

IN THE HIGH COURT OF FIJI AT SUVA  
CIVIL JURISDICTION

ACTION NO. HBC 351 of 2009

BETWEEN : SAKIUSA SOLI (Senior) Retired, and SAKIUSA SOLI (Junior)  
an infant suing by his grandfather and next friend Sakiusa Soli  
(Senior) both of Lot 13, Soqe Place, Nadera.

Plaintiff

AND : RAIWAQA BUS LIMITED  
1<sup>st</sup> Defendant

AND : KAMINIELI TUIMAVANA  
2<sup>nd</sup> Defendant

AND : NEW INDIA ASSURANCE COMPANY LIMITED  
1<sup>st</sup> Named Third Party

AND : LAND TRANSPORT AUTHORITY  
2<sup>nd</sup> Named Third Party

BEFORE : Hon. Justice Mayadunne Corea

COUNSEL : Mr. D. Singh for the Plaintiff  
Mr. A. Sudhakar for the 1<sup>st</sup> named 3<sup>rd</sup> party  
Mr. J. Cati for the 2<sup>nd</sup> named 3<sup>rd</sup> party.

Date of Hearing : 17<sup>TH</sup> September, 2013

Date of Judgment : 11<sup>th</sup> June 2014

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**DECISION**

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- [1]. The application before me is a summons for leave to appeal the decision of the Master and among other things an application for extension of time to appeal, to file notice and grounds of appeal to 21 days.
- [2]. The order has been pronounced on 26.3.12 and the summons for leave to appeal has a date stamp of 30.3.12. This application is filed by the 1<sup>st</sup> named third party who will herein after been called the applicant and the plaintiff who will be called the plaintiff respondent.
- [3]. One Mohini Devi Ali has filed an affidavit in support of the summons.
- [4]. The application for leave to appeal was made pursuant to Order 59 Rule 8 and 11.
- [5]. The deponent of the affidavit in support of the summons deposes that the **“learned Master erred in Law and in fact in wrongly interpreting and or prematurely interpreting the subject policy”**.
- [6]. That the learned Master had erred in Law and fact in failing to properly consider to apply the principles interpreting Queensland Insurance (Fiji) Ltd -vs- Shore Buses Ltd.
- iii. **That the Learned Master erred in law and in fact in that the Plaintiff's Summons did not seek a question and/or there was no question to be determined.**
  - iv. **That the Learned Master failed to take into account the facts of the case, the nature of the claim and the Pleadings filed between the 1<sup>st</sup> Defendant, who are the Insured, and the 1<sup>st</sup> named Third Party, who is the Insurer.**
  - v. **That the Learned Master erred in Law and in fact in making Final Order when the Pleadings between the Defendants and 1<sup>st</sup> named Third Party are conflicting and requires as to the subject insurance policies its construction and the intention of parties to the subject insurance of**

policies in question and this need oral evidence and for ventilation of evidence for the Court to make a determination.

- vi. That the Learned Master erred in law and in fact when The Learned Master read down, so as to amend, the Plaintiff's Summons to cure the fatal defects in the Plaintiff's Summons and subsequently delivering a Ruling when no application was made by the Plaintiff's Solicitors to amend its application.
  - vii. That the Learned Master erred in law and in fact when applying the *contra proferentum* rule in that it failed to apply the normal interpretation of the subject contract between the parties first which required oral evidence or at least evidence of the 1<sup>st</sup> Defendant who did not give any evidence.
  - viii. That the Learned Master erred in law and in fact in delivering the Final Order in its Ruling where there is no evidence in the Plaintiff's Affidavit or the Law Clerk's Affidavit on any interpretation as to ambiguity or interpretation of the Insurance Contract between the 1<sup>st</sup> Defendant and the 1<sup>st</sup> Named Third Party.
  - ix. That the Appellant reserves their rights to file Amended Grounds of Appeal.
- [7]. Further it was deposed that 1<sup>st</sup> named third party will be prejudiced and injustice caused by this decision and that the defendant has a reasonable chance of success on the grounds of appeal.
- [8]. In the affidavit in reply filed by one Jagdish Prakash the law clerk of D Singh lawyers deposed among other things that the summons dated 7 September 2010 had been amended to read "as whether the New India Insurances Company i.e. the 1<sup>st</sup> named third party was liable for passenger risk cover of \$100,000.00 to each claimant or whether the \$100,000.00 was the aggregate sum of all the claims".

- i. That there was no oral evidence required to interpret the insurance policy as the sole or principle question at issue was one of the construction of the insurance policy and;
- ii. That there was no error in law and in fact in applying the contra preferentum rule.
- iii. That the applicant does not have an arguable appeal and no reasonable prospect of success on the appeal.

### Determination

[9] The order of master dated in 26 March 2012 is an interlocutory order.

[10] The appeal process pertaining to interlocutory orders are governed by Order 59 of the High Court Rules. Order 59 Rules 8(2) state:

**“No appeal shall lie from an interlocutory order or judgment of the Master to a single judge of the High Court without the leave of a single judge of the High Court which may be granted or refused upon the papers filed.”**

[11] Accordingly the 1<sup>st</sup> named 3<sup>rd</sup> party has filed this application.

[12] The ruling of the master dated 26 March 2012 States in the Order:

- a. **The interpretation of this court is that the 1<sup>st</sup> Named Third Party in terms of the Motor Comprehensive Policy No 922623/ 3104/286256 is liable for passenger risk cover of \$100,000 applied to each claimant. (AND NOT THE AGGREGATE SUM OF ALL CLAIMS OF PASSENGERS).**
- b. **No cost is awarded for this application.**

- [13] Both parties admit that the summons that was filed on 7 September 2010 had been orally amended before the master and the master had given the order pertaining to the said amended summons. It is submitted that the original summons seeks for an order pertaining to the amount of risk liability of passengers pertaining to each claim. Plaintiff Respondent's counsel submits that the amended summons read as "whether the new India Insurance Company i.e. First named third party was liable to passenger risk cover of \$ 100,000 to each claimant or whether the 100,000 was the aggregate sum of claims." This was not denied by the applicant.
- [14] Accordingly, as submitted there had been a question submitted in the amended summons where the Master was required to deliver a ruling. The plaintiff respondent further submitted that the amendment was required to clarify the real issue.
- [15] It was submitted that the 1<sup>st</sup> defendant in its third party statement of claim had pleaded that the defendant was relying on his insurance policy.
- [16] That in the statement of defence of the 1<sup>st</sup> named 3<sup>rd</sup> party in paragraph 3 "passenger risk' liability is mentioned and there was an uncertainty.
- [17] That to avoid confusion and for clarity the plaintiff thereafter had filed a summons to obtain an order on the interpretation of passenger risk liability as per the policy. Paragraph 5 of the affidavit in support of the summons claims the purpose of filing this summons. It is submitted that the impugned order has resolved a preliminary issue before the court proceeds to resolve the main issues.
- [18] The learned Master by his ruling has deliberated on this preliminary issue pertaining to the limit of liability of the insurance pertaining to the insurance policy. In dealing with the preliminary issue the Court had acted under order 33 rule 3 of the High Court rules read with order 18 rule 11 of the white book (1999) 18.11.1.
- [19] The Master had come to the conclusion that the word 'passenger' has no reference in section 2 of the policy which deals with the insurance liability pertaining to "**person's and property**".

- [20] Accordingly it was submitted that there is an ambiguity in interpreting the policy and therefore the Master had applied the contra preferentum rule, and citing Queensland Insurance (FIJI) LTD VS Shore buses LTD it was submitted to interpret a clause of the contract there was no necessity to lead oral evidence.
- [21] However at this stage this court will have to deal only with the application for leave to appeal as the order impugned is an interlocutory order.
- [22] Appeals against interlocutory orders and decisions rarely succeed. Leave is granted only when there are exceptional circumstances. If the court opines that there is not much success in the proposed appeal appellant will hardly succeed in obtaining leave.
- [23] Courts have expressed this view pertaining to the appeals from interlocutory orders when it was held "I am mindful that court have respectfully emphasised that appeals against interlocutory orders and decisions will only rarely succeed." Kelton Investments Ltd vs CAAF [1995] ABU 0034.95.5.
- [24] This may be to prevent frivolous appeals being forwarded in abuse of the process of the court. This has been clearly discussed in Niemann v Electronic Industries Ltd 1978 VR 431. However, it has also been held that the court will grant leave if it finds reasons to do so (Decon Corp vs Port Industries [1991] FCA 655, 109 ALR 621).
- [25] For the court to grant leave, the 1<sup>st</sup> named 3<sup>rd</sup> party will have to satisfy court that the **impugned** order has the effect of finally altering the substantial rights of the parties and that there is a high probability of success in the appeal. Appeal should have meritorious grounds of appeal.
- [26] The first named third party **alleges** that there will be substantive injustice caused to it if the interlocutory order is to stand as it is.
- [27] It was submitted that the 1<sup>st</sup> named third party has not filed an opposition to the summons, nor have they objected to the maintainability of the summons. In view of the interpretation given to the passenger risk liability by the insurer the plaintiff has file this motion and the court had proceeded to hear and determined the preliminary

issue of interpretation. It was further submitted that the master had determined the issue of interpreting the clause of the policy as an application for trial of a preliminary issue on a point of law.

- [28] The plaintiff submitted that the 1st named 3<sup>rd</sup> party has failed to file an opposition to the summons or to take any opposition to the amendment of the summons. The 1<sup>st</sup> named 3<sup>rd</sup> party has only filed written submission and hence there was no affidavit in opposition to the summons.
- [29] It is also submitted that the summons seeks an order under Order 15 rule 18 of the High Court Rules.
- [30] The 1<sup>st</sup> named third party has elaborated on the prepared grounds of appeal in the written submissions. The court at this stage does not have to go to the merits of the case. This court at this stage only has to consider whether by the impugned order the first named third party's substantive right has been affected and whether the first named third party has an arguable appeal with a probability of success.
- [31] The sealed order has only interpreted the risk liability of the insurance policy. In dealing with liability the learned master has come to the conclusion that as per the policy the insurance is liable for passenger risk cover of \$100,000.00 applied to each claimant.
- [32] The interlocutory Order does not come to a finding that the insurer is liable to pay to the plaintiff. It does not come to the conclusion that the plaintiff is entitled to \$100,000.00. Though it is interpreted that the insurer is liable to pay \$100,000.00 for each claim, the amount claimed has to be proved in court by the claimants. It is also submitted that there is no interpretation as to the total liability of the insurer pertaining to the claim. The master has not interpreted whether the total claim is subjected to the value of the policy or whether it will exceed the value of the policy as contested by first named third party. I think this submission is made prematurely at this stage.

[33] In the given circumstances the first named third party applicant has failed to satisfy court that their substantial rights are affected by the learned master's interlocutory order.

[34] The 1<sup>st</sup> named third party has failed to satisfy court that by the impugned order, the first named third party will suffer a substantial injustice as submitted. In **Niemann vs Electronic Industries Ltd** [1978] VR 431 it was held:

*“if the order is seen to be clearly wrong this is not alone sufficient. It must be shown in addition to affect a substantial injustice by its operation”.*

[35] The plaintiff's case against the defendant (insured) has not yet commenced, the liability of the defendant towards the plaintiff has not yet being assessed. Accordingly there is no final determination of rights of the parties by the Master's interlocutory order.

[36] Once the cause filed by the plaintiff is determined and if it is against the insurer then the first named third party has a right of appeal from the determination of the main cause.

[37] Accordingly I find the proposed appeal by 1<sup>st</sup> named third party lacks merit and I can't see any meritorious facts or an arguable appeal to grant leave to appeal.

[38] The plaintiff has argued basically on the merits of the case which at this stage will be of little assistance to court. However, he submitted that as the order impugned does not determine the final substantive rights of the parties nor its operation affect a substantial injustice. The first named third party will not have a good arguable appeal. As the first named third party has failed to present a good arguable appeal the plaintiff submits that the court should refused to grant leave to appeal as decided in **Prasads –vs- Prakash** Fiji Court of Appeal no. 93 of 2005.

[39] For the reasons set out in this Decision the 1<sup>st</sup> named third party has failed to satisfy court that by the interlocutory order the final substantive rights of parties have been firmly adjudicated. As submitted once the trial concludes, still the first named third party will have the right to appeal.




[40] Therefore this court is inclined to accept the plaintiff's objection and summons for leave to appeal is dismissed. Cost of this application to be cost in the cause.

[41] Accordingly I make the following orders:

- a) Leave to appeal against the decision of the Master pronounced on 26 March 2012 is refused.
- b) Cost of this application to be cost in the cause.
- c) Case to take its normal course.



  
Mayadunne Corea  
**JUDGE**

11.6.2014