

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 54 of 2016

BETWEEN : SAMUELA SAUTAMATA RITOVA of Lot 59, Makoi Road, Nasinu, Unemployed.

PLAINTIFF

AND : AKHTAR ALI of Sakoca Settlement, Nasinu, Driver.

1ST DEFENDANT

AND : RAIWAQA BUSES LIMITED a limited liability company having its registered office at 211 Ratu Sukuna Road, Suva.

2ND DEFENDANT

AND : SUN INSURANCE COMPANY LIMITED a limited liability company having its registered office at Level G & 1 Kaunikuila House, Laucala Bay Road, Suva.

1ST NAMED THIRD PARTY

AND : NEW INDIA ASSURANCE COMPANY LIMITED a limited liability company having its registered office at Harrifam Centre, 2nd Floor, Chr Renwick and Greig Street, Suva.

1ST NAMED THIRD PARTY

BEFORE : Master Vishwa Datt Sharma

COUNSELS : Mr. Diven Prasad -for the Plaintiff
Mr. M.A Khan -for the 2nd Defendant

Date of Ruling : 06th August, 2018 @ 10 am

RULING

[Application by the Plaintiff seeking an order for the Interim Payment of \$50,000 pursuant to Order 29 Rules 10 and 11(1) (c) of the High Court Rules, 1988.]

APPLICATION

1. This is the **Plaintiff's Summons** for an **Interim Payment** filed on 02nd March, 2017 and sought the following orders:
 - (a) *That an interim payment of \$50,000 be made herein to the Plaintiff pursuant to Order 29 Rule 10 and Rule 11 (1) (c) of the High Court Rules, 1988.*
2. The **Defendants opposed** the Plaintiff's **interim payment** application.
3. 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

4. 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)

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 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.

BACKGROUND

5. The **1st Defendant** was at all material times the authorized driver of vehicle registration No. DU 927.
6. The **2nd Defendant** was the registered owner of the vehicle registration No. DU 927.
7. On or about 28th May, 2014, the Plaintiff was a passenger in vehicle registration No. DU 927 which was travelling along Kubukawa Road, Tovata, Nasinu, when the **1st Defendant** found it difficult to engage the gears of the said vehicle, lost control and veered off the road. As a result the Plaintiff sustained **severe injuries**.

8. The Plaintiff in his substantive action is claiming judgment for **Special Damages and General Damages for pain and suffering, loss of amenities of life, loss of earnings, loss of FNPF contribution and cost of domestic and nursing care.**
9. The Plaintiff's current application before this court is seeking an order for **Interim Payment of \$50,000.**
10. The Defendants are **opposing** the application for Interim payment sought by the Plaintiff.

ANALYSIS and DETERMINATION

11. This is an application by the Plaintiff seeking an order for an **interim payment of damages** in the sum of **\$50,000.**
12. Under this provision of the Law, the Applicant (Plaintiff) is required to file an Affidavit that must verify the amount of Damages or Debts other sum that would justify the Plaintiff's application.
13. The Plaintiff is asking court to assess the interim payment sought on the strength of the Plaintiff's medical report wherein he has been assessed to have 82% permanent disability.
14. Under *Order 29 Rule 11(1) of the High Court Rules, 1988*, the court may make an order for Interim Payment if any of the requirements hereunder are satisfied by the Plaintiff:-
 - (a) *That the defendant against whom the order is sought 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.*
15. So far, the Defendants have **not admitted any liability** for the Plaintiff's Damages nor that the Plaintiff has obtained Judgment against the Defendants for the Damages to be assessed.
16. Further, this action is yet to proceed to trial and even if it did, without hearing and testing the entire evidence exclusive of the **medical reports**, tendered in the Affidavit herein that the court may not be able to judge beforehand what the result and/or final determination would eventuate. However, the **particular medical report marked as "RN 2"** does indicate that the Plaintiff suffered **51% permanent incapacity** as a result of his injuries sustained in this accident.
17. Further, in terms of *Order 29, Rule 11 (2)* - No order shall be made under **paragraph (1)** hereinabove 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 plaintiffs claim;*
 - (b) *a public authority; or*
 - (c) *a person whose means and resources are such as to enable him to make the interim payment.*
18. The court is mindful of the application by the Plaintiff for the **Interim Payment** and the main issue that the court should consider in the circumstances is to consider **whether the court can satisfy that the Plaintiff would eventually succeed against the Defendants in the pending Substantive Action** which was based on common law of Tort of Negligence and the Workmen's Compensation Act.

19. The Plaintiff's substantive claim is based on an allegation of **negligence** against the **1st Defendant** and **vicarious liability** against the **2nd Defendant** for personal injuries the Plaintiff sustained in a motor vehicle.
20. According to the Plaintiff and the **medical reports** tendered herein within the Affidavit in Support, the Plaintiff was hospitalised and admitted on 28th May, 2014 until 02nd August, 2014, 07th October to 08th October, 2014 and then from 18th July, 2015 to 20th July, 2015 inclusive.
21. The Plaintiff further stated that with **82% disability**, the court will appreciate the gravity of the injuries the Plaintiff has suffered and continues to suffer and he is now a total **handicap** and **has no source of Income** or **financial support**.
22. This court was referred to paragraph of the Plaintiff's Affidavit in Support wherein he has deposed that he is unable to walk and was confined to a Wheelchair with no source of Income or support from anyone. The Plaintiff has 3 children aged 11, 12 and 18 and the wife who looks after him.
23. The Plaintiff has explained at paragraph 14 of his Affidavit in Support why he needed this order for the Interim payment, "*the Defendants are fully insured and the 2nd Defendant is a substantial Company therefore capable to pay Interim Payment and any issues between the Insurance Companies and the 2nd Defendant is a matter between them and due to the accident, he is now left to suffer a great financial hardship and such sufferings has led to his family to suffer with him in terms of food, electricity, clothing, mortgage repayments and other basic needs which he cannot provide.*"
24. On the other hand, the **2nd Defendant** submitted that pursuant to *Order 29 Rule 11 of the High Court Rules, 1988*, there are three (3) grounds the court must be satisfied and therefore empowered to make orders for Interim Payment which are as follows-
 - (a) *That the Defendant 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.*
25. The Defendant's contention is that none of the three grounds have satisfied by the Plaintiff to this court.
26. Further, the Defendant has not admitted **liability** and submitted that the Defendant has filed substantial **Defences** to the Plaintiff's claim.
27. According to the Defendants, the bus involved in the accident was maintained and serviced before departing for its duty route on the day of the accident and was issued with a Land Transport Authority fitness and therefore was fit to be driven on the public road.
28. The Defence confirmed to court that it was covered by two (2) Insurance Policies at the time of the accident. The **1st** was a Comprehensive Motor Vehicle Policy issued by Sun Insurance Company Ltd and the **2nd** cover was a Compulsory Third Party Policy issued by New India Assurance.
29. The Defence was of the view that Third Party Proceedings has now been finalised and **2nd Defendant** has filed and served its **3rd Party Statement of Claim** and subsequent response has been filed by the **1st Named 3rd Party**. Therefore, **3rd Party** proceedings are being finalised together with the pleadings within the Substantive claim.
30. The Defence Counsel's argument in the event of any **liability** raised, should be held and borne by the two (2) **Insurance Policies** issued by **Sun Insurance (1st Named 3rd Party)** and **New India**

- Assurance** (3rd Named 3rd Party) respectively. In the event this court decides to make any orders for Interim Payment, these **Insurance Companies** hereinabove should be made **liable** for the payment of the same since they have covered insurance for bus registration No. DU 927 at the time of the accident.
31. The English Court of Appeal in STRINGMAN (a minor) v. MCARDLE 119941 1 W.L.R 1653, held as follows:
- " that a plaintiff was not required to demonstrate any particular need beyond the general need to be paid his damages as soon as reasonably possible, and the court should not, when considering to order such a payment, investigate how the money was to be used".*
32. The above judgment was quoted by Hon. Justice John Byrne in the case of The A.G of Fiji and Ministry of Health v. LorainiDre [Civil Appeal No. ABU 022 of 20091 where he explicated the **two basic principles** involved in **granting an interim payment** as follows:
1. *Unless there are exceptional reasons for not doing, where it is reasonable to award an interim payment of damages the courts will make such an award.*
 2. *There is no requirement for a plaintiff to show need or hardship before an order for interim payment can be made by a Court.*
 3. Hence it is obvious on a balance of probabilities that the plaintiff did suffer **personal injury** by accident occurred during the course of his employment with the defendants. Further, it appears that the plaintiff's claim against the defendants for negligence and breach of duty of care would be successful at the trial.
33. In the current action before this court, the 2nd **Defendant** has admitted the ownership of the vehicle **Registered No. DU 927** but denies that the vehicle was defective and/or that the 1st **Defendant** was the **authorized driver** of this vehicle.
34. The 2nd **Defendant** doesn't know whether the Plaintiff was a **passenger in DU 927** and denies the Claim and the particulars of injuries pleaded in the Statement of Claim and is unaware of any injuries where the Plaintiff was involve.
35. The 2nd **Defendant** also **denied** any Negligence or Casualty caused on the part of the 2nd **Defendant**.
36. The 2nd **Defendant** denies any **liability or negligence** and that the Plaintiff had suffered loss and damage, Pain and Suffering and Loss of Amenities of life.
37. However, this court has taken sometime to determine the Plaintiff's application seeking an order for an Interim Payment in the sum of **\$50, 000**.
38. This court also directed itself to the Order of this court made by Hon. Justice Amaratunga on 04th May, 2018 in Civil Action HBC No. 90 of 2018 including the current case HBC No. 54 of 2016 - *"that a Declaration is made that the liability of the Plaintiff to indemnify the 1st and 2nd Defendants in the civil matters from the accident on 28th May, 2014 as listed herein is limited to the sum of \$40,000 pursuant to Section 6 (b) of the Motor Vehicles (Third Party Insurance) Act.* This order has some impact on the current case in terms of the Interim Payment, leave alone the final determination of this action.

39. It cannot be denied from the affidavit evidence before court that the Plaintiff did sustain severe injuries and according to the CWM Medical report marked annexure 'C' within the Plaintiff's Affidavit in Support filed on 02nd March, 2017, that the Permanent Impairment Assessment Report confirms that "the total whole person impairment for Samuela Ritova is **Eighty Two (82) %**.
40. Therefore on the prima facie evidence, bearing in mind the 82% impairment, the court is sufficiently satisfied that if this action proceeded to trial, the Plaintiff is highly likely to obtain damages against the Defendants.
41. The 2nd Defendant is a limited liability company and therefore have sufficient financial means to make the **interim payment in the circumstances**.
42. For these reasons I am satisfied that the Applicant (Plaintiff) at this stage of the proceedings until the final disposition of the substantive action, should receive an **interim payment of \$30,000 to allow him some relief**.
43. Accordingly the 2nd Defendant is ordered to pay the sum of **\$30,000 as interim payment** to the Plaintiff within 14 days timeframe henceforth.
44. Any order for costs of this application will be costs in the cause for the Plaintiff.
45. I now proceed to make the following final orders-

FINAL ORDERS

- (i) The 2nd Defendant to pay a sum of \$30,000 as Interim Payment to the Plaintiff.
- (ii) This amount to be paid within 14 days' time frame.
- (iii) Costs orders in the cause.
- (iv) Orders accordingly.

Dated at Suva this 6th day of August, 2018



Master
MR VISHWA DATT SHARMA

cc. Diven Prasad Lawyers, Suva.
M.A.Khan Esq, Suva