

**IN THE HIGH COURT OF FIJI  
(WESTERN DIVISION) AT LAUTOKA  
CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 333 OF 2019**

**BETWEEN** **ROHIT SANJAY KUMAR** of Vatukoula. **PLAINTIFF**

**AND** **VATUKOULA GOLD MINES LIMITED** a limited liability company having its registered office at Vatukoula. **DEFENDANT**

**AND** **CAPITAL INSURANCE (FIJI) LIMITED** a limited liability company having its registered office at Level 2, 231 Waimanu Road, Suva **THIRD PARTY**

**BEFORE** Justice A. M. Mohamed Mackie

**APPEARANCES** Mr. Chaudhary for the Plaintiff.  
Mr. Narayan with Mr. Vanualagi for the Defendant.  
Ms. Narayan for the Third Party

**HEARING DATE** 6<sup>th</sup> November, 2023

**RULING** 20<sup>th</sup> November, 2023

**RULING**

(On the amount of Costs)

**A. INTRODUCTION:**

1. This ruling is pronounced on the amount of costs that is payable to the Defendant and the Plaintiff by the Third Party on account of the vacation of the trial owing to an Application filed by the Third Party on 3<sup>rd</sup> November 2023 and supported inter-partes on 6<sup>th</sup> November 2023.
2. By the said application, the third party sought to strike out the Third party Summons and/or to amend the Third Party Defence.
3. This Court, after hearing the learned counsel for the Third Party, the Defendant and the Plaintiff, vacated the trial by allowing the counsel for the Third party to withdraw the Application for striking out and permitting to file its amended Defence by consent, however subject to the payment of costs of which the decision on the amount was reserved.

**B. HISTORY:**

4. The Plaintiff commenced this action on 23<sup>rd</sup> December 2019 by way of his writ of Summons and the Statement of claim (SOC) seeking from the Defendant, inter alia, the following reliefs;
  - i. *General damages for pain and suffering, loss of amenities of life and loss of earning capacity.*
  - ii. *The cost of future care provided to the Plaintiff.*
  - iii. *The cost of medicine and other sanitary items needed for the plaintiff.*
  - iv. *In the ALTERNATIVE a sum of \$67,000.00 under the workmen Compensation Act ( Cap 94)*
  - v. *Interest, and*
  - vi. *Cost of this action.*
5. The Plaintiff's claim was based on the averments of the SOC that on 26<sup>th</sup> December 2017 at around 11:00 when he was working in the Defendant's RI Mining, a heavy rock fell on him, whereby he sustained severe personal injuries as fully set out in the SOC.
6. An interlocutory judgment being initially entered against the Defendant, it was subsequently set-aside by consent and, accordingly, the Defendant filed the Statement of Defence on 14<sup>th</sup> September 2020. Thereafter, the Third Party Notice being filed by the Defendant on 24<sup>th</sup> September 2020, along with the Statement of claim, and the leave being granted for the same on 1<sup>st</sup> October 2020, the Defendant on 8<sup>th</sup> December 2020 filed the amended Third Party Statement of Claim, on which Third party filed its Statement of Defence on 22<sup>nd</sup> December 2020.
7. In the meantime, with the leave of the court, the Plaintiff filed the Amended Statement of claim on 7<sup>th</sup> December 2021 and the Defendant filed the Defence to the Amended Statement of Claim on 14<sup>th</sup> February 2022. The Third Party filed its amended Third Party Statement of Defence on 14<sup>th</sup> February 2022. The plaintiff on 16<sup>th</sup> February 2022 filed his reply to the Statement of Defence to the Amended Statement of claim. The Defendant on 2<sup>nd</sup> March 2022 filed its Reply to the amended Third Party Defence.
8. All the pre-trial formalities being complied with before the Master on 11<sup>th</sup> April 2023, the matter was fixed for the trial to be held before me from 6<sup>th</sup> to 8<sup>th</sup> November 2023. The Plaintiff and the Defendant had their Subpoenas on the respective witnesses issued and served in preparation for trial.
9. Accordingly, it was when the 3 days trial was to commence on 6<sup>th</sup> November 2023, the Solicitors for the Third Party, having filed and served the said summons on 3<sup>rd</sup> November 2023 (Friday) supported the same as aforesaid causing the trial to be vacated.
10. I have heard all 3 learned counsel on the amount of the cost to be ordered, and also carefully perused the contents of the record as to the sequence of events. As per the record the Third Party Notice was first served on them 23<sup>rd</sup> October 2020 and they filed the acknowledgment of serve on 4<sup>th</sup> November 2020. The Application in hand for striking out

and/ or the amendment had been filed by the Third party exactly on the expiry of 3 long years after becoming a party to the action.

11. In paragraph 10 of the Affidavit in Support, the Third Party states that their office had inadvertently overlooked that the injury sustained by the Plaintiff was caused whilst working underground, which circumstances excluded from being indemnified under the Workmen's Compensation Policy that the Defendant had with their Office at the time material to this action.
12. However, the court has now adjourned the 3 days trial, which was necessitated by the Third Party's belated Application. They had sufficient time to have this Application filed well before the trial date and avoided the costs that the Plaintiff and the Defendant claim to have incurred.
13. Mr. Narayan, Counsel for the Defendant, made submissions to the effect that they had incurred cost in having the witnesses in court and in preparation for the trial. The Defendant had called two witnesses as per the record, apart from the Director/s of the Defendant. He stated that when he was intimated about the Application on 3<sup>rd</sup> Friday, he had suggested a sum of \$15,000.00 to be paid as costs if the trial to be adjourned owing to the Application of the Third Party, but they did not respond to it. Mr. Narayan submitted further that since he had come ready for the trial, with his witnesses, and as the Third party still wanted to proceed with the their Application, causing the vacation of the trial, he wants cost in a sum not less than \$20,000.00.
14. On the other hand, Mr. Chaudhary, Counsel for the Plaintiff submitted that the Plaintiff was brought to Court in an Ambulance and they too had incurred costs in preparation for the trial and having the witnesses in Court. He also moved for cost in the same scale. I observed that the Plaintiff was placed in a stretcher as he was said to be finding it difficult to be seated in a Wheel Chair for a longtime.
15. The plaintiff had summoned the General Manager of Lautoka Hospital, the Acting Director of Mines, the Senior Labour Officer, the General Manager of Colonial War Memorial Hospital Suva, Dr. ALAN BIRIBO from the said Hospital and the Human Resources Manager of Vatukoula Gold Mines Ltd –Suva. All these arrangements would, undoubtedly, have caused a considerable amount to the Plaintiff.
16. I observe that the Third party made the Application at the last moment just before the Trial and no meritorious explanation had been provided for the delay. The Third Party's negligence was clear and rampant throughout 3 years. They turned a blind eye to the purported clause in their own Policy. It is pertinent that during this period of 3 years they took no steps when the matter was progressing. In fact, on 11<sup>th</sup> April 2023 parties appeared in Court and consented to the trial being fixed for 6<sup>th</sup> to 8<sup>th</sup> November 2023. Parties are well aware of the fact that if a trial is vacated, it is very difficult to have an early next date for the trial.
17. When parties enter an action for trial, it is a notice to the Court there are no outstanding issues and that parties will proceed with trial based on the pleadings already before the


court. The plaintiff and the Defendant have been put to incur expense in preparation for trial and they were ready for trial from 6<sup>th</sup> to 8<sup>th</sup> November 2023. Plaintiff's Medical witnesses had come from Suva and the Plaintiff had been brought in an Ambulance, which was not disputed.

18. Learned Counsel for the Third Party has drawn my attention to number of authorities with regard to the amount of costs ordered on the instances of vacation of trial. I found it was unfair to vacate the trial, due to the belated Application of the Third Party, without ordering a reasonable amount as costs to be paid to the Plaintiff and the Defendant, who had made all preparations for the Trial. As a result of the Third Party's inaction over a period of 3 years, the trial fixed for 3 days has been vacated. From 11<sup>th</sup> April 2023, on which date the trial was fixed, the plaintiff has waited for 7 months in anticipation of the trial to be commenced and completed so his claim can be determined finally. Now the plaintiff has to wait longer and incur more expenses in the future. There is the risk that the witnesses/s may become unavailable to attend the next trial date. The determination of the Plaintiff's claim is being unjustifiably delayed, and it is a matter of concern for the Defendant as well.
19. However, I don't find any compelling reason to order the cost in such a high scale (\$20,000.00) as moved by the Counsel for the Defendant and the Plaintiff. Counsel for the Third Party consented for a sum of \$1000.00 each as costs in this regard. Having considered circumstances and the submissions made, I decide that ordering a total sum of \$6000.00 to be paid as summarily assessed costs by the Third Party unto the Plaintiff and the Defendant \$3,000.00 each would do justice.

**ORDERS:**

- a. The Third Party shall pay unto the Plaintiff and the Defendant a sum \$3,000.00 (Three Thousand Dollars) each totaling to \$6,000.00 (Six Thousand Dollars) as summarily assessed costs.
- b. The cost shall be paid in 28 days from today.



  
**A.M. Mohamed Mackie**  
Judge

At High Court, Tagimoucia, Lautoka this 20<sup>th</sup> day of November, 2023.

**SOLICITORS:**

For the Plaintiff:	<b>Messrs. Chaudhary &amp; Associates – Barristers &amp; Solicitors</b>
For the 1 <sup>st</sup> Defendants:	<b>Messrs. A.K. Lawyers –Barristers &amp; Solicitors</b>
For the Third Party:	<b>Messrs. Swastika Legal – Barristers &amp; Solicitors</b>