

IN THE COURT OF APPEAL, FIJI
On appeal from the High Court of Fiji

CIVIL APPEAL ABU 49 OF 2012
(High Court HBC 22 of 2005)

BETWEEN : DOMINION INSURANCE LIMITED *Appellant*

AND : TEBARA TRANSPORT LIMITED *First Respondent*

AND : MOTOIULA NEMANI *Second Respondent*

AND : RAVINDRA KISHORE *Third Respondent*

Coram : Calanchini P

Counsel : Ms S Narayan for the Appellant
Mr R K Naidu for the First and Second Respondents
Mr D Singh for the Third Respondent

Date of Hearing : 6 September 2016

Date of Ruling : 28 October 2016

RULING

- [1] On 3 August 2002 while travelling from Nausori to work in Suva the third Respondent (Kishore) was injured when the bus in which he was a passenger was involved in a collision with another vehicle. The bus was driven by the Second Respondent (Nemani) and was owned by the First Respondent (Tebara Transport). Kishore was also employed by Tebara Transport as a tyre repairman. As a result of the collision Kishore suffered multiple injuries and was admitted to hospital. In proceedings commenced by writ in the High Court, Kishore claimed that his injuries were caused by the negligence of Nemani whilst driving the bus in the course of his employment with Tebara Transport. Nemani and Tebara Transport joined the Appellant (Dominion Insurance) as a third party seeking a declaration that in the event that they were held liable to Kishore, they were entitled to be indemnified by Dominion Insurance pursuant to either a Workman's Compensation policy or a Compulsory Third Party Insurance policy both issued by Dominion Insurance.
- [2] Nemani was, subsequent to the collision, convicted in the Magistrates Court at Suva of the offence of dangerous driving as a result of the collision, fined and disqualified from holding or obtaining a driving licence for three months. The High Court consequently found that the collision was caused by the negligence of the driver Nemani and that his negligence caused Kishore's injuries. Tebara Transport was found to be vicariously liable as Nemani was driving in the course of his employment. Tebara Transport has not sought to challenge these findings on appeal.
- [3] Dominion Insurance in its defence to the third party notice raised a number of defences to the claim by Tebara Transport for indemnity either under the Workman's Compensation policy or the Compulsory Third Party policy. The learned High Court Judge concluded that Kishore was not obliged by the terms of his employment to travel by bus and as a result his travelling by bus was not a journey undertaken in the course of his employment. As a result the Workman's Compensation policy did not apply.

[4] In relation to the claim for indemnity under the Compulsory Third Party policy, the learned Judge concluded that the legal liability clause in the policy provided an express stipulation “*for personal injury to passengers (who are not fare paying passengers).*” Therefore Dominion Insurance was liable under the policy to indemnify Tebara Transport to the extent of the increased coverage of \$250,000 provided therein.

[5] The learned High Court Judge assessed damages in the total sum of \$172,458.35 including interest up to the date of judgment. This assessment is also not challenged in the appeal. Costs were awarded in the sum of \$3000.00. The Court also ordered that Tebara Transport Limited is entitled to be indemnified by Dominion Insurance under the terms of the Motor Vehicle Compulsory Third Party Policy Certificate for the full amount of damages and costs awarded to Kishore. Judgment to that effect was pronounced in court on 1 June 2012.

[6] Being dissatisfied with the Court’s judgment and orders Dominion Insurance filed and served a timely notice of appeal relying on the following grounds of appeal:

- “1. ***THAT*** the Learned Judge erred in law by finding that the Third Respondent was not an employee of the First Respondent when travelling to his work place using the First Respondent’s bus but travelling as a general public therefore covered under the Compulsory Third Party Policy with increased covered to \$250,000.00.
2. ***THAT*** the Learned trial Judge erred in law and in fact by finding that the Appellant’s Third Party Motor Vehicle. Policy exclusion in Section 2, Clause 22(b) did not apply as it is contrary to Section 6(1) (a) (ii) of The Motor Vehicle (Third Party) Insurance Act Cap 177.
3. ***THAT*** the Learned Trial Judge failed to consider that the Third Respondent was given a privilege to travel free in First Respondent’s bus as he was an employee and the Motor Vehicle Third Party Policy has an exclusion that any employee of the insured is not covered to the increased coverage of \$250,000.00 but limited to \$4,000.00 under the Motor Vehicle (Third Party) Insurance Act Cap 177.”

[7] The issues raised by the grounds of appeal relate solely to the liability of Dominion Insurance to indemnify Tebara Transport for the amount awarded to Kishore. Neither

Dominion Insurance nor Tebara Transport have sought to challenge the liability in negligence of Tebara Transport or the quantum of the award.

[8] Dominion Insurance subsequently applied to the High Court for an order to stay execution of the judgment pending the determination of the appeal. The other parties all opposed the application. The learned Judge appears to have considered the application under Order 45 Rule 10 of the High Court Rules. I have some reservations about such an approach once appeal papers have been filed in the Court of Appeal. It seems that the High Court's jurisdiction to grant a stay of execution under Order 45 Rule 10 must be considered in the context of Rules 34 and 26(3) of the Court of Appeal Rules. It is also my opinion that the principles upon which an application under Order 45 Rule 10 falls to be considered differ from the principles that apply to an application for stay pending appeal.

[9] In any event the fact that the application was made by Dominion Insurance would appear to indicate that it has accepted that as a result of the orders made by the High Court it was responsible for satisfying the judgment. In other words Dominion Insurance's liability to pay was not dependent on Tebara Transport paying to Kishore the judgment amount before any obligation to indemnify Tebara Transport arose.

[10] The learned High Court Judge on 7 December granted a stay of execution of the judgment pending the final determination of the appeal. It has to be acknowledged, however, that there does not appear to be any good reason why Kishore should have been denied the fruits of his victory in the High Court when neither liability in negligence nor quantum are challenged. The dispute is between the insured and the insurer under workman's compensation and compulsory third party insurance policies.

[11] The written submissions filed on behalf of Dominion Insurance address the issue of stay as the basis for its opposition to the application by Kishore for an interim payment. However, so far as Kishore is concerned it is of no consequence whether Dominion Insurance's appeal does or does not succeed. To the extent that the principles governing

a stay of execution pending appeal and the principles governing the making of an order for interim payment are interconnected is of no consequence for Kishore's application in this case.

[12] The written submissions filed on behalf of Nemani and Tebara Transport raise two issues. The first is whether Order 29 Part 2 of the High Court Rules can be relied upon in an application for an interim payment made in the Court of Appeal. The second issue raised by the submissions relates to the fact that a stay of execution pending appeal order has already been made by the High Court.

[13] In dealing with the first issue there is sufficient authority in the Court of Appeal Act Cap 12 (the Act) to support the proposition that a single judge of the Court of Appeal can hear and determine an application for an interim payment. Section 13 of the Act states:

“For all the purposes of and incidental to the hearing and determination of any appeal under this Part and the amendment, execution and enforcement of any order, judgment or decision made thereon, the Court of Appeal shall have all the power authority and jurisdiction of the High Court and such power and authority as may be prescribed by rules of Court.”

[14] In my judgment section 13 provides the statutory basis for the Court of Appeal to exercise the jurisdiction for which provision is made under Order 29 of the High Court Rules. Furthermore, section 20(1) of the Act provides the statutory basis for an application for interim relief to be heard and determined by a judge of the Court of Appeal. The recent decision of a single judge of this Court in **Attorney-General of Fiji and Ministry of Health –v- Loraina Dre** (ABU 22 of 2009; 17 February 2011) provides adequate authority for both these propositions.

[15] The second issue raised by Nemani and Tebara Transport relates to the stay of execution order made by the High Court on 7 December 2015. Upon a reading of that decision it is apparent that the Court has considered the principles for a stay in relation to the issues raised by Dominion Insurance in its appeal against Tebara Transport. The Court has

made no reference to the fact that neither liability nor quantum have been challenged. Nor has the Court made any reference to the hardship caused to Kishore as a result of the considerable delay caused by the appeal proceedings which have nothing to do with Kishore's success at trial. If the court below when granting a stay fails to consider matters that should have been considered it is open to this Court to grant an order for interim payment notwithstanding the existence of the stay order in the court below:
Attorney-General -v- Dre (supra)

[16] Since there is no dispute as to either liability or quantum in respect of the claim by Kishore there is no reason why he should be deprived of at least some of the award pending the outcome of the proceedings in this court. There is no real risk in this case that one of the parties would not be able to pay back to the other any amount ordered to be paid to Kishore. Therefore an appropriate course is to order that both Tebara Transport and Dominion Insurance each pay to Kishore the sum of \$25,000 for a total of \$50,000.00 within 14 days from the date of this judgment. Both Tebara Transport and Dominion Insurance should consider the consequences of the post judgment interest provisions in the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap 27 (as amended). Kishore is also entitled to costs fixed at \$1,800.00.

Order:

- 1. The Appellant Dominion Insurance Ltd and the First Respondent Tebara Transport Ltd are each to pay to the Third Respondent the sum of \$25,000.00 for a total of \$50,000.00 by way of interim payment within 14 days from the date of this Ruling.*
- 2. Dominion Insurance and Tebara Transport are ordered to pay \$900.00 each as costs to Kishore within 14 days from the date of this Ruling.*



W. Calanchini
Hon. Mr. Justice W. Calanchini
PRESIDENT, COURT OF APPEAL