

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

**Civil Action No. HBC 08 of 2015**

**BETWEEN**

SAMEND PRATAP trading as Samend's General Haulage of  
Coloci, Seaqaqa, Businessman.

**PLAINTIFF**

**AND**

DOMINION INSURANCE LIMITED a Limited Liability Company having its  
registered office at 231 Waimanu Road, Suva.

**DEFENDANT**

<b>Counsel</b>	:	Mr. A. Kohli for the Plaintiff Ms. S. Narayan for the Defendant
<b>Dates of Hearing</b>	:	19 <sup>th</sup> , 20 <sup>th</sup> & 21 <sup>st</sup> September, 2016
<b>Written Submissions</b>	:	10 <sup>th</sup> October, 2016 and 12 <sup>th</sup> October, 2016
<b>Date of Judgment</b>	:	02 <sup>nd</sup> November, 2016

# JUDGMENT

- [1] The plaintiff who was at all material times the owner of the Nissan truck bearing registration No. EH 858 instituted this action to recover \$75,000.00 which the amount for which the said vehicle was insured with the defendant and \$2500 per week as the loss of income.
- [2] On 9<sup>th</sup> June 2014 while the plaintiff was driving the said vehicle at Korosomo Hill met with an accident and the vehicle was damaged beyond repair.
- [3] The plaintiff claimed the sum entire insured from the defendant which was repudiated by the defendant on the following grounds;
- (a) The insurance policy had been cancelled due to non-payment of premium in time;
  - (b) The plaintiff falsely informed the defendant that the vehicle was valued at \$75,000.00 when the value was much less than that; and
  - (c) The plaintiff made a false claim on the ground of gearbox problem.
- [4] As per the minutes of the pre-trial conference the parties have admitted the following facts;
- 1. At all material times the plaintiff was the owner of the Nissan Heavy Goods Truck bearing registration No. EH 858.
  - 2. An at all material time the defendant was the insurance company duly registered as Dominion Insurance Limited pursuant to the provisions of sections 20 and 202 of the Companies Act (Cap 247) and was liable to be sued in and by its corporate name and style and at all such times carried on business as an insurer.
  - 3. The defendant, in consideration of the sum of \$3600.00 agreed to be paid by the plaintiff, issued to the plaintiff a policy of

insurance number 295615-1 for the period of 24<sup>th</sup> March, 2014 to 24<sup>th</sup> March, 2015 under which the defendant agreed to indemnify the plaintiff against physical or damages to the motor vehicle registration No. EH 858.

4. On 9<sup>th</sup> June, 2014 the vehicle was extensively damaged beyond repair at Korosomo Hill.
5. The plaintiff notified the defendant of the damages and requested the defendant to indemnify him against the loss.
6. The defendant refused to indemnify the plaintiff against the loss sustained by the plaintiff.

[5] The parties have agreed that the following are the issues to be tried at the trial;

1. Did the plaintiff make payments of the premium as per the policy?
2. Was the plaintiff in breach of the policy by not making payments on time?
3. If so, was the breach waived by the defendant by accepting late payment?
4. Did the plaintiff make the payment of the sum of 2000.00 after the accident?
5. Did the plaintiff collude with the Defendant's agent in Labasa to have the receipt of the sum of \$2000.00 back dated?
6. Did the plaintiff at the time of making of an application for the insurance cover falsely inform the defendant that the price of the vehicle being insured was valued at \$75000.00?
7. Was the value of the vehicle at the time of the application for the insurance cover around \$38,000.00?
8. Is the plaintiff in breach in breach of clause 9 of the policy?
9. Has the plaintiff made a false claim for indemnification on the ground that the vehicle had a gearbox problem?

10. Was there a gearbox problem at the time of the accident?
11. Has the plaintiff fraudulently informed the defendant prior to the inception of the insurance policy that the value of the vehicle was \$75000,00 and has he made claim for indemnity by disclosing false information to the defendant as alleged in paragraph 11 of the statement of defence?
12. Is the plaintiff making a false claim and thereby attempting to enrich himself as alleged in paragraph 12 of the statement of defence?
13. Even if the policy was in force if the claim made by the plaintiff was on genuine grounds, is the plaintiff entitled to be indemnified at a pre-accident market value only?
14. What was the pre-accident market value?
15. Is the plaintiff entitled to loss of income?
16. Is the plaintiff entitled to claim general damages? If so how much?
17. Is the claim of the plaintiff frivolous, vexatious and without merit?
18. Is the plaintiff is entitled to special and general damages as claimed together with costs?
19. Is the defendant entitled to the declaration sought in its prayers?

[6] The main question for determination here is whether the contract of insurance between the parties was in existence at the time of the accident. If the court answers this issue in the affirmative that is that the contract of insurance was valid and in force at the time of the accident only all the other issues arising out of the contract of insurance arise for consideration.

[7] The position of the plaintiff is that he paid all premiums due to the defendant but the defendant while denying this position of the plaintiff averred in the statement of defence and also adduced evidence that the contract of insurance had lapsed at the time of the accident for non-payment of premiums.

[8] According to the invoice dated 24<sup>th</sup> March, 2014 [D3] the plaintiff was required to pay the insurance premium in three installments. These three installments of \$1600.00, \$1000.00 and \$1000.00 were due on 24<sup>th</sup> March, 2014, 24<sup>th</sup> April, 2014 and 24<sup>th</sup> May, 2014 respectively. The plaintiff tendered in evidence three receipts for \$1500.00, \$100.00 and \$2000.00 dated 20<sup>th</sup> March, 2014, 26<sup>th</sup> March, 2014 and 06<sup>th</sup> June, 2014 respectively.

[9] It is a fact admitted by the plaintiff that the defendant gave him time to pay the premium. According to the document "D3" the plaintiff had been given two months to pay the entire premium in installments as referred to in the previous paragraph. The condition 6 of the insurance policy reads as follows;

Unless alternative premium payment terms have been agreed in writing this policy will become null and void 14 days after the original inception date or any subsequent renewal date unless the full annual premium has been paid to the Dominion Insurance.

[10] By 24<sup>th</sup> May, 2014 the plaintiff was due and owing to the defendant \$2000.00 by way of insurance premiums. According to the above clause the insurance policy was to become null and void on 07<sup>th</sup> June, 2014 but the plaintiff has paid the entire sum due on 06<sup>th</sup> June, 2016 which was one day before the insurance policy was to become null and void automatically.

[11] The payment made on 06<sup>th</sup> June, 2016 by the plaintiff is denied by the defendant. It is the position of the defendant that the plaintiff has colluded with its own agent and backdated the receipt [P2b].

[12] The defendant called a witness from Ibrahim & Sons Limited who testified that she went to make the payment appears on receipt No. 15354 on 06<sup>th</sup> June, 2014 to the agent in Labasa for Dominion Insurance after 2.00 pm. The receipts bearing Nos. 15353 and 15354 were tendered in evidence marked as "D1". The plaintiff's evidence is that he went to make the payment to the same agent on the same day between 1.00 pm and 2.00 pm. The question

asked by the learned counsel for the defendant is that if the plaintiff paid the premium before this witness how he was issued with a receipt bearing a serial number after the number of the receipt issued to the witness. This certainly creates a doubt in the mind of the court but question is the fraud alleged to have been perpetrated by the plaintiff in collusion with the defendant's own agent can be established only by creating doubt in the mind of the court. The party who alleges fraud must establish by adducing strong evidence. In this case according to their evidence both the plaintiff and the witness for the defendant have gone to the agent to pay insurance premiums at almost the same time. The witness does not say exactly at what time she paid the money and the plaintiff two says it was between 1.00pm and 2.00 pm. The court is not allowed to make findings of fact on assumptions it needs hard evidence. The evidence adduced by the defendant is absolutely insufficient for the court to arrive at a finding that the plaintiff and the defendant's own agent acted collusively to defraud it. It is also pertinent to state that the defendant is bound by the acts of its own agent.

- [13] The defendant also alleged that the plaintiff made a false declaration in the insurance proposal (P1) on the purchase price of the vehicle. In the proposal form the plaintiff has state \$75,000.00 as the value of the vehicle. There is no evidence on record that the plaintiff made a false statement as to the purchase price. In the proposal form there is no space to state the purchase price of the vehicle. All that had been asked the plaintiff to provide was the value of the vehicle and the sum insured. The premium payable by the insured is calculated on the basis of the sum insured and not on the real value of the vehicle. The witness Mr. Vikash Kumar, Head of Claims of the defendant company in his evidence stated that even if the value of the vehicle is higher than the sum insured the insurer does not pay anything more than the sum insured. It is clear from the evidence of this witness that the price paid for the vehicle by the plaintiff was immaterial for the purposes of insurance. All what was required was the amount for which the insured wanted to insure the vehicle. It is not a fact in dispute that the premium payable by plaintiff had

been calculated on the basis of the sum insured which was \$75,000.00. If the defendant at the time of making the proposal by the plaintiff felt that the value of the vehicle was much less than \$75,000.00 and if they did not want to insure the vehicle for that amount it should either have obtain a valuation from a qualified valuer, refused to accept the proposal or suggest to insure the vehicle for a lessor sum with a lessor premium. After charging the plaintiff an insurance premium calculated on the basis that the value of the vehicle was \$75,000.00 the defendant cannot be now heard to complain the valuation given by the plaintiff was false or incorrect. As we all know insurance is also a profit earning business. However, the insurance companies must see to it that not only them but also the insured are also benefited by their investment. In the circumstances the defendant has no legal or moral right to repudiate the claim of the plaintiff on the ground that he made an incorrect declaration as to the value of the vehicle in the proposal from and the allegation that the plaintiff has breached clause 9 of the insurance policy (D1) is baseless.

[14] The defendant also alleges that the plaintiff made a false statement as to the manner in which the accident occurred in that he stated that it was due to a gearbox problem. The insurance policy does not indicate the categories of accidents which are qualified to be indemnified. Under the policy damage caused to the vehicle due to any form of accident is liable to be indemnified by the insurance company subject to the limitations contained in the policy. Hence, the statement of the plaintiff as to how this accident occurred or whether statement of the plaintiff in that regard is true or false, is immaterial when it comes to indemnify the damage caused.

[15] It is the position of the defendant that if the plaintiff's claim is genuine it is only liable to pay the plaintiff the pre-accident market value of the vehicle and not the entire sum assured. According to Section 1(b) of the insurance policy if the vehicle is completely damaged insured is indemnified as follows;

- (i) Where the vehicle is less than 12 months old (from the date of first registration or sale after manufacture) the insured will be

indemnified by payment of an amount equal to the replacement cost of the vehicle but not more than the sum insured;

- (ii) Where the vehicle is more than 12 months old (from the date of first registration or sale after manufacture) the insured will be indemnified by payment of an amount approximating the market value of the vehicle immediately before the loss but not more than the sum insured. Where the market value is more than the sum insured the Dominion will be entitled to possession of the wreck and retain the proceeds of its disposal in the ratio of the sum insured divided by the market value.

[16] It is not a disputed fact that at the time of the accident the vehicle was more than one year old from the date of first registration. Therefore, under section 1(b)(ii) of the policy the plaintiff is only entitled to recover the approximate market value of the vehicle immediately prior to the accident.

[17] The plaintiff who claimed the entire sum insured did not adduce any evidence on the pre-accident market value of the vehicle. The defendant called Mr. Pradeep Mudaliar who has been mechanical work for the last 35 years and has repaired more than 1000 trucks during that period. He testified that he inspected the truck involved in the accident. It is his evidence that before the accident the value of the truck would have been \$22,000.00. The evidence on the value of the truck of this witness has not been challenged by the plaintiff. Since there is no evidence to the contrary the court has to accept the only evidence which is unchallenged on the question of valuation of the vehicle.

[18] The plaintiff also claimed \$2500.00 per week for the loss of income. This action is based on the contract of insurance entered into between the parties. The contract of insurance does not cover the loss of income in the event the vehicle insured becomes immobilized due to an accident. Therefore, the plaintiff's claim for damages for the loss of income is liable to be dismissed.



[19] Accordingly, I make the following orders.

- (1) The defendant shall pay the plaintiff \$22,000.00.
- (2) The defendant shall also pay the plaintiff interest on the said sum in terms of section 4(1) of the Law Reform (Miscellaneous Provisions) (Death and Interest) (Amendment) Decree 2011 from the date of the judgment until the entire sum is paid in full.
- (3) The defendant shall also pay the plaintiff \$2000.00 as costs (Summarily Assessed) of this action.

  
Lyone Seneviratne,

JUDGE



02<sup>nd</sup> November 2016.