

IN THE HIGH COURT OF FIJI
AT LAUTOKA
WESTERN DIVISION

CIVIL JURISDICTION

Civil Action No.: HBC 158 OF 2019

BETWEEN : **MESULAME DRIGITA** of Nasoso, Nadi, Driver.

PLAINTIFF

AND : **THE NEW INDIA ASSURANCE COMPANY LIMITED**
a limited Liability company having its registered office at New
India Assurance Building, 87 M G Road, Fort Mumbai – 400001
and having its principle place of business in Fiji at Harifam Centre,
2nd Floor Cnr Renwick Road and Greig Street, Suva in Fiji.

DEFENDANT

Appearances : (Ms) Salote Veitokiyaki for the plaintiff
No appearance for the defendant

Hearing : Wednesday, 25th September, 2019.

Ruling` : Friday, 31st January, 2020.

R U L I N G

[A] INTRODUCTION

- (1) The matter before me stems from an Originating Summons filed by the plaintiff seeking the grant of the following orders;

A Declaratory Order that the defendant is liable to pay the judgment sum of \$94,512.08 to the Plaintiff in respect of the Order sealed on 2nd March, 2015 being Lautoka High Court Civil Action No. 040 of 2011.

An Order that the defendant pays the said judgment sum and cost to the plaintiff's Solicitors trust account forthwith.

That the defendant pays the cost of this action.

- (2) The application is made pursuant to Order 7 of the High Court Rules 1988 and Section 17 of the Motor Vehicle (Third Party Insurance) Cap 177. The application is supported by an Affidavit sworn by the plaintiff on 21st June, 2019.

[B] BACKGROUND

- (01) On 23rd March, 2011 the plaintiff, Mesulame Drigita (“**Mesulame**”) filed a writ of summons and statement of claim against the defendants seeking damages for injuries he sustained as a result of an accident which occurred allegedly as a result of the negligence of the 1st defendant, Apenisa Drigita (“**Apenisa**”). According to the statement of claim, on 29th September, 2009 Apenisa was driving vehicle registration number DD965, which is a van, along Namaka Road in Nadi. He drove the said vehicle so negligently and caused the vehicle to run over Mesulame.
- (02) Mesulame suffered a closed fracture of left femur, an open fracture of the right tibia and fibula and left Achilles tendon rupture. He was admitted at Lautoka Hospital for some eight (8) weeks or so from 23rd September, 2009 to 25th November, 2009.
- (03) The second defendant, Seini Bavesi (“**Seini**”) is being sued vicariously by virtue of the fact that she was the registered owner of DD965 at all material times.
- (04) Against the defendants, Mesulame claims special damages in the sum of \$8080.00, general damages, costs and interests.

[C] DEFAULT JUDGMENT

- (01) Neither Apenisa nor Seini has filed a statement of defence. On 7th July, 2011 Mesulame entered default judgment against “Apenisa” only. No default judgment was entered against “Seini”
- (02) On 11th August, 2011, Mesulame filed a notice of assessment of damages which was duly served only on Apenisa. Again, that notice of assessment was not served on Seini.

[D] ASSESSMENT OF DAMAGES

After the hearing, the Court awarded \$94,512.08 (total) for damages.

[E] CONSIDERATION AND THE DETERMINATION

- (01) The plaintiff has secured a judgment against the driver of the van (the first defendant). New India Assurance Company Ltd was not joined as a defendant in the proceedings.
- (02) New India Assurance Company has denied liability in respect of the personal injuries award in favour of the plaintiff because it had not been given a notice of the proceedings, required under the provisions of the Motor Vehicle (Third Party Insurance) Act, within the time prescribed by **section 11(2) of the Motor Vehicle (Third Party Insurance) Act (Cap 177)**. The insurer says that the failure to comply with the notice requirement avoided its statute imposed liability to pay the plaintiff (the third party) the amount of the judgment against the driver (Apenisa). (Annexure marked MD10 and referred to in the affidavit in support of the plaintiff). On the other hand, the plaintiff says that there had been substantial compliance with the notice requirement.
- (03) The plaintiff seeks recovery against the insurer. In order to resist the plaintiff's claim against it, the insurer has shown the non -satisfaction of section 11 (2)(a).

This matter reduces to the question of the proper construction of section 11(1) and 11(2)(a) of the Act which provides;

Duty of Insurance Company to satisfy judgments against person insured in respect of third party risks

11. - (1) *If, after a certificate of insurance has been delivered under the provisions of subsection (4) of section 6 to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under the provisions of paragraph (b) of subsection (1) of section 6, being a liability covered by the terms of the policy, is obtained against any person insured by the policy, then, notwithstanding that the insurance company may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurance company shall, subject to the provisions of this section, pay to the persons entitled to the benefit of such judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable by virtue of any written law in respect of interest on that sum.*

(2) *No sum shall be payable by an approved insurance company under the provisions of subsection (1) –*

(a) *in respect of any judgment unless before, or within 7 days after the commencement of the proceedings in which the judgment was given, the insurance company has notice of the bringing of the proceedings; or the notice is a condition precedent to the insurer's statutory liability.*

- (04) Section 11(1) of the Act imposes a statutory liability on the insurer to pay the sum of a relevant judgment against a person insured to the person in whose favour the judgment has been awarded. Section 11(2) defines a condition precedent to the liability imposed by section 11. The object of the notice requirement under section 11(2)(a) was to enable the insurer to take over the proceedings promptly. New India Assurance Company has not received notice of the bringing of the proceedings within 07 days of their commencement as required by section 11(2) (a) of the Act. The notice it received was by service upon it of the writ on 20th April, 2011. This was 28 days after the proceedings were commenced on 23rd March, 2011. There was no argument at any stage of the proceedings that the insurer has waived the time limit requirement or was estopped from relying on it.
- (05) The notice by service of the writ 28 days after the proceedings were commenced did not constitute 'substantial compliance' with the act. On that basis, I hold that New India Assurance cannot be held liable to pay the plaintiff the amount of the judgment against the driver, the first defendant.

In **Dominion Insurance Limited v Kay Lynette Bamforth, Margaret Annette Wilson and Others**¹ where a truck driven by Ravind Chand struck a motor vehicle driven by Mrs. Wilson which was owned by Kay Bamforth. Mrs. Wilson suffered personal injuries in the accident and the vehicle she drove was a write off. Mrs. Wilson secured a judgment against the employer of Ravin Chand, the owner of the truck and the third party insurer. Notice of the commencement of the proceedings had been given to the insurer 13 days after they began and not within 7 days as required by section 11(2)(a). On appeal by the insurer to the court of appeal, it was held that there had been substantial compliance with the notice requirement and sustained the liability. However, on appeal to the Supreme Court by the insurer, it was held that the insurer was not liable as the mandatory provision of giving seven days' notice had not been complied with.

This case illustrates the effect of section 11(2)(a) which creates a condition precedent before imposing liability on an insurer.

[F] **CONCLUSION**

For the preceding reasons, I find and hold that the defendant is entitled to avoid liability to provide indemnity under the policy to Apenisa and Seini in respect of the claim of the plaintiff due to non-satisfaction of section 11 (2) (a) of the Motor Vehicle (Third Party Insurance) Act (Cap 177) .

Consequently, the defendant is not liable to satisfy any judgment entered against Apenisa and Seini in the Civil Action No -40 of 2011.

¹ (2003) FJSC 3, CBV 0005.2002S (24th October 2003)

ORDER

I dismiss the plaintiff's Originating Summons filed on 26/06/2019. I decline to grant the declaration sought.


..... 26/01/2020
Jude Nanayakkara
[Judge]



At Lautoka
Friday, 31st January, 2020