

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO. ABU 13 OF 2008
(High Court Civil Action No. HBC 611 of 2005)

BETWEEN : **WESTERN MARINE LIMITED** *Appellant*

AND : **1. KELERA LEDUA LESIVAKARUA**
2. SOUTH SEAS ENGINEERING LIMITED

Respondents

Coram : **Chandra JA**
Malalgoda JA
Kumar JA

Counsel : **Mr. Sharma S.P. for the Appellant**
Mr. Vuataki. K. for the 1st Respondent
Mr. Barnes. N. for the 2nd Respondent

Date of Hearing : **14 May 2014**

Date of Judgment : **29 May 2014**

JUDGMENT

Chandra JA

I have read the judgment of Malalgoda JA and agree with his proposed orders.

Malalgoda JA

- [1] The 1st Respondent as Administratrix of the Estate of Taniela Vuli filed a writ of summons together with a statement of claim, claiming that the Appellant and the Second Respondent were liable for the injuries suffered by Taniela Vuli who died as a result of being electrocuted by touching a welding machine belonging to the 2nd Respondent which had been given for the use of the Appellant and returned to the 2nd Respondent.
- [2] The trial had proceeded inter partes on the basis of representation by both parties, the Appellant and the 2nd Respondent by the same solicitors namely Gavin Adam Lewis O'Driscoll and judgment had been entered against the Appellant and the 2nd Respondent on the basis of their liability being apportioned as 10% on the deceased, 75% (of 90%) on the Appellant and 25% (of 90%) on the 2nd Respondent.
- [3] The 2nd Respondent had paid its share of the responsibility and obtained a discharge from the 1st Respondent.
- [4] The Appellant had filed an appeal within time giving 8 grounds of appeal and thereafter applied for a stay of execution on 22nd February 2008. In the Affidavit of Minghua Liu Managing Director of the Appellant Company, he had set out assertions regarding his company not being served with Writ of Summons and not appointing Mr. Gavin O'Driscoll to act on its behalf.
- [5] The Appeal was set for hearing on 16 March 2011 and after hearing the appeal, the judgment was reserved.

- [6] The appeal was set for re-hearing as the judgment was not given by the panel of Judges who heard the appeal. The Appellant after a change of solicitors had filed an application for hearing of fresh evidence and an amended notice of appeal and grounds of appeal. In the said amended grounds of appeal Ground 9 states as follows:

"Subject to leave being granted to adduce further evidence, that there has been a substantial wrong or miscarriage of justice to the Appellant in all the circumstances pertaining to trial of the proceedings in the High Court and accordingly the Judgment dated 23rd January 2008 be set aside and/or new trial be ordered."

"Particulars:

- i. The Appellant was never served with the Writ of Summons (with Statement of Claim attached) in the High Court;*
- ii. That the Appellant had no knowledge of the existence of the proceedings and of it being in the High Court from its institution on the 28th December 2005 until after the judgment herein was delivered on 23rd January 2008;*
- iii. The Appellant had never given any instructions or retained legal counsel Mr. Gavin O'Driscoll in respect of this or any other matter including in particular to make any legal representations on its behalf or agree to 75% apportionment of liability;*
- iv. The Appellant was denied natural justice an opportunity to defend the claims made against it in these proceedings or be heard;*
- v. The Appellant also refers to and relies on the grounds set out in the Affidavit of Mr. Minghua Liu sworn and filed herein."*

- [7] On the filing of the application for fresh evidence the 1st Respondent and the 2nd Respondent also filed affidavits in response to the affidavit filed on behalf of the Appellant Minghua Liu as well as by the Solicitor who had appeared on behalf of the Appellant at the trial and further affidavits in reply which are set out in chronological order as follows:

- 4th February 2013 *Affidavit of Minghua Liu in support of Appellant's application for leave to adduce fresh and/or further evidence (including letter sent to Messrs. O'Driscoll and Co. Solicitors).*
- 13th March 2013 *Affidavit in reply of Emosi Lesivakarua for 1st Respondent.*
- 18th March 2013 *Affidavit in answer of Gavin Adam Lewis O'Driscoll, Legal Practitioner including Respondents with QBE Insurance (Fiji) Limited and letter from Diven Prasad Lawyers dated 19th February 2008 and its reply thereto.*
- 18th March 2013 *Affidavit of Mesake Waqa, Litigation Clerk of Munro Leys, Solicitors for 2nd Respondent including affidavit of John Liburne Hunt , General Manager QBE Insurance.*
- 18th March 2013 *Affidavit of Kamlesh Narayan in response to affidavit of Minghua Liu (Claims Supervisor QBE Insurance (Fiji) Ltd).*
- 25th March 2013 *Affidavit of John Liburne Hunt in response to affidavit of Minghua Liu including correspondence with O'Driscoll & Co. and 1st Respondent.*
- 28th March 2013 *Affidavit of Josevata Cati in support of application for leave to re-file signed affidavit and to file and serve answering affidavit of John Hunt.*
- 28th March 2013 *Summons to re-file signed affidavit and file answering affidavit of John Hunt.*
- 2nd April 2013 *Affidavit of Minghua Liu in response to affidavit of Kamlesh Narayan.*
- 2nd April 2013 *Affidavit of Minghua Liu in response to affidavit of John Liburne Hunt.*
- 2nd April 2013 *Affidavit of Minghua Liu in response to affidavit of Gavin Adam Louise O'Driscoll including*

correspondence between Patel Sharma Lawyers and Messrs. O'Driscoll & Co.

- 2nd April 2013 Affidavit of Minghua Liu in response to affidavit of Emosi Lesivakarua .*
- 5th April 2013 Affidavit of John Liburne Hunt in answer to affidavit of Gavin O'Driscoll.*
- 5th April 2013 Affidavit of John Liburne Hunt in response to affidavit of Minghua Liu including correspondence with O'Driscoll & Co.*
- 15th April 2013 Affidavit of Minghua Liu in response to affidavit of John Liburne Hunt.*
- 12th April 2013 Affidavit in support of the affidavit of Emosi Lesivakarua by Taraivina Ranadi Bui, Clerk of Law Firm of Vuataki Law authorized by 1st Respondent.*

[8] Rule 22(2) of the Court of Appeal provides:

"The Court of Appeal shall have full discretionary power to receive further evidence upon question of fact, either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner;

Provided that in the case of an appeal from a judgment after trial or hearing of any cause or matter upon the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds."

[9] Granting of such an application has been recognised in several decisions in Fiji and other jurisdictions and this court giving due consideration to the decision in **ANZ Banking Group Ltd vs Merchant Bank** (1994) FJA 51, **Ladd vs Marshall** (1954) 3 All ER, **Chand vs Chand** (2012) FJA 22 and **Sachida Nand Mudaliar** (2008) FJSC 25; CAV 0001 of 2007(17 October 2008) and the principles laid down in those cases, decided to grant permission to lead Fresh Evidence by its order dated 30th May 2013 as follows:

- (1) *Application of the Appellant to lead evidence in the affidavit sworn by Minghua Liu on the 4th February 2013 allowed.*
- (2) *Parties entitled to file further affidavits if any within 28 days.*
- (3) *Parties to bear their own costs”.*

[10] When perusing the records at the Court of Appeal Registry we find that no fresh affidavits were filed as permitted by this court, other than the affidavits referred to in paragraph 7 of this Judgment.

Consideration of the Fresh Evidence

[11] It is in the interest of Justice as discussed in the Judgment dated 30th May 2013, that this court has granted permission to lead fresh evidence and this court will now proceed to analyze the affidavits tendered to court during the period 4th February 2013 and 16th April 2013.

[12] However, it is our duty to place on record that we are mindful of the facts of the affidavit to stay, submitted on 22nd February 2008 by Minghua Liu and due consideration will be given to the facts discussed in the said affidavit when it is necessary.

Affidavit of Minghua Liu

[13] In the affidavit dated 4th February 2013 Minghua Liu who is the Managing Director of Western Marine Limited deposes that neither him or his servants and agents had any knowledge of the claim brought against the Appellant in the High Court Civil Action No.

611 of 2005 until the High Court Judgment delivered by Justice Coventry on 23rd January 2008 was served by Kelera Ledua Lesivakarua on a date after 23rd January 2008.

- [14] He further deposed that he first went to his Lawyers at that time, Messrs. Diven Prasad Lawyers and Mr. Prasad had explained the Judgment to him. Mr. Prasad explained that the 1st Respondent had filed a case against two Respondents namely South Seas Engineering Limited (SSEL) and Western Marine Limited (WML) for negligence and damages relating to the death of Taniela Vuli an employee of South Seas Engineering Limited.
- [15] Mr. Prasad had also advised him that the High Court by its order assessed, damages payable by Western Marine Limited as 75% and South Seas Engineering Limited as 25% and during the said discussion he got to know a Lawyer by the name Mr. Gavin O'Driscoll had acted as the Lawyers for Western Marine Limited, but he had never heard this lawyer, nor ever had any dealings with him, nor ever talked to him or any of his staff and certainly did not instruct Mr. O'Driscoll or his law firm to represent him or his company on this case.
- [16] He says that he instructed Mr. Prasad to challenge and appeal against the decision as he was not liable for the death of Mr. Vuli.
- [17] The Appellant believed that they have a valid defence as they had no connection with the accident caused to Vuli at South Seas Engineering Limited premises. However on 1st February 2013 when the Appellant changed its Solicitors, the new Solicitor advised that the circumstances under which the High Court Judgment was entered and including the unauthorized concession made on its behalf by Lawyers, and the need to adduce fresh evidence on Appeal.

[18] The present Solicitors, Patel Sharma Lawyers, on his instructions, had written to Mr. O'Driscoll affording an opportunity to respond some serious issues raised in that letter.

[19] When taken together Minghua Liu had raised two important issues in his affidavit, and the first issue is the fact that the Appellant was never served with writ of summons and the second was that the Appellant never appointed Mr. Gavin O'Driscoll to act on behalf of Western Marine Limited. In addition to the above issues, he further discussed certain facts, as to how the accident had taken place at South Seas Engineering Limited premises, but I will leave this matter to be considered separately.

[20] As pointed out above in paragraph 12 in this judgment. I observe at this point that the affidavit dated 22/02/2008 does not contradict these issues.

Affidavit of Emosi Lesivakarua

[21] 1st Respondent responded to the 1st issue above by filing an affidavit dated 13th March 2013 through Emosi Lesivakarua.

[22] In his affidavit Emosi Lesivakarua does not reveal his relationship to the 1st Respondent but states that he could recall Mr. Vuataki of Vuataki Law Office giving him the Statement of Claim to be delivered to the Appellant and the 2nd Respondent in the year 2005.

- [23] He further deposes that he possesses a class 3 Watch Keeper Certificate from the School of Maritime and engaged as a Marine Engineer. He in the above capacity knew the Appellant and their shop at Walu Bay.
- [24] After serving the 2nd Respondent, he had gone to the Appellant at Walu Bay and served the documents to Mr. Liu and he could remember Mr. Liu telling him “You are a bad person. We know each other. Why you take me to court” and then said “okay never mind. I will get a Lawyer and we will see in court”.
- [25] In response to the above affidavit Minghua Liu submitted an affidavit dated 2nd April 2013.
- [26] In that affidavit he claims that he knew and had a business relationship with Mr. Emosi Lesivakarua since his company supplied parts and marine paints to Mr. Lesivakarua’s vessel “Deep Sea” but he had no personal or social dealings with him.
- [27] He further states that no Writ of Summons (or as stated by Emosi Lesivakarua a Statement of Claim) was served upon the Appellant or upon him at any time by Mr. Emosi Lesivakarua as alleged by him. The only time a document was served on him was sometime after 23rd January 2008 when the 1st Respondent – Kelera Ledua Lesivakarua served a copy of the High Court Judgment and at that time she was accompanied by her husband Mr. Emosi Lesivakarua. He could further remember expressing his utter surprise with the words to the effect “We know each other and why you never inform us about the case”. Emosi Lesivakarua’s reply was to the effect that his wife was handling the case and he thought that the case was against South Seas Engineering Limited and not Western Marine Limited and only after the Judgment he realized, it also involved Western Marine Limited.

- [28] In his affidavit Minghua Liu further submitted that the alleged service (which he denied) is irregular, invalid and defective under the provisions of the Companies Act 1983 and High Court Rules 1988. He further gives the details of the Registered Office and the Registered Postal Address of his company with documents in support of the above.
- [29] In addition to the affidavit of Emosi Lesivakarua another affidavit dated 12th April 2013 from Taraivina Ranadi Biu clerk attached Vuataki Law Office was filed in response to the service of Writ of Summons. Deponent submitted that Emosi Lesivakarua had informed Mr. Vuataki that he served the Writ of Summons on both Defendants in High Court Civil Action and thereafter their Solicitor Mr. O'Driscoll filed Acknowledgement of Service and Defence for both Defendants. Affidavit of Service was not filed because Acknowledgement of Service had been received.

Affidavit of Gavin Adam Lewis O'Driscoll

- [30] In response to the Affidavit of Minghua Liu, the Solicitor who appeared for both Defendants in the High Court Civil Action, Gavin Adam Lewis O'Driscoll submitted an affidavit dated 18th March 2013. As a preliminary observation, he deposes that, he was engaged by QBE Insurance (Fiji) Limited in the High Court to represent the 2nd Respondent by way of memo from the then General Manager QBE Insurance (Fiji) Limited.
- [31] Whilst attaching the said memo as Exhibit "A" he goes on to say, "The memo does mention that QBE Insurance (Fiji) Limited was the insurer of the 2nd Respondent. It does not specify instructions, to only file on behalf of the 2nd Respondent".

- [32] There was a meeting held between him and John Hunt to discuss the matter and that he received implied instructions to defend more than just the insured as he understood it.
- [33] By 30th January 2006 he filed Acknowledgment of Service for the defendants and copy of the same was sent to QBE with a covering letter which is marked as Exhibit "B" to Deponent's, affidavit.
- [34] Between 30th January and 18th April a Statement of Defence for both Defendants were filed and a copy of the same was forwarded to QBE with a covering letter which was marked as Exhibit "C" dated 18th April 2006.
- [35] At the conclusion of the trial when the Judgment was delivered he notified QBE of the amount it was liable for its insured by letter dated 28th January 2008 and this amount was paid and a discharge was signed by the plaintiff and the relevant documentation were tendered marked as Exhibits D,E and F.
- [36] During the course of the matter in High Court, Appellant was contacted by his office but no representative ever attended to his office to see him. However several employees and directors of 2nd Respondent did come to discuss the matter with him and they were also requested to ensure that the Appellant was aware of it and should participate in the hearing and preliminaries thereto. On the basis that the two companies were well known to each other he had assumed, perhaps naively, that the Appellant was being kept informed of the progress of the case.
- [37] Whilst answering the affidavit of Minghua Liu the deponent stated, that he got to know from the discussions he had with the employees of the 2nd Respondent that the Appellant

was aware of the accident of 2nd Respondent's employee just after the return of the welding machine by the Appellant and also states that the service of the Writ of Summons is now refuted by the 1st Respondent and further he recalls Mr. Vuataki indicating that he did not file an Affidavit of Service because the Acknowledgement of Service was filed.

- [38] He further states that there is a clear finding against the Appellant by the Learned Trial Judge in terms of the facts of the case which shows that the Appellant was more blameworthy than the 2nd Respondent, and the Appellant had a very clear link with the death of Mr. Vuli.

Affidavit of John Liburne Hunt

- [39] John Liburne Hunt was the General Manager QBE Insurance (Fiji) Limited during 2001 – 2007. He had said to have sworn an affidavit in response to the affidavit of Minghua Liu on 15th March 2013 at Bangkok, Thailand before Notary Public Pilan Kuhakarn. The said affidavit was tendered to this court with an affidavit of Mesake Waqa, a Litigation Clerk of Munro Leys Solicitors for 2nd Respondent, when it was revealed that the said affidavit was not signed by John Liburne Hunt he had sworn two affidavits. One in response to the affidavit of Minghua Liu and another in response to the affidavit of Gavin O'Driscoll on 25th March 2013 at Manila, Philippines and submitted to this court with the affidavits of Josefata Malaude Cati Solicitor at Munro Leys and Mesake Waqa Litigation Clerk Munro Leys.
- [40] In the first affidavit in response to the affidavit of Minghua Liu he admits instructing Mr. O'Driscoll on behalf of QBE Insurance – (Fiji) Limited in respect of 2nd Respondent only since only the 2nd Respondent was covered by the QBE Insurance (Fiji) Insurance Policy.

[41] All the correspondence with regard to this action is recorded in the internal file, and the file confirms that Mr. O' Driscoll was instructed by him and QBE Insurance (Fiji) Limited to act for the second Respondent only.

[42] Deponent had documented 3 documents as Exhibit JH 1, JH 2 and JH 3 as follows:

i. *QBE – Fiji's letter of instructions dates 26 January 2006.*

This letter specifically instructs Mr. O'Driscoll that "we are the Workers Comp insurers of South Seas. (2nd Defendant). A copy of the letter is annexed and marked "JH 1".

ii. *Mr. O'Driscoll's letter to QBE Fiji dated 24 January 2008.*

Through this letter Mr. O'Driscoll reports and provides a copy of the Judgment. Based on the appointment, QBE – Fiji's liability for the Second Defendant was calculated by Mr. O'Driscoll to be \$21,685.80. This letter also encloses a "final bill of costs". This bill shows that Mr. O'Driscoll had only acted for Second Respondent on QBE – Fiji's instructions. A copy of the letter is annexed and marked "JH 2".

iii. *Mr. O'Driscoll's letter to QBE Fiji dated 28 January 2008.*

This letter confirmed that the Plaintiff accepted the calculations provided by Mr. O'Driscoll on behalf of the Second Respondent. A copy of the letter is annexed and marked "JH 3".

[43] In the second affidavit in response to the affidavit of Gavin O'Driscoll, the deponent whilst repeating the contents of his earlier affidavit signed in response to the affidavit of Minghua Liu, specifically denied that there was any "implicit or standing instruction that no default judgment should be allowed against either Defendant" or that Mr. O'Driscoll should represent the Appellant or any other party whose liability was not covered by a QBE – Fiji insurance policy".

[44] He further deposes that “There was no reason for QBE – Fiji to instruct Mr. O’Driscoll whether expressly or implicitly to represent the Appellant as it was not insured with QBE – Fiji and they were not liable to indemnify it for any damages that might be awarded against it. Its interests were in direct conflict with those of our insured and therefore of QBE Fiji.

[45] In response to Exhibit A submitted by Mr. O’Driscoll’s affidavit, deponent states that “The memo dated 26 January 2006 is express and does not require any inferences to be drawn. Mr. O’Driscoll was specifically instructed to protect the interest of the Second Respondent and QBE Fiji only. The memo specifically names the Second Respondent. There was no ambiguity or confusion in QBE – Fiji’s instructions to Mr. O’Driscoll.”

[46] In addition to the above, deponent further stated that “It is not true that there were any implied instructions (in general) to defend cases for persons other than our insureds”.

[47] Referring to Exhibit “B” of the O’Driscoll’s Affidavit deponent submitted:

“It is not true that QBE – Fiji or I “cleared” with Mr. O’Driscoll that he should file the Acknowledgment of Service for both Defendants. It is also not true that Mr. O’Driscoll’s letter 30 January 2006(Annexure B to the O’Driscoll Affidavit) by which Mr. O’Driscoll forwarded us a filed and served copy of the Acknowledgment of Service stated that it had been filed for both Defendants. It makes no mention of this. In fact, the letter stated that “We refer to the above matter and your memo dated 26 January 2006”. My memo of 26 January 2006 to Mr. O’Driscoll was an instruction to represent the Second Respondent.

[48] Referring to Exhibit “C” of the O’Driscoll’s affidavit deponent submitted:

Mr. Driscoll filed and served the Statement of Defence on 8 February 2006 and did not send this to us until 18 April 2006. Contrary to Mr. O'Driscoll's assertions his covering letter dated 18 April 2006 (Annexure C to the O'Driscoll Affidavit) does not state (either expressly or implicitly) that the Appellant was being represented by O'Driscoll.

[49] Referring to the Acknowledgment of Service and the Statement of Defence, where there is reference to both Defendants the deponent had submitted that he assumed that Mr. O'Driscoll had been independently instructed by the Appellant.

[50] With regard to the events that took place after the judgment, was explained by the deponent as follows:

Mr. O'Driscoll first informed QBE – Fiji of the Judgment by letter of 24 January 2008. In that earlier letter Mr. O'Driscoll calculated the amount payable by QBE – Fiji to the Plaintiff. Consistently with our instructions to act only for our insured the Second Respondent, Mr. O'Driscoll advised QBE – Fiji only that it was liable to pay 25% of the Judgment Sum. No reference was made in that letter to the Appellant. A copy of the letter was annexed to my earlier affidavit as annexure "JH 2".

The 28 January 2008 letter (Annexure "E" to the O'Driscoll Affidavit) is a later letter confirming the amount payable by QBE – Fiji to the First Respondent had been accepted by the First Respondent's Solicitors as the correct calculation. The 28 January 2008 letter makes reference to the 24 January 2008 letter and requests a cheque payable to the First Respondent. Again no reference is made to the Appellant.

[51] And further he had submitted that all the bills he had annexed to his affidavit marked JH 2 – JH 5 confirms that QBE – Fiji were billed by Mr. O'Driscoll for work done on behalf of the insured, the Second Respondent. None of the bills of costs make any reference to the Appellant.

[52] In support of the affidavit of John Hunt, Kamalesh Narayan, Claims Supervisor attached to QBE Insurance Fiji had submitted an affidavit on 18th March 2013.

[53] In that affidavit he had confirmed that the QBE file contains no information about:

- i. Any service of Writ of Summons on the Appellant.
- ii. Any instructions given to Mr. O'Driscoll by the Appellant.

[54] In answer to Gavin Adam Lewis O'Driscoll, Minghua Liu filed an affidavit dated 28th March 2013. The contents of the above affidavit can be summarized as follows:

- (a) *At no stage of the High Court Civil Action Mr. O'Driscoll or anyone from his office did contact the deponent or anyone from the Appellant's company.*
- (b) *Deponent is not aware of any discussions between Mr. O'Driscoll and Mr. Vuataki.*
- (c) *Mr. O'Driscoll on his own, without instructions from the Appellants unauthorisedly undertook the defence on the Appellant's behalf. He should at least have contacted and advised the Appellant of the case which he did not do at any stage. It is rather mischievous for Mr. O'Driscoll to suggest that the Appellant lacked interest in taking part in the trial in the event that the Appellant was always kept in dark with no contact whatsoever from Mr. O'Driscoll on his staff members.*

[55] Answering paragraph 20 of the affidavit of Mr. O'Driscoll which I too have delt under paragraph 33 of this Judgment, he deposes that:

"Given the obvious Professional Conflict of duty and responsibility towards the Appellant and at the same time towards South Seas Engineering Limited. In all circumstances, the contents of this paragraph are not only remarkable but clear evidence that Mr. O'Driscoll should not have acted in the manner he did in the circumstances."

- [56] It is my duty now to analyze the above material and consider as to what extent the fresh evidence can be admitted and acted upon by this court when arriving at a decision in this case.
- [57] As averred by Minghua Liu, in his Affidavit evidence if the Writ of Summons and/or Statement of Claim had not been served on the Appellant and the trial proceeded without the knowledge of the Appellant, grave prejudice was caused to the Appellant.
- [58] Similarly, if the solicitor who represented the Appellant's interest had done so without his knowledge and the judgment had been entered into on the representations of the solicitor who acted without instructions of the Appellant, that too is an issue this court should looked into.

Whether the Writ of Summons were Served on the Appellant

- [59] Not only in his affidavit dated 4th February 2013, but also in the affidavit for stay dated 22nd February 2008 Minghua Liu has taken up the position that Appellant was never served with Writ of Summons and Statement of Claim and the first time he became aware that this case had been filed against the Appellant by the 1st Respondent was when he was served with a copy of the Judgment by 1st Respondent on a date after 23rd January 2008.
- [60] In response to the above, 1st Respondent has filed two affidavits one from Emosi Lesivakarua and the other from Taraivina Ranadi Biu.

- [61] According to Emosi Lesivakarua, he knew Mr. Liu well and also their shop at Walu Bay. He recalls collecting the Statement of Claim and Acknowledgment of Service in 2005 from Vuataki Law for both Appellant and 2nd Respondent and duly handing them over to the Appellant and 2nd Respondent.
- [62] He could further remember some discussion he had with Mr. Liu on that day when he went to hand over the documents to him.
- [63] The above position was confirmed by Taraivina Ranadi Biu clerk attached to Vuataki Qoro by his affidavit dated 12th April 2013. In his affidavit he submitted that Emosi Lesivakarua had informed Mr. Vuataki that he had served the Writ of Summons on both Defendants (Appellant and 2nd Respondent). However deponent doesn't say that Mr. Emosi Lesivakarua informed him of the Service of Writ of Summons and what he says is heresay.
- [64] Further, he admits that the Affidavit of Service was not filed since Acknowledgment of Service and Defence for both defendants were filed by solicitor Mr. O'Driscoll.
- [65] The affidavit in answer to Minghua Liu by Emosi Lesivakarua was further challenged by Minghua Liu by his further affidavit dated 28th March 2013. In his further affidavit Minghua Liu admits business relationship with Emosi Lesivakarua as his company supplied parts and marine paints to Mr. Lesivakarua's vessel "Deep Sea" but denies receiving Writ of Summons through him in 2005. However, deponent admits meeting Mr. Lesivakarua when he came with his wife the 1st Respondent to deliver the Judgment dated 23rd January 2008. Minghua Liu refers to a dialogue he had with Mr. Lesivakarua at that time.

[66] When considering the two positions taken up by Emosi Lesivakarua and Minghua Liu, I observe that, if the Writ of Summons were served on the Appellant in 2005 as stated by him, and the Appellant did not take part or ignored the notice he received, there would have been more discussions between the parties when Emosi Lesivakarua visited the Appellant on subsequent occasions to purchase goods as admitted by both parties.

[67] In the absence of such discussion, the version more acceptable to me is the version given by Minghua Liu.

[68] Order 13 Rule 8 of the High Court Rules 1988 deals with Proof of Service of Writ as follows:

8 (1) Judgment shall not be entered against a defendant under this order unless:

- (a) *The defendant has acknowledged service on him of the Writ or*
- (b) *An affidavit is filed by or on behalf of the plaintiff providing due Service of the Writ on the defendant or*
- (c) *The plaintiff produces the writ endorsed by the defendant's solicitor with a statement that he accepts Service of the Writ on the defendant's behalf.*

[69] From the evidence adduced by affidavits before this court, I wish to make the following observations:

- (i) Solicitor O'Driscoll admits having filed the Acknowledgment of Service by 30th January 2006.

- (ii) He further confirms that he recalled Mr. Vuataki indicating that he did not file an Affidavit of Service because Acknowledgement of Service was filed. This was confirmed by the affidavit of Taraivina Ranadi Biu of Vuataki Law office.
- (iii) Minghua Liu states that he never received the Writ of Summons nor that he instructed Mr. O'Driscoll to appear in this case.
- (iv) Mr. O'Driscoll does not speak of the fact that he saw the Writ of Summons which was served on the Appellant, does he say that he received any instructions from the Appellant nor that he met the Appellant or his servants when the trial was pending in the High Court. Mr. O'Driscoll was informed of this action by QBE Insurance (Fiji) Limited and thereafter he filed the Acknowledgment of Service for both Defendants.
- (v) 1st Respondent does not speak of serving the Writ of Summons at the Registered Office of the Appellant.

[70] From the above account it is very much clear that it is unsafe to conclude that, under the circumstances urged by the Appellant and the additional evidence placed before this court through affidavits that I have already discussed, that the Writ of Summons or Statement of claim with regard to High Court Civil Action No. 00611 of 2005 were properly served on the 1st Defendant in the said action, who is the Appellant in the present appeal.

Whether There was Proper Instructions to Solicitor Gavin Adam Lewis O'Driscoll to Represent the Appellant

[71] The affidavit of solicitor O'Driscoll in this issue can be summarized as follows:

- (i) *Mr. O'Driscoll had received instruction in writing from QBE Insurance (Fiji) to appear for the Second Defendant South Seas Engineering in High Court Civil 611 of 2005 (Exhibit A).*
- (ii) *He further claims that he received implied instruction from QBE Insurance (Fiji) Limited to defend the 1st Respondent as well. By 30th January 2006 Mr. O'Driscoll filed the Acknowledgement of Service for both the defendants.*
- (iii) *He further claims that he would not have filed on behalf of the 1st Defendant without having cleared this with QBE Insurance (Fiji) Limited. Between 30th January and 18th April 2006 a statement of Defence was filed for both Defendants.*
- (iv) *During the course of the trial no representative from the 1st Defendant ever attended his office to meet him but several employees and Directors of 2nd Defendant did come to discuss the matter with him.*
- (v) *When the Judgment was delivered he notified QBE Insurance the amount they are liable under the Judgment (Exhibit E).*

[72] When the above facts are considered with the affidavits of John Liburne Hunt and Minghua Liu the only conclusion that this court can arrive is that the Appellant - Western Marine Limited had never given instructions to the Solicitor who represented the 1st Defendant Western Marine Limited in the High Court Civil Action 00611 of 2005.

[73] Before getting onto the grounds of appeal, I would now wish to discuss as to how the responsibility of each defendant had been fixed and apportioned by the Trial Judge in his Judgment. Paragraphs 20, 21 and 22 of the Judgment reads as follows:

[20] *Counsel for the plaintiff suggests that liability for this tragic event should rest equally upon the two defendants. Counsel for*

the defendants states that Western Marine, the hirers of the machine, should bear 75% liability and South Seas 25%.

[21] *Decisions upon such matters as these can never be precise. They inevitably must be assessed in broad terms. I do agree with counsel the defence that a greater measure of liability should rest with Western Marine. They are shipwrights; they had the machine for two days and allowed it to become dangerously wet. They had a duty of care to South Seas and its employees when returning the machine to inform them of its state or ensure it was in good working order or at least the same working order as when they hired it. It was foreseeable that if they did return the machine in a dangerous condition, especially at 8 o'clock in the evening, when South Seas was still working, that the machine would be used by employees of South Seas when they were not aware of its condition and foreseeable that injury and death could come about as a result.*

[22] *Basic day-to-day safety precautions and procedures might seem mundane and unnecessary when nothing amiss happens for months or years. However, practices and procedures are set out not only for circumstances when all is going well but also for when there are dangers known or unknown to those working. South Seas must bear a substantial portion of responsibility for this electrocution, but appreciably less than half. In my Judgment, I find that counsel for the defence's apportionment of 75% - 25% is correct.*

[74] The Trial Judge had come to the above conclusion including the apportionment of liability was based on the evidence placed before him and the submissions made before him. If counsel representing the 1st Defendant, appeared without proper instructions from his client, and the case for the 1st Defendant was not properly presented to the court, a question arises whether there was sufficient material before the Trial Judge to come to a correct finding. In other words it is not wrong to conclude that the above findings are tainted with distorted facts. I therefore conclude that a substantial loss and a miscarriage of Justice will be caused to the appellant if these findings are not reversed.

[75] Section 23(1) and (2) of the Court of Appeal Rules reads as follows:

23.-(1) *On the hearing of any appeal the Court of Appeal may, if it thinks fit, make any such order as could be made in pursuance of application for a new trial or to set aside any decision.*

(2) *A new trial shall not be ordered on the ground of the improper admission or rejection of evidence unless in the opinion of the Court of Appeal some substantial wrong or miscarriage has been thereby occasioned.*

[76] In Nalave vs State (2008) FJA 56 AAU 004 of 2006 Court of Appeal acting under Rule 23 held that:

"The circumstances in which Appellants pleaded guilty raise serious doubts in our mind about the genuineness of their guilt. For these reasons, we are satisfied there had been a miscarriage of justice. We therefore, conclude that the convictions of the Appellant's are unsafe. We propose to allow the appeal and order a new trial before another Judge."

[77] For the reasons I have discussed above I am satisfied that there had been a substantial wrong and a miscarriage of Justice to the appellant in this case, I therefore decide to allow the appeal of the Appellant on ground 9 of his Amended Grounds of Appeal dated 4th February 2013 and order a new trial before the High Court. In the circumstances I see no reason to consider appeal grounds 1-8.

[78] When this matter was taken up before me and my Brother Judges on 14th May 2014 for Argument we observed a letter filed on behalf of the 2nd Respondent by their Solicitor informing that the 2nd Respondent does not wish to contest the case and will concede the appeal.

- [79] Exhibit JH 3 to the affidavit of John Liburne Hunt dated 25th March 2013 and Exhibit D to the affidavit of Gavin Adam Lewis O' Driscoll dated 18th March 2013 refers to the documents which deals with the discharge of the 2nd Respondent after the payment of the apportioned amount decided by the High Court Judge in his order dated 23rd January 2008. In the event the High Court is making an order after the new trial, the Trial Judge should take into account the amount already paid on behalf of the Second Respondent.
- [80] Other than that, the High Court Judge will be free to hear and determine this case and should do so expeditiously.
- [81] The Solicitor appearing for the Appellant requested the Court to reconsider the cost already ordered by this court on 18th February 2013. He submits that his client was dragged into this case unnecessarily. The two Respondents too have wasted a long time to see a finality in this case. Therefore, I see no reason to change the order already made on 18th February 2013 with regard to cost.

Kumar JA

I agree with the orders of the judgment of Malalgoda JA.

Orders of the Court:

- (i) *Appeal is allowed on ground 9 of the Amended Grounds of Appeal, A New Trial is ordered.*
- (ii) *The parties shall bear their own costs.*



S. Chandra

.....
Hon. Justice S. Chandra
JUSTICE OF APPEAL

V. Malalgoda

.....
Hon. Justice V. Malalgoda
JUSTICE OF APPEAL

K. Kumar

.....
Hon. Justice K. Kumar
JUSTICE OF APPEAL