

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 22 of 2005

BETWEEN : RAVINDRA KISHORE

PLAINTIFF

A N D : MOTOIULA NEMANI

1ST DEFENDANT

A N D : TEBARA TRANSPORT LIMITED

2ND DEFENDANT

A N D : DOMINION INSURANCE LIMITED

THIRD PARTY

COUNSEL : Mr. D. Singh for the Plaintiff.
Mr. R. Naidu for the first and Second Defendants
Ms. K. Singh for the Third Party

Date of Hearing : 23rd October, 2015

Date of Ruling : 07th December, 2015

RULING

[01] The plaintiff on 03rd August 2002 while on his way to work in the bus bearing registration No. DA 737 belonging to the 2nd defendant met with an accident and sustained injuries.

[02] The plaintiff filed this action to recover damages caused to him by the accident and the Court awarded \$ 172,458.35. The Court also ordered that the 2nd defendant is

entitled to be indemnified by Dominion Insurance Limited, the 3rd Party, under the terms of the Motor Vehicle Compulsory Third Party Policy Certificate, the total amount of damages and costs.

[03] The 3rd party appealed against the judgment and sought in this application to stay the execution of the judgment pending the determination of the appeal. The plaintiff and the 1st and 2nd defendants opposed this application.

[04] Order 45 rule 10 of the High Court Rules provides as follows;

Without prejudice to Order 47 rule 1, a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the Court may by order grant such relief, and on such terms, as it thinks just.

[05] In **Natural Waters of Viti Ltd v Crystal Clear Mineral Waters (Fiji) Ltd – Civil Appeal ABU0011.04S** the Court of Appeal laid down the guidelines for the Court to consider in allowing or refusing an application for stay the execution of judgment pending appeal. They are;

1. Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative). See **Philip Morris (NZ) LTD v Liggett & Myers Tobacco Co (NZ) Ltd [1977] 2 NZLR 41 (CA)**
2. Whether the successful party will be injuriously affected by the stay.
3. The bona fides of the applicants as to the prosecution of the appeal.
4. The effect on third parties.
5. The novelty and importance of questions involved.
6. The public interest in the proceeding.
7. The overall balance of convenience and the status quo.

[06] In deciding whether the applicant's right of appeal will be rendered nugatory if stay is not granted the Court must first consider whether the applicant stands a chance of winning the appeal. In deciding that, although the Court will not engage in the

exercise of deciding the appeal on its merits, it will consider the merits of the appeal for the sole purpose of ascertaining the applicant's prospects of success in appeal.

[07] The learned counsel for the 3rd party (appellant) challenges the decision of the High Court on three grounds of appeal. They are;

1. The learned trial Judge erred in law by finding that the plaintiff was not an employee of the 2nd defendant when travelling to his work place using the 2nd defendant's bus but travelling as a member of the general public therefore covered under the compulsory third party policy with increased coverage of \$ 250,000.00.
2. The learned trial Judge erred in law and in fact by finding that the appellant's third party motor vehicle policy exclusion in section 2, clause 22(b) did not apply as it is contrary to section 6(1)(a)(ii) of the Motor Vehicle (Third Party) Insurance Act (Cap 177).
3. The learned trial Judge failed to consider that the plaintiff was given a privilege to travel free in the 2nd defendant's bus as he was an employee, and the motor vehicle third party policy has an exclusion that any employee of the insured is not covered by the increased coverage of \$ 250,000.00 but limited to \$ 4000.00 under the Motor Vehicle (Third Party) Insurance Act (Cap 177).

[08] The learned High Court Judge on the question whether section 2 clause 22(b) of the insurance policy is applicable to the plaintiff or not, made the following observations;

Mr. Diven Prasad cited Lord Denning in **Vandyke v Fender and another(Sun Insurance Office Ltd, Third Party)**, (1070) 2 AER 335 at page 340 referring to two leading cases, namely, **St Helen's Colliery Co. Ltd v Hewitson** (1924) A.C. 59 and **Weaver v Tredegar Iron & Coal Co. Ltd** (1940) A.C. 955b as follows;

“They show, to my mind quite conclusively, that when a man is going to or coming from work, along a public road, as a passenger in a vehicle provided by his employer, he is not then in the course of his employment – unless he is obliged by the terms of his employment to travel in that vehicle. It is not enough that he should have right to travel in the vehicle, or be permitted to travel in it. He must have an obligation to travel in it. Else he is not in the course of his employment. That distinction must be maintained: for otherwise there would be no certainty in this branch of law”. (Emphasis added).

Lord Lowry in **Smith v Stages** (1989) 1 AER 833 at 847 agreeing with Lord Denning MR’s observations on the meaning of the expression “*in the Course of his employment*” in the above case stated:

“Both the plaintiff and Fender (who was driving) were undertaking their customary journey from their homes to their regular place of work. The employers provided a car and a travelling allowance, no doubt as an inducement to the men to accept their employment but, the men were not paid for the time during which they were travelling to work; they were not on duty and not in the course of their employment.”

- [09] The learned Judge held that it is evident that Ravindra Kishore was not obliged by the terms of his employment to travel in that vehicle. Accordingly, he was not in the course of his employment and the Workman’s Compensation Policy is inapplicable.
- [10] The learned High Court Judge decided that the 2nd defendant’s liability under the third party policy extended up to \$ 250,000. In arriving at the said conclusion the learned Judge observed that in the motor vehicle insurance policy under the heading of “**WHAT YOU ARE INSURED FOR**” it is stated as follows;

IN RESPECT OF SECTION 2 – LEGAL LIABILITY.

You shall become legally liable for accidental physical loss or damage to property of others or personal injury to passengers (who are not fare paying passengers) arising out of the use of any vehicle insured under section 1.

[11] In terms of section 6(1) of the Motor Vehicle (Third Party Insurance) Act (cap 177) the third party compulsory policy limit is \$ 4000.00. Section 6(1) of the said Act provides as follows;

In order to comply with the provisions of this Act, a policy of insurance must be a policy which-

- (a) is issued by an approved insurance company;
- (b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle:

Provided that-

- (a) such policy shall not be required to cover-
 - (i). liability solely arising by virtue of the provisions of the Workmen's Compensation Act; or (Cap. 94)
 - (ii). **save in the case of a passenger carried for hire or reward in a passenger vehicle or where persons are carried by reason of or in pursuance of a contract of employment,** liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the motor vehicle at the time of the occurrence of the event out of which the claims arise;
or
 - (iii). liability in respect of the death of or injury to a relative of the person using the vehicle at the time of the occurrence of the event

out of which the claim arises, or to a person living with the person so using the vehicle as a member of his family; in this paragraph "relative" means a relative whose degree of relationship is not more remote than the fourth;

(iv). any contractual liability;

(b) such policy shall not be required to cover liability in excess of \$4,000 for any claim made by or in respect of any passenger in the motor vehicle to which the policy relates or in excess of \$40,000 for all claims made by or in respect of such passengers. The amount herein specified shall be inclusive of all costs incidental to any such claim or claims. (Amended by Ordinance 27 of 1954, s. 3; 8 of 1956, s. 2; 12 of 1964, s. 3.)

[12] The learned High Court Judge in arriving at the conclusion that the liability of the insurer extends up to \$ 250,000 observed that the provisions require that the persons specified in the policy have to be insured against any liability which may be incurred by him or them, in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle.

[13] However, it is not clear the basis on which the Court arrived at the finding that the liability of the insurer extends up to \$ 250,000 and in my view this is an important question of law which requires the attention of the Court of Appeal.

[14] The learned counsel for the applicant submitted that the power to order stay of execution is to be exercised only where a special or exceptional circumstance exists and cited the decision in **Cellante & Another v G. Kallis & Another** (1991) 2 VR 636 where it was also held that such circumstances will exist where there is a real risk that the appeal is successful, will be rendered nugatory. In the case of **Linotype - Hell Finance Ltd v Baker** (1992) 4 All E.R. 887 it was held that where an unsuccessful defendant seeks a stay of execution pending appeal to the Court of Appeal, it is a legitimate ground for granting the application that the defendant is

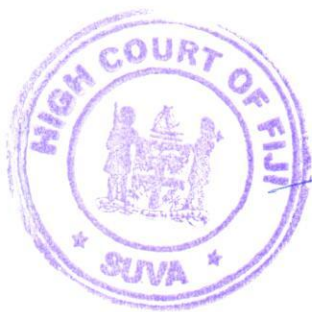
able to satisfy the court that without a stay of execution he will be ruined and that he has an appeal which has some prospects of success.

[15] The question then arises for determination whether, if the stay is not granted the 3rd defendant's right of appeal will be rendered nugatory. The amount awarded is \$ 172,458.35. If the question of law referred to above is decided in favour of the 3rd defendant (the appellant) it will be absolutely difficult if not impossible for the 3rd defendant to recover from the plaintiff whatever the amount which the 3rd defendant will be declared entitle to recover.

[16] For the above reasons I make the following orders.

ORDERS.

1. The execution of the judgment pending the final determination of the appeal is stayed.
2. There will be no order for costs of this application.




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Lyone Seneviratne

JUDGE