

IN THE HIGH COURT OF FIJI AT LABASA

CIVIL JURISDICTION

Civil Action No. HBC 37 of 2019

BETWEEN

APOLOSI MALUMUCANA of Malau, Labasa, Unemployed in the Republic of Fiji.

PLAINTIFF

AND

FIJI FOREST INDUSTRIES LIMITED a limited liability having its
registered office in Malau, Labasa.

FIRST DEFENDANT

AND

QBE INSURANCE FIJI LIMITED a limited liability company having its
registered office at Victoria Parade, Suva, in the Republic of Fiji.

SECOND DEFENDANT

Counsel : Mr. S. Sharma with Ms. S. Naidu for the Plaintiff.
Mr. H. Robinson with Ms. Angeline Sumer for the First Defendant.

Dates of Hearing : 14th & 15th October 2020

Date of Judgment : 16th October 2020

JUDGMENT

- [1] The plaintiff instituted these proceedings against the 1st and 2nd defendants to recover damages for the injuries caused to him while on duty.
- [2] He claimed General Damages, Punitive Damaged, Special Damages in the sum of \$1,826.50 and in the alternative compensation under the Workmen’s Compensation Act.
- [3] At the hearing the learned counsel for the plaintiff informed court that the plaintiff is not pursuing the claim for special damages.
- [4] The learned Master of the High Court on 21st November 2019 discharged the 2nd defendant by consent of the parties from the proceedings.
- [5] At the pre-trial conference the parties admitted the following facts:
- 1) The plaintiff was employed by the 1st defendant at all material times.
 - 2) The operations of the defendant company has ceased from 2019.
 - 3) The 2nd defendant QBE Insurance Fiji Limited as 21st day of November 2019 has been discharged from the proceedings by orders of the court.
 - 4) The plaintiff was being paid a gross weekly wages of \$209.07 less deductions of \$18.18 being his FNPF.
 - 5) The plaintiff was injured on 22nd day of June 2017 in the cause of his employment.

[6] In paragraph 6 of the statement of claim the plaintiff has explained the manner in which he sustained injuries which I will reproduce below:

THAT on/or about 22nd day of June 2017, the plaintiff was directed by the servants and agents of the 1st defendant company to work at the Boiler Section. Whilst the plaintiff was working alone and at about 4.00am in the morning one of the timber was stuck on the roller and he tried to pull the timber with his hand and whilst pulling the timber the plaintiff's hand was struck in the roller as a result he sustained injuries.

[7] The particulars of negligence of the 1st defendant as averred by the plaintiff in the statement of claim are as follows:

- i. Failure to provide safe machinery to prevent the injury on the plaintiff.
- ii. Failure to provide an additional employee to work on the boiler with the plaintiff where it is a requirement that a boiler to be operated with two employees.
- iii. Failure to provide or maintain a safe and proper system of working, or to instruct their workmen including the plaintiff to follow that system.
- iv. Failure to provide adequate supervision at all times and failure to provide another employee to assist the plaintiff in the course of his employment.
- v. Failing to take any or any adequate precautions for safety of the plaintiff while engaged in his said work.
- vi. Exposing the plaintiff to risk of damage or injury of which they knew or ought to have known.
- vii. Failing to provide or maintain any or any safe or proper system of work.
- viii. Requiring the plaintiff to engage in a dangerous activity alone without due regard to his safety.

[8] The position of the 1st defendant is that the injury was caused by the negligence of the plaintiff in not turning off the machine before handling the timber. The 1st defendant has further averred in the statement of defence the following particulars of plaintiff's negligence:

1. The plaintiff failed to take heed of the guidance and instructions provided to him on a regular basis before commencing work at the Diamond Hogger Machine;
2. The plaintiff failed to follow instructions given by the supervisor;
3. The plaintiff failed to exercise adequate precaution for his own safety while engaged in his work;
4. The plaintiff was not exposed to any risk of any injury or damage known to the defendants;
5. The plaintiff failed to follow the established guidelines when working at the Diamond Hogger Machine;
6. The plaintiff was never required to engage in any dangerous activity on his own;
7. Negligently and recklessly trying to pull the stuck timber with his hands without switching off the machine first when he was not required to do so in the circumstances;
8. Inserting hand inside the running Diamond Hogger Machine (conveyor) when it was not necessary to do so nor was he ever instructed;
9. Not waiting to switch off the Diamond Hogger Machine before trying to remove the stuck Timber.
10. Failing to exercise care and being reckless about his own safety; and
11. Not following guidelines and knowledge gained from working on the Diamond Hogger Machine.

[9] The burden of proving the negligence on the part of the 1st defendant is on the plaintiff. The plaintiff has taken two different position as to the manner in which he suffered injuries. As I have stated above in paragraph 5 the plaintiff has suffered injuries while trying to remove the timber that got stuck on the roller. However, in his evidence he said his hand did not get stuck when he tried to remove log suck in the machine. He also said that when he put the log into the machine he was not standing properly and because of the weight of the log his right hand went into the machine.

[10] The 1st defendant tendered the NOTICE OF CLAIM BY OR ON BEHALF OF A WORKMAN under the workmen's Compensation regulations 1964 in evidence (D2). In the said notice the manner in which the accident happened has been explained as follows:

...(6) he was running the diamond machine. At 5.05am he saw a piece of timber which was jammed at the back roller of the diamond hogger infeed conveyor belt. Without switching off machine's drive system, he attempted to pull piece of timber out. The right arm was pulled by the conveyor causing it to jam between the roller and the conveyor. ..

- [11] The plaintiff did not offer any explanation for giving evidence contrary to what has been pleaded in the statement of claim and also to the information given to the Divisional Labour Officer nor did he deny providing such information to the Labour officer.
- [12] It is a well-established principle of law that pleadings are not evidence. The claims of the parties to an action are based on what is averred in the pleadings. The burden of proving their respective claims as averred in the pleadings are on the parties. They cannot deviate from what has been pleaded and take totally a different position in evidence. If court allows such a practice the purpose of filing pleading would be purposeless.
- [13] It is also the evidence of the plaintiff that the log was about 40 Kg in weight and 2 to 3 meters in length. He showed by hand the diameter of the logs he used to log into the machine. As the court understood the diameter of each log would have been about 40 cm. However, this evidence was contradicted by the witnesses for the 1st defendant. Witness Mikaele Valetino said what they put into the machine are slabs and not logs. If logs are put into the machine they get stuck and each slab does not exceed 20 Kg. In reply to a question asked in cross-examination the witness said the diameter of the slab was 100mm and they did not use bigger and/or hard wood. The learned counsel for the plaintiff attempted to suggest to the witnesses of the 1st defendant that the plaintiff sustained injuries because his hand went under the log. The witness said there is no way the hand could get stuck while putting slabs on the conveyor belt.
- [14] The plaintiff also alleges that the 1st defendant failed to provide or maintain a safe and proper system of working, or to instruct their workmen including the plaintiff to follow that system. In this regard the learned counsel for the plaintiff cross-examined the defendant's witness Vinesh Chand who testified that safety meetings were held every week and before the shift starts there was also a briefing. He went on to say

that the Hogger Machine is operated by one person and how the machine should be operated is posted on the walls.

[15] There is no evidence that it was a requirement to have more than one person to operate the Hogger Machine.

[16] There had been supervisors but not at the time of the accident. However, there is no requirement that a supervisor must always accompany the machine operator and tell him what to do. That is not the supervisor's responsibility. The plaintiff in his evidence or through any other witness did not adduce any evidence to show what measures the 1st defendant should have taken to avoid this accident. From the evidence of the witnesses of the 1st defendant the court is satisfied that the 1st defendant had taken all the safety measures required and it is the negligence of the plaintiff that caused injuries. The plaintiff in cross-examination admitted that the accident could have been avoided if he switched of the machine before removing the piece of timber that got stuck between the roller and the conveyor.

[17] For the reasons aforementioned the court makes the following orders.

ORDERS

1. The statement of claim of the plaintiff is struck out and the action is dismissed.
2. There will be no order for costs.




Lyone Seneviratne

JUDGE

16th October 2020