6.1 I will now consider the chances of the Appellant if extension of time is granted to appeal the Ruling delivered by the Master on 20<sup>th</sup> May, 2014. I will look at the grounds of appeal for this purpose.

6.2 It is stated in the proposed grounds of appeal that the Learned Master erred in law and fact in the following:

- (i) In not considering the that there was no supporting evidence adduced by the 1<sup>st</sup> Respondent indicating a verified check to confirm that the bus indeed did not have a reversing beeper, causing the 1<sup>st</sup> Respondent not to get sufficient warning of the bus reversing.
- (ii) In not considering the issue whether anybody driving within the private yard in the absence of any fare paying passengers were still required to possess a licence or a heavy PSV licence, at all needs to be decided by way of oral evidence.
- (iii) In not considering that the 3<sup>rd</sup> party failed to provide any supporting evidence indicating that an investigation was in fact done by the 3<sup>rd</sup> party to confirm the adequacy or inadequacy of the lighting at the bus depot of the 1<sup>st</sup> Appellant.
- (iv) In not considering that there was no supporting evidence adduced indicating that an investigation was in fact done by the 3<sup>rd</sup> party to confirm the sufficiency of any such device (reversing beeper) prior to or after the accident.
- (v) By concluding from the Medical report dated 09<sup>th</sup> July, 2012 that the 1<sup>st</sup> Respondent was admitted for 2 weeks in hospital and that the same was indicative of the seriousness of the injuries suffered by the 1<sup>st</sup> Respondent and failed to consider that the Medical Certificate dated 25<sup>th</sup> September, 2007 which confirmed

that the 1<sup>st</sup> Respondent was only admitted and seen as an inpatient for 7 days from the date of the incident.

- (vi) By considering from the Medical report dated 09<sup>th</sup> July, 2012 that the 1<sup>st</sup> Respondent had a permanent incapacity of 80% but failed to consider that the same Doctor who prepared the Medical report dated 11<sup>th</sup> March, 2010 which was 2 ½ years after the injury but did not contain any permanent incapacity suffered by the 1<sup>st</sup> Respondent.
- (vii) In not considering that the 1<sup>st</sup> Respondent had failed to provide any evidence of pain and suffering or any loss suffered by him and that he was in fact in employment as a heavy PSV driver subsequent to the injury.
- (viii) In holding that the 1<sup>st</sup> Respondent was entitled to an award for interim payment of \$5,000.00 and failing to consider that the claim for interim payment was made by the 1<sup>st</sup> Respondent in terms of Workmen's Compensation only, and thereby, without any claim being made proceeding to award damages under Common Law as opposed to a remedy under Workmen's Compensation Act, without providing a detailed reasons as to how the award of \$5,000.00 was made up to.

6.3 It is evident from the facts deposed by the 1<sup>st</sup> Respondent (Plaintiff) in the Affidavit filed in support of the application for interim payment that the claim is based on the provisions of the Workmen's Compensation Act. However, the learned Master in his Ruling grants the interim payment of \$5,000.00 to the 1<sup>st</sup> Respondent based on the Common Law. It is also noted that detailed reasoning as to how \$5,000.00 was made up is also not given in the Ruling.

6.4 Furthermore, the learned Master has stated that the 1<sup>st</sup> Respondent being an inpatient for two weeks is some indication of the seriousness of the injury. Paragraph 15 of the Ruling is as follows:

*[15]"To be an inpatient for two weeks is some indication of seriousness of the injury. It is often the case that, the longer a period of hospitalization is, the more likely there is to be a finding that the injuries sustained were of greater severity. These will usually then set the stage for a finding of, and an award for pain and suffering."*

- 6.5 This finding of the Master is based on the Medical Report of Dr. Joel Mareko dated 09<sup>th</sup> July, 2012. However, according to the Medical Certificate marked C attached to the Affidavit in Opposition sworn by Jaswant Kumar (Affidavit in Opposition filed for the interim payment application), the 1<sup>st</sup> Respondent was an inpatient only for one week. I find that the learned Master has not considered the Medical Certificate marked C dated 25<sup>th</sup> September, 2007.
- 6.6 There are some other important issues such as whether the bus had a reverse beeper or whether the lighting at the depot was adequate or inadequate at the time of the accident which should be dealt with after hearing the evidence at a trial.
- 6.7 I am also of the view that the learned Master has not considered that the 1<sup>st</sup> Respondent had failed to provide any evidence of pain and suffering or any loss suffered by him. The 1<sup>st</sup> Respondent admits in his Affidavit that he did work for Khan Buses to feed himself and his family on "casual basis". I find that these facts have not been considered by the learned Master in arriving at his decision.
- 6.8 In *Vunimoli Sawmill Ltd -v- Sen* [2013] FJCA 140, ABU28.2013 (20 Dec 2013) Calanchini J said:

*"[17] In view of the substantial delay from the date of the Judgment to the date of filing of the present applications, the Appellants must establish that there is a ground of appeal that has a high probability of succeeding. In assessing the probability of success of any one ground of appeal, the function of this Court at this stage is not to consider in detail the merits of any particular ground of appeal....."*

- 6.9 As such it is not my task in this matter to consider in detail the merits of any particular ground of appeal but to see whether there is a high probability of success in any one ground of appeal. As determined by me on the above paragraph, I am of the view that there is a high probability of success in some of the grounds of appeal.
7. **Prejudice to the parties**

In his Affidavit in Support of this application, Sunil Maharaj has deposed that the 1<sup>st</sup> Respondent does not have the means to pay back the awarded sum in the event he fails in his claim on trial in the substantive matter, the Appellant will be to a detriment in terms of recovery of the payment that will be made at




this stage. It is also deposed by him that the 1<sup>st</sup> Respondent is still capable of working in the same capacity of the heavy PSV driver and earn income for his living.

8. I have concluded that there is merit in the grounds of appeal. As such if an interim payment is made at this stage and the Appellants succeed in their appeal and at the trial in the substantive matter, they will be prejudiced by not having a chance to recover the amount paid. On the other hand the 1<sup>st</sup> Respondent has admitted he is employed at another Bus Company as a casual worker. Therefore, I am of the view no serious prejudice could be caused to the 1<sup>st</sup> Respondent if an interim payment is not made at this stage.

### Conclusion

9. In the outcome, having considered the Affidavits filed and the Submissions made by both Counsel I hold that the Appellants should be granted an enlargement of time to appeal the Ruling and Orders made by the Master of the High Court on 20<sup>th</sup> May, 2014. The Learned Counsel for the Appellant Ms. Narayan stated in her submissions that she is only seeking relief as prayed for in prayer 2 of the Summons filed.
10. Accordingly the Court orders;
- (i) That the Appellant are granted an enlargement of time to appeal the Ruling and Order made by the Master of the High Court on 20<sup>th</sup> May, 2014.
  - (ii) The Appellants to file an Application for leave to Appeal within 14 days from this Order.
  - (iii) Costs of this Application be costs in cause.



  
Lal S. Abeygunaratne  
Judge

At Lautoka  
28<sup>th</sup> November, 2014