

IN THE HIGH COURT OF FIJI AT SUVA  
CIVIL JURISDICTION

Civil Action No. 54 of 2016

BETWEEN : SAMUELA SAUTAMATA RITOVA

PLAINTIFF

AND : AKHTAR ALI

FIRST DEFENDANT

AND : RAIWAQA BUSES LIMITED

SECOND DEFENDANT

AND : SUN INSURANCE COMPANY LIMITED

FIRST NAMED THIRD PARTY

Coram : The Hon. Mr Justice David Alfred

Counsel : Ms S. Narayan for the Plaintiff  
: Mr M A Khan for the Second Defendant  
: Mr J Daurewa for the Third Party.

Date of Hearing : 31 October 2018  
Date of Decision : 9 November 2018

## DECISION

1. This is the Second Defendant/Appellant (sic, Applicant's) summons for leave to appeal against the Master's decision (Ruling) on 6 August 2018.
2. It is supported by the affidavit of Ashish Deepak Kumar (Kumar) who deposed as follows:
  - (1) He is a director of the Applicant.
  - (2) The Plaintiff instituted a personal injury claim against the Applicant arising out of a vehicle accident on 28 May 2014 involving Bus No. DU 927 (bus). There are 5 separate claim arising from the said accident but this is a test case by virtue of consent orders made on 23 July 2018, which is still pending before the Court.
  - (3) The Plaintiff is claiming damages for pain and suffering and special damages.
  - (4) The Applicant commenced third party proceedings against both the Third Party (Sun) and New India Assurance Company (New India) with whom it had valid motor vehicle policies under which it was adequately insured.
  - (5) Pursuant to an originating summons, New India deposited \$40,000 into the Judicial Department trust account and it being the second named Third Party is now out of the proceedings.
  - (6) The Plaintiff filed a summons for interim payment on 2 March 2017 and on 6 August 2018 the Master ordered the Applicant to pay the Plaintiff an interim payment of \$30,000.
  - (7) The Applicant filed a summons seeking to be indemnified by Sun but withdrew it on 19 September 2018.
  - (8) The Applicant is advised there are merits in an appeal which has yet to be heard (sic, filed).
3. The Plaintiff in his affidavit in opposition deposed as follows:
  - (1) He suffered severe personal injuries which being a passenger in the bus of which the First Defendant was the authorized driver and the Applicant was the registered owner.
  - (2) The Applicant has been ordered to pay the sum of \$30,000 which it is capable of paying hence it should adhere to the Orders granted by the Court.

- (3) More than 2 years have passed since the matter was initiated and he has no financial assistance or compensation from the Applicant.
4. The hearing commenced with Mr Khan submitting. He said if leave were not granted it will cause financial hardship to the Applicant. There were errors committed by the Master viz Sun was not in the proceedings before him.
  5. Ms Narayan then submitted. She said if Sun were to be ordered to pay, that should be done by the Applicant and not by the Plaintiff. The Applicant is financially able to pay the interim payment and there was no reason why it should not pay.
  6. Mr Daurewa finally submitted. He said Sun prefers that the substantive issues of liability and quantum be decided expeditiously. The appearance of Sun's Counsel before the Master was excused.
  7. Mr Khan replied that it was not proper for the Applicant to bring in Sun for the interim payment. The Plaintiff should have done it.
  8. At the conclusion of the arguments, both Mr Khan and Ms Narayan informed the Court that the application for stay will await the determination of the application for leave.
  9. I informed Counsel I would take time for consideration. Having done so I now deliver my decision. I first refer to the case of *Ali v. Radruita* [2011] FJHC 302 (26 May 2011). This was an application for leave to appeal an order made by the Master that the Defendant should pay \$10,000.00 as interim damages to the Plaintiff within 28 days.
  10. Calanchini J (as he then was) said that "It is well settled that only in exceptional circumstances will leave be granted to appeal an interlocutory order. Leave will not normally be granted unless some injustice would be caused (page 4). Then at page 6 he said "The exceptional circumstances that the Defendant is required to establish in the

present application are that the Master has acted upon a wrong principle, or has neglected to take into account something relevant, or has taken into account something irrelevant or that the amount awarded is so much out of all reasonable proportion to the facts proved in evidence. In my judgment the Defendant must also establish that it is necessary in the interests of justice for the Master's award to be reviewed".

11. The pivotal issue is Order 29 rule 11(2) of the High Court Rules which reads "No order shall be made under paragraph (1) in an action for personal injuries if it appears to the Court that the defendant is not a person falling within one of the following categories, namely-
  - (a) A person who is insured in respect of the plaintiff's claim".
12. Here it is clear from Kumar's affidavit para 11 that "The Applicant now seeks to be indemnified by Sun Insurance Company Limited to (sic, with) whom it has a valid 3<sup>rd</sup> party comprehensive policy".
13. Thus para (a) of O.29 r.11 (2) is satisfied that the Applicant is a person which is insured and therefore it is fit for the Court to order the Respondent (Applicant here) to make an interim payment of such amount as it thinks just.
14. At the end of the day I shall adopt and apply Calanchini J's Decision that ".....in order to obtain leave to appeal the Defendant must show special circumstances. For the reasons stated above I have concluded that there are no special circumstances established by the Defendant that would enable me to grant special leave to the Defendant". (page 7).
15. In the result, the Applicant's (Second Defendant) summons for leave to appeal is dismissed and the Applicant is ordered to pay the Plaintiff the costs of the application which are summarily assessed at \$250.

Delivered at Suva this 9<sup>th</sup> day of November 2018.



David Alfred

**JUDGE**

High Court of Fiji