

**IN THE HIGH COURT OF FIJI**  
**AT LABASA**  
**CIVIL JURISDICTION**

**HBM 3 OF 2019**

**BETWEEN**            :            **JAITUN BI**

**PLAINTIFF**

**AND**                        :            **SUN INSURANCE COMPANY LIMITED**

**DEFENDANT**

**BEFORE**                :            **M. Javed Mansoor, J**

**COUNSEL**                :            **Mr. A. Sen and Ms. R. Sangeeta for the Plaintiff**  
**Mr. H. Robinson and Ms. A. Sumer for the Defendant**

**Date of Hearing**        :            **17 & 18 March 2022**

**Date of Judgment**    :            **18 September 2023**



6. The defendant's notice of motion of 14 January 2020 was taken up for hearing on 18 February 2020. The court was not inclined to grant a stay or to strike out the action. By its ruling of 28 May 2020<sup>1</sup>, the court made order to continue the proceeding as if begun by a writ of summons in terms of Order 28 rule 9 of the High Court Rules. The court also directed the registrar to submit a report on the state of the traffic case in the Magistrate Court of Savusavu.
7. The defendant filed a further notice of motion on 3 December 2020, seeking a stay of action pending the decision of the Savusavu Magistrates' Court in case No.234 of 2014 and for an order directing the resident magistrate to expedite hearing of the matter. By ruling given on 11 March 2021, the stay was declined and the resident magistrate was directed to expeditiously hear and conclude the case.
8. The parties filed their respective writ of summons, statement of defence and reply to defence.
9. The plaintiff pleaded that at the time of the accident, the vehicle involved was subject to a valid insurance cover. Therefore, the plaintiff claimed, the defendant is required to satisfy the judgment given in HBC 40 of 2016 in terms of section 11 of the Motor Vehicles (Third Party Insurance) Act ("Act").
10. The plaintiff states that although its solicitors demanded the judgment sum from the defendant, it remains unsatisfied.
11. The defendant denied the claim and pleaded that it was unaware of the action against the defendants in HBC 40 of 2016. The defendant stated that the driver of the vehicle was intoxicated at the time of the accident, and that, therefore, in terms of the insurance policy, the defendant was not liable to make a third party payment.

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<sup>1</sup> [2020] FJHC 355; HBM3.2019 (28 May 2020)

12. On the day of trial, the defendant began the case in terms of Order 35 rule 5 (6) of the High Court Rules 1988 following an application by Mr. Sen, who submitted that the action was filed to enforce a judgment of the High Court. The application was allowed as the defendant had the burden of proving the main issues in the case. These issues are mainly concerned with whether the driver of the insured vehicle was intoxicated when he was driving.
13. Several witnesses were summoned to give evidence on behalf of the defendant. Mr. Binay Dutt, the claims manager of the defendant, confirmed that an insurance policy was issued to Mr. Vijendra Prasad, the owner of the vehicle, for compulsory third party insurance cover. The witness said that the insurance policy contained conditions that had to be observed. Non-compliance of those conditions, he said, would result in the refusal to pay an insurance claim. In the present case, he said, the insured did not comply with the policy's condition in clause 1 (d) (i), which prohibited the insured from allowing any person under the influence of intoxicating liquor to use the vehicle.
14. The witness said that the insurance company carried out an investigation on receipt of the claim and that it declined to make settlement as the driver was found to have been intoxicated at the time of the accident. The policy holder was advised of the defendant's refusal to pay the claim.
15. The defendant summoned other witnesses to give evidence to establish the driver's intoxication at the time of the accident.
16. Shivnil Mani Naidu, a police officer, said that he arrested Edward Bernet for causing an accident, and charged him for drunk driving and dangerous driving. The driver was brought to the station on the day of the accident and charged on the following day, as he could not be interviewed due to his drunkenness. He was charged for dangerous driving because the accident was caused on a pedestrian crossing.
17. Corporal Sanjay R Prasad, who worked as a traffic investigator in Savusavu, confirmed in his evidence that the driver was in a state of intoxication when he

performed a breathalyser test on him. The breathalyser report was not admitted as evidence in view of the restriction placed by the Land Transport Regulations 2012.

18. The defendant stated that the driver was charged by police for dangerous driving and for driving the vehicle under the influence of alcohol. However, he was acquitted of the charge of drinking and driving. The court proceeded with the second charge of dangerous driving. The defendant submitted that the driver was discharged on a “no case to answer” application, as the prosecution did not summon the relevant police officers to give evidence against him.
19. According to the Savusavu Magistrates’ Court record the driver admitted to having been under the influence of liquor when he drove the vehicle. In his judgment, the magistrate stated that the “accused was drunk while he was driving the vehicle registration number FA 745 on the evening of 19/9/14”.

#### **The legal position**

20. The evidence has it that the vehicle insurance policy was renewed on 8 of November 2013. The accident occurred on 19 September 2014, while the policy was in force. As the action against the insured and the driver was not defended, the insurance company would have been liable in the ordinary course. Not so in this case says the defendant. Liability to pay the accident victim is being denied on the basis that the driver’s intoxication constituted a breach of the policy.
21. An examination of Sections 11 (1) and 11 (3) of the Act is necessary to determine whether the defendant is liable in the circumstances.
22. Section 11 (1) of the Act states that if a judgment is obtained against a person insured under an insurance policy, the insurance company is required to pay the judgment sum to the person entitled to the benefit of the judgment. The insurance company is required to pay the judgment sum although it may be entitled to avoid or cancel or may have avoided or cancelled the policy. Section 11 (3) of the Act makes provision for the insurance company to avoid such liability.

23. The insurer can avoid making payment if it commences an action before or within three months after the commencement of proceedings in which the judgment was given and obtains a declaration on the grounds specified in section 11 (3) of the Act after giving notice to the claimant within seven days of commencing its action.
24. Mr. Dutt told court that the defendant informed the plaintiff's solicitors that the claim would not be settled. The witness also admitted receipt of a notice dated 21 June 2016 sent on behalf of the plaintiff stating its intention to file a civil action against the owner of the vehicle. Mr. Dutt said that when the plaintiff brought the judgment in HBC 40 of 2016 to the defendant's attention, it gave instructions on the matter to its solicitors.
25. The defendant referred to the decision in *Sun Insurance Company Limited v Chandra*<sup>2</sup> and submitted that under section 11 (3) of the Act the insurance policy did not cover liability if the vehicle was driven by a person under the influence of liquor.
26. The defendant's contention is misconceived. The defendant could have avoided liability by following the statutory process and observing the time limits prescribed in section 11 (3) of the Act. The defendant failed to take those steps despite having notice of the plaintiff's claims. The failure was to the defendant's detriment. At this stage, the defendant cannot fall back on the insured's breach of the insurance policy to deny the third party claim. In those circumstances, the plaintiff is entitled to claim the judgment sum in HBC 40 of 2016 from the defendant.
27. For the foregoing reasons, judgment is granted in favour of the plaintiff to recover the sums awarded in HBC 40 of 2016.

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<sup>2</sup> [2012] FJSC 8; CBV 0007.2011 (9 May 2012)

**ORDER**

- A. Judgment is entered in favour of the plaintiff.
- B. The defendant is to pay the plaintiff the sums awarded in HBC 40 of 2016 within 21 days.
- C. The defendant is to pay the plaintiff costs summarily assessed in the sum of \$3,000.00 within 21 days.

Delivered at Suva *via skype* on this 18<sup>th</sup> day of **September, 2023.**



A handwritten signature in blue ink, appearing to read "M. Javed Mansoor".

M. Javed Mansoor  
**Judge**

Solicitors:

MAQBOOL & Company (*for the Plaintiff*)

GIBSON & Company (*for the Defendant*)