

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 08 of 2017

BETWEEN: ANA VAKASAWAQA of Lot 100, Maqbool Road, Nadera, Unemployed.

PLAINTIFF

AND: MALAKAI GUCAKE of Nadi, Commercial Pilot.

1ST DEFENDANT

AND: AIR PACIFIC LIMITED trading as FIJI AIRWAYS and formerly as Air Pacific a limited liability company having its registered office at Air Pacific Maintenance and Administration Centre, Nasoso Road, Nadi Airport.

2ND DEFENDANT

BEFORE: Master Vishwa Datt Sharma

COUNSEL: Mr. Vananalagi with Mr. Daurewa - for the Plaintiff
Ms. Jackson. L - for the 1st Defendant
Mr. Nilesh Prasad - for the 2nd Defendant

Date of Ruling: 03rd August, 2018 @ 10 am

RULING

[Application by the Plaintiff seeking an order for the Defendants jointly and/or severally to pay interim payment of \$75,000 to the Plaintiff pursuant to Order 29 Rules 10 and 11 of the High Court Rules, 1988 and the Court's Inherent Jurisdiction.]

APPLICATION

1. This is the Plaintiff's Summons filed on 09th February, 2017 and sought the following orders:
 - (a) *That the Defendants be ordered jointly and/or severally to pay interim payment of \$75,000.00 to the Plaintiff.*
 - (b) *That costs of this application be costs in the cause.*
2. The application is made pursuant to *Order 29 Rule 10 and 11 of the High Court Rules 1988* and *the Court's inherent jurisdiction.*
3. The **Defendants** **opposed** the Plaintiff's **interim payment** application.
4. The application was heard in terms of the **oral and written submissions** made in this proceeding by the Plaintiff and the Defendants.

THE LAW and PRACTICE

5. The law on interim payment is stipulated at *Order 29 Rule 10 and 11 of the High Court Rules 1988* which states as follows-

Application for interim payment (O.29, r.10)

10. (1) The plaintiff may, at any time after the writ has been served on a defendant and the time limited for him to acknowledge service has expired, apply to the Court for an order requiring that defendant to make an interim payment.

(2) An application under this rule shall be made by summons but may be included in a summons for summary judgment under Order 14 or Order 86.

(3) An application under this rule shall be supported by an affidavit which shall-

(a) Verify the amount of the damages, debtor other sum to which the application relates and the grounds of the application;

(b) Exhibit any documentary evidence relied on by the plaintiff in support of the application.

(4) The summons and a copy of the affidavit in support and any documents exhibited thereto shall be served on the defendant against whom the order is sought not less than 10 clear days before the return day.

(5) Notwithstanding the making or refusal of an order for an interim payment, a second or subsequent application may be made upon cause shown.

Order for interim payment in respect of damages (O.29, r.11)

11-(1) If, on the hearing of an application under rule 10 in an action for damages, the Court is satisfied-

(a) that the defendant against whom the order is sought (in this paragraph referred to as "the respondent") has admitted liability for the plaintiff's damages; or

(b) that the plaintiff has obtained judgment against the respondent for damages to be assessed; or

(c) that if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the respondent or, where there are two or more defendants, against any of them, the Court may, if it thinks fit and subject to paragraph (2), order the respondent to make an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the plaintiff after taking into account any relevant contributory negligence and any set-off, cross-claim or counterclaim on which the respondent may be entitled to rely.

(2) 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;

(b) a public authority; or

(c) a person whose means and resources are such as to enable him to make the interim payment.

BACKGROUND

6. At all material times, the Plaintiff was a Senior Flight Attendant in the employment of the Second Defendant and was on duty as cabin crew on board the Fiji Airways Airbus A330-200, registration DQ-FJV (hereinafter referred to as "the plane") performing flight FJ-911 from Nadi to Sydney.
7. The First Defendant was at all material times the pilot in command and in operational control of the plane and a servant, agent and employee of the Second Defendant.
8. The Second Defendant is the flag carrier airline of Fiji based in Nadi operating international and domestic services.
9. On or about 18th March 2014 the plane landed on Sydney's runway 34L on schedule at about 12:05L but touched down hard producing about +2.9G vertical acceleration or nearly three times the force of gravity.
10. The accident was caused by the negligent, careless and/or reckless control of the plane by the First Defendant.

AND the Plaintiff claims from the Defendants

- i] General Damages to be assessed;
- ii] Special Damages and Loss in the sum of \$404,785.00 or such further sum under paragraph 7 hereof;
- iii] Costs of Future Care;

- iii] Interest on the above Damages pursuant to the Law Reform [Miscellaneous Provisions] [Death and Interest] Act Cap 24;
 - iv] Damages under the Workmen's Compensation Act;
 - v] Costs of this action on a Solicitor client indemnity basis;
 - vi] Any other relief that seem just to this Honourable Court.
11. The Defendants contention is that under the **Workmen's Compensation Claim** lodged by the Plaintiff, a sum of **\$17,156.26** was already paid to the Plaintiff which she has already uplifted and utilised. Therefore the Plaintiff is precluded from making any further claims for Damages for injuries sustained during the Plane accident including any claims for interim payments and the application should be Dismissed accordingly.

ANALYSIS and DETERMINATION

12. This is an application by the Plaintiff for the interim payment of damages in the sum of \$75,000 by the Defendants.
13. This Summons is filed pursuant to *Order 29 Rules 10 and 11 of the High Court Rules, 1988*.
14. At all material times the Plaintiff was a Senior Flight Attendant in the employment of the Second Defendant and was on duty as cabin crew on board the Fiji Airways Airbus A330-200, registration DQ-FJV (hereinafter referred to as "the plane") performing flight FJ-911 from Nadi to Sydney.
15. On or about 18th March 2014 the plane landed on Sydney's runway 34L on schedule at about 12:05L but touched down hard producing about +2.9G vertical acceleration or nearly three times the force of gravity. The Plaintiff alleges that this accident was caused by the negligent, careless and/or reckless control of the plane by the First Defendant.
16. By reason of the First Defendant's negligence, the Plaintiff was hospitalised in Sydney immediately after the accident and was admitted for a month where she sustained severe injuries, loss and damages including emotional distress, nervous shock and Presyncopal episode.
17. The Plaintiff on 04th November, 2015 had refused to accept a proposal from the Second Defendant for an option for early retirement amongst other things in which the amount involved was more than double the amount of \$17, 156.26 in the alleged Agreement. The Plaintiff gave a counter offer to the representative of the Second Defendant to pay the Plaintiff full amount for the remaining 15 years or so of her working life calculated in the sum of \$21,920 per annum and in the alternative \$150,000 which they refused.
18. Consequently, the Plaintiff was considered medically unfit to fulfil the duties of a flight attendant and her employment with the Second Defendant was terminated with immediate effect on 10th November, 2015.
19. The Plaintiff did fill in Workmen's Compensation Claim and in fact was paid a sum of \$17,156.26 by a cheque sent over to her which she is alleged to have utilised. The Plaintiff claimed that she was never explained the contents of the Agreement before she signed.

20. 18. On 16th January, 2017 the Plaintiff commenced this proceedings claiming damages for personal injuries sustained during this accident caused by the negligent, careless and/or reckless control of the plane by the First Defendant.
19. The **First Defendant** submitted that the Plaintiff's Affidavit in Support [Referring to annexure "AV-6"] that first paragraph of the letter from Fiji Airways to Plaintiff dated 10th November, 2015 stated:
- "Under the Workmen's Compensation Act and due process, a final assessment was received on 13th October, 2015 from the Ministry of Labour stating a twelve (12) per cent degree of permanent incapacity and Air Pacific Limited trading as Fiji Airways has acknowledged and accepted the Ministry's assessment..."*
21. The Second Defendant's letter to the Plaintiff clearly shows that the Plaintiff has received compensation under the provisions of the Workmen's Compensation Act [Cap 94]. Therefore, in light of above payment the Plaintiff is now precluded from seeking damages under the common law pursuant to section 25(1) (c) of the Workmen's Compensation Act [Cap 94].
22. Since the Plaintiff is precluded from pursuing any claim independently from the Workmen's Compensation Act [Cap 94] the First Defendant submits that the Plaintiff is therefore barred from pursuing interim payment of damages under the common law. On this basis alone, the First Defendant submits that the Plaintiff's application for interim payment filed on 09th February 2017 ought to be dismissed.
23. The Plaintiff in her Statement of Claim (Claim) alleges negligence and has particularised the same in para 5(a) to (g). Based on these particulars the Plaintiff has mounted the Claim against the Defendants.
24. The Second Defendant in its Statement of Defence (Defence) denies all the ^o allegations enumerated in para 5 of the Claim.
25. Similarly, and for completeness, the First Defendant also "categorically denies that there was an accident as alleged by the Plaintiff" in her Claim and further that the Plaintiff suffer any alleged injuries.
26. The above places the onus squarely on the Plaintiff to prove these allegation A during trial.
27. *Schott Kern v Bendy (supra)* at p.73 ruled in, and as adopted by Master Amaratunga (as His Lordship was then) in *Matanababa*, that "interim payment procedures [were] not suitable where the factual issues are complicated or where difficult points of law arise which may take many hours and the citation of many authorities to resolve."
28. Further to the above, the Second Defendant has a very strong defence in the form of sections 20 and 25(1) (c) of the *Workmen's Compensation Act* with an extremely high chance of success. If this defence is allowed then the Plaintiff's impecuniosity, as exhibited in her Affidavit, will make it almost impossible for the Second Defendant to recover the sum of \$75,000 as sought and any sum at all.

29. We therefore submit that the "high" burden of proof lies with the Plaintiff. Based on the cases cited above, the Affidavit material is inconclusive and there many untested documents therein, which cannot be given any evidentiary weight.
30. The Second Defendant has a meritorious defence with exceptional chances of success hence an interim payment is premature at this stage of the case.
31. In the case of *Schott Kern v Bendy (supra)*, the procedure for the application for interim payment is divided into two (2) stages.

At the **first stage**, this Honourable Court has to consider whether it is "satisfied" that one of the matters set out in *Order 29 Rule (1)(a) to (c)* has been established by the Plaintiff. If the Court is satisfied that the Plaintiff would recover a substantial sum if the matter proceeded to trial, the **Second stage** requires this Honourable Court to ensure that any interim payment awarded to the Plaintiff does not exceed a reasonable proportion of the damages which in the opinion of this Honourable Court will be recovered by the Plaintiff.

32. In terms of *Order 29 Rule 11(1) (a) (b)* of the *High Court Rules 1988*, the First Defendant submits that there has been no admission of liability on the part of the First Defendant, nor has the Plaintiff obtained any judgment for damages against the Defendants. Since the first two limbs of *Order 29 Rule (1)(a) and (b)* have not been satisfied by the Plaintiff, the First Defendant therefore submits that this Honourable Court needs to be satisfied under *Order 29 Rule 11(1)(c)* being; if this action were to proceed to trial, the Plaintiff would obtain judgment for substantial damages against the Defendants.
33. The First Defendant submits that if this Honourable Court were to be satisfied that the Plaintiff would be successful at trial and obtain judgment against the First Defendant for substantial damages, this Honourable Court would naturally have to be satisfied that the First Defendant was indeed negligent as alleged by the Plaintiff.
34. Further, the Second Defendant submitted that he has a very strong Meritorious Defence in the form of sections 20 and 25(1) (c) of the Workmen's Compensation Act with an extremely high chance of success.
35. The Second Defendant has a meritorious Defence and the high burden of proof lies with the Plaintiff. Based on the case cited, the affidavit material is inconclusive and there may be untested documents therein, which cannot be given evidentiary weight.
36. As it can be easily ascertained and seen from the abovementioned arguments of the parties to the proceedings, that there is a Dispute and various triable issues are raised. For example: the main contention of the Defendant's is that the Plaintiff had already received a sum of \$17,156.26 as the Workmen's Compensation.
37. Whether, this sum received is sufficient and conclusive payment which precludes the Plaintiff from pursuing her Quantum of claim for Damages for the injuries sustained as alleged in this accident during her employment with Fiji Air?

38. Whether sections 16 and 25 of the Agreement executed with the Labour Ministry was done in a fair and justifiable manner, and whether the consequences of the contents of the Agreement executed was fully explained to the Plaintiff or not are some of the questions that arise in mind for this Court to make a decision that there is a Dispute and various tribal issues that needs to be dealt with at a full hearing in the substantive matter to decide whether the Plaintiff is entitled to seek further quantum of sum from the Defendants for the injuries sustained during this plane accident?
39. For the aforesaid rational, I find that there are triable issues and therefore it would not be appropriate in the circumstances to grant an order for any interim payment since the Workmen's Compensation as applied for by the Plaintiff has been paid which she had received and utilised accordingly. Whether this payment received by the Plaintiff precludes the Plaintiff from pursuing with her substantive claim needs to be determined at a hearing where the entire evidence of the parties together with the documentary evidence will be tested and both parties to the proceedings will be entitled to represent their respective cases in a just and fair manner for determination accordingly.
40. For the obvious rational that the Plaintiff has been paid \$ \$17,156.26 as Workmen's Compensation instead, I decline in the circumstances to award any interim payment sum as sought for in the Plaintiff's application.
41. Accordingly, the Plaintiff's Summons seeking an order for the interim payment is accordingly dismissed.
42. This doesn't mean that the Plaintiff cannot bring and file a second application for interim payment, provided it is appropriate in the circumstances to do so of course the question of costs may arise.
43. Each party to bear their own costs in prosecuting and defending this application for interim payment.
44. I now proceed to make the following final orders-

FINAL ORDERS

- (i) The Plaintiff's Summons seeking an order for interim payment is hereby Dismissed.
- (ii) Each party to the proceedings to bear their own costs.
- (iii) The Substantive matter is adjourned for further directions to Friday 03rd August, 2018 @ 10 am.

Dated at Suva this 03rd day of August, 2018



MASTER
VISHWA DATT SHARMA

cc: R. Vananalagi & Associates, Nabua
Faktaufon & Bale Lawyers, Suva
Mitchell Keil Solicitors, Suva