IN THE HIGH COURT OF FIJI AT LABASA

CIVIL JURISDICTION

Action No. HBM 05 of 2018

IN THE MATTER of section 11 of the Motor Vehicle (Third Party Insurance) Act.

BETWEEN

JAITUN BI of Tabia, Labasa, Domestic Duties.

PLAINTIFF

AND

SUN INSURANCE COMPANY LIMITED a limited liability company having its registered office Ground and Level 1, Sun Insurance Kaunikula House, Laucala Bay Road, Honson Street, Suva.

DEFENDANT

Counsel	:	Mr. Sen A. for the Plaintiff Mr. Ram A. for the Defendant
Date of Hearing	:	13th May, 2019
Date of Judgment	:	25th June, 2019

JUDGMENT

[1] The plaintiff filed this summons to recover the damages awarded by the court against the defendants in civil action No. 40 of 2016, from the insurer.

[2] The claim of the plaintiff in the said action was that the vehicle bearing registration No. FA 745 owned by Ragendra Prasad (the 2nd defendant) and driven by Edward Bernet (the 1st Defendant) knocked her down on a pedestrian crossing.

[3] Since the defendants failed to appear in court upon service of summons the learned Master of the High court entered judgment in default. It is averred in the affidavit in opposition of Arvendra Kumar that the defendants sought to have the default judgment vacated but to no avail.

[4] The defendant in the current proceedings was the insurer of the 2nd defendant in HBC 40 of 2016. The defendant in these proceedings was not a party in HBC 40 of 2016.

[5] The learned counsel for the defendant submitted that the manner in which these proceedings have been instituted is contrary to the provisions of Order 5 of the High Court Rules 1988.

[6] Order 5 rule 1 of the High Court Rules 1988 provides that subject to the provisions of any Act and of these Rules, civil proceedings in the High Court maybe begun by writ, originating summons, originating motion or petition.

[7] In this action the plaintiff has filed summons and a supporting affidavit. Order 7 rule 2 of the High Court Rules 1988 requires that an originating summons must be in Form 5 and it has to be before a judge and not before the Master of the High Court. The summons file by the plaintiff in this action is worded as follows;

> "LET all parties concerned attend before a Master in Chambers at the High Court, Labasa on ....."

[8] Although the learned counsel for the plaintiff attempted to convince the court that this summons could be considered as an originating summons it does not satisfy

the requirements of Order 5 rule 2 and Order 7 rule 2 of the High Court Rules 1988.

[9] Order 6 rule 1 of the High Court Rules 1988 requires that a writ of summons must be in Form 1 and it must be accompanied by indordement of claim. The summons filed in this action is not in compliance with Order 6 rules 1 and 2. Therefore, it cannot be considered as a writ of summons.

[10] In the case of **In The Estate of Nayan Singh; In the Matter of an Application by Hemant Kumar Singh aka Hermant Kumar Singh (HPP0043 of 2011s)** the Master of the High Court held:

> There is no provision in the High Court Rules that allows the institution of an action through an ex parte notice of motion. On that ground alone, the application should be struck off.

[11] The procedural laws are enacted to facilitate the proper administration of justice. The parties who come before courts of law must comply with these procedures. They cannot ignore the statutorily provided procedures and adopt their own procedures.

[12] The defence taken by the defendant is that it is not liable in damages if the insured or anyone else with his permission has driven the vehicle under the influence of intoxicating liquor. In this regard the plaintiff relied on section 9(2) of the Land Transport (Breath Test and Analysis) Regulation 2000 which provides as follows:

> The fact that a person has undergone a breath test or submitted to a breath analysis and the result of a breath test or breath analysis are not, for the purposes of any contract of insurance, admissible as evidence of the fact that the person was at any time under the influence of or affected by alcohol or incapable of driving or of exercising effective control over a motor vehicle, but nothing in this regulation precludes the admission of any other evidence, including evidence of a conviction under section 102(1), 103(1) or 105(1) of the Act to show any such fact.

[13] The driver of the vehicle was charged for driving a motor vehicle whilst there was present in the blood a concentration of alcohol in excess of the prescribed limit

contrary to section 103(1)(a) and 114 of the Land Transport Act. Therefore, the defendant must be given an opportunity to adduce evidence of drunkenness of the driver. The proper course for the plaintiff was to commence these proceedings by writ of summons.

[14] The plaintiff relied on the decision of the Supreme Court in the case of **Q.B.E Insurance (Fiji) Ltd v Prasad** [2011] FJSC 14; CBV0003.2009 (18 August 2011). In paragraphs 73 and 74 of the judgment the Supreme Court has made the following observations:

> Because the insurer who has been given notice of the Court proceedings, fails to operate the statutory scheme when the third party is obliged to sue the tort feasor and/or the insured, does not change the position in any way. Once these issues are decided the insurer has no *locus standi* to re raise them in an action by the third party against it because the insurer has not paid the damages, interest or costs, than if the insurer had been a party to the tort proceedings.
>
> There was one play that the insurer by refusing liability and manipulating the third party to sue it can make. In that action it used to be the case in Fiji, that the insurer could raise breach of a condition of the insurance policy on the part of the owner and/or driver who were using the vehicle on a public road at the time of the event. I now turn to that matter.

[15] In QBE Insurance case the issue was whether the driver had licence to drive and whether the driver drove the vehicle under the supervision of the insured. In that case the insurance company had been given statutory notice pursuant to section 11(2) of the Motor Vehicle (Third Party Insurance) Act which provided:

> No sum shall be payable by an approved insurance company under the provisions of subsection (1)-
>
> (a) in respect of any judgment unless before, or within 7 days after the commencement of the proceedings in which the judgment was given, the insurance company has notice of the bringing of the proceedings;

[16] There is no evidence that statutory notice required to be given pursuant to section 11(2) of the Motor Vehicle (Third Party Insurance) Act was in fact given to the

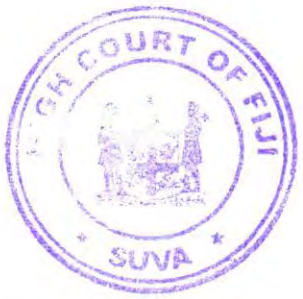
defendant in HBC 40 of 2016. There is no averment to that effect in the affidavit in support of the plaintiff. In the affidavit in response of the defendant it is averred that the defendant was not a party to that action the defendant was made aware through its research and enquiries into the matter. This position was not challenged by the plaintiff. Therefore, the above principle enunciated in QBE Insurance decision is of no relevance to this matter.

[17] The learned counsel for the plaintiff submitted that the defendant failed to take this objection before the learned Master of the High Court. Failure on the part of the defendant to take the objection to the validity of the summons filed by the plaintiff before the learned Master does not make it valid. It remains contrary to the relevant provisions of the High Court Rules 1988.

[19] In my view the failure on the part of the plaintiff to comply with the provisions of Orders of the High Court Rules 1988 referred to above is fatal and his summons is liable to be struck out.

ORDERS

1. The summons filed by the plaintiff on 23rd October, 2018 is struck out.
2. There will be no order for costs of these proceedings.



Lyone Seneviratne

JUDGE

25th June, 2019