REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

HCA No. S 1469 of 2005

BETWEEN

SHIVA VISHAN MAHARAJ

(age 13 months old born on the 17th day of February, 2004 and sues by his mother and next friend YOUTRA MAHARAJ)

First Named Plaintiff

AND

VANIESHA MAHARAJ

(age 5 years old born on the 3rd day of December, 1999 and sues By her mother and next friend YOUTRA MAHARAJ)

Second Named Plaintiff

AND

DEVAN RAMKISSOON
(age 18 months old born on the 27th day of September 2003 and sues by his mother and next friend NADIRA RAMKISSOON)

Third Named Plaintiff

AND

DINESHWAR MAHARAJ
(age 12 years old born on the 1st day of January 1993 and sues by his mother and next friend GANGADAYE MAHARAJ)

Fourth Named Plaintiff

AND

YOUTRA MAHARAJ

Fifth Named Plaintiff

AND

NADIRA RAMKISSOON

Sixth Named Plaintiff

AND

STEVE RAMKISSOON

Seventh Named Plaintiff

AND

HINDU CREDIT UNION CO-OPERATIVE SOCIETY LIMITED

First Named Defendant

AND

GAYNDLAL RAMNATH

Second Named Defendant

AND

BANKERS INSURANCE COMPANY OF TRINIDAD AND TOBAGO

Co-Defendant

Before The Hon. Madam Justice C. Gobin
Appearances:
Mr. M. Dhaniram for the Plaintiffs
Ms. K. Subero for the Defendants

REASONS

1. This running down 'old rules' action arose out of a head on collision on the 15th January 2005 which involved motor vehicle PBO 2366 owned by the first defendant, driven by the second defendant and insured by the co-defendant. An appearance was entered by the defendants and the co-defendants on the 16th September, 2005 but no defence was filed. Judgment in default of defence was taken up over the counter against the first and second defendants on the 15th May, 2005.

2. By summons dated 5th October 2011, the Plaintiffs herein sought leave to enter judgment in default of defence against the co-defendant with damages to be assessed. The affidavit in support of the application simply set out an undisputed

chronology of events leading up to the taking up of judgment against the first defendant and second defendants.

3. The co-defendant objected to the application on the ground that the claim had abated pursuant to O.3 r.6 which then provided as follows:

Order 3 Rule 6 of the Rules of the Supreme Court 1975 ("RSC")

> **(1) Where, in any cause or matter which has not been set down on the general list of cases for <u>trial and in which no judgment has yet been entered</u>:** (emphasis added)
>
> **(a) no steps has been taken by the party instituting it, whether it be by way of claim or counterclaim, for a period of more than one year; or**
>
> **(b) more than one year has elapsed since the determination of the last proceeding in such cause or matter,**
>
> **whichever shall be later, the said cause or matter shall stand abated until such time as a Judge in Chambers in Trinidad or if the matter proceeding in Tobago, a Judge in Chambers or a Master, grants leave to proceed within it.**

4. The plaintiff submitted that the rule is clearly inapplicable in the context of this case since judgment has already been entered against the owner and the driver of the vehicle PBO 2366.

5. The co-defendant, on the other hand, disagreed, stating that more than five years had elapsed since judgment was entered against the defendant and the co-defendant. Further, the co-defendant submitted that the affidavit in support of the

summons failed to set out "good and sufficient cause for the delay". I can say here that since this was not an application by the plaintiffs for reinstatement under Order 3 Rule 6(2) this submission was rejected and the cases cited considered inapplicable.

6. After I had read the submissions I came to the conclusion that in running down actions in which insurers are joined by virtue of S 10 1(A) of the Motor Vehicle Insurance (Third Party Risks) Act, the co-defendant was in a peculiar position and in those circumstances the claimant's inaction did not attract Order 3 Rule 6.

7. It is accepted that ordinarily, in a case with multiple defendants, the plaintiff would have been required to take active steps in the prosecution of its claim against each defendant separately in order to avoid what were the stringent terms of Order 3 Rule 6. Where as in the instant case, the claim against the co-defendant is for an indemnity, the position is not the same.

8. Two sections of the Act are relevant. Section 10(1) of the Act imposes a statutory duty on insurers to satisfy judgments against persons such as the defendants in this case. Section 10(A)(1) permits the joinder of the insurer as a party even at a stage of the proceedings where liability has not yet been determined.

9. As I understand it, the co-defendant's liability under Section 10(1) was determined upon the entry of judgment against the first and second defendants,

because it filed no defence excepting liability in any of the circumstances provided for under the Act. That liability had effectively been decided from the moment judgment was entered against the other defendants. No formal order or declaration was required at that stage to confirm the effect of that judgment, or indeed the clear terms of Section 10(A)(3) which provides:

> ***"Where the insurer is joined as a co-defendant under this section, or is required to pay to any person entitled to the benefit of a judgment under section 10, he shall be liable to satisfy the judgment that may be obtained against the insured in addition to all costs and interest payable in respect of such judgment and any other costs for which the insured may be made liable".***

10. It is well settled that the obligation to pay does not arise until the liability has been quantified on an assessment. This would suggest that there was practically no step to be taken in prosecuting a claim against an insurer until such time as the assessment was determined. Until such time, failure of the plaintiffs to take a procedural step cannot be relied upon by the insurer to avoid the clear statutory duty to deprive them of their substantive rights under the Act. This is in effect what would be the result if I were to accept the defendant's submissions.

11. The legislation provides a convenient and efficient procedure for the benefit of the persons who are alleged victims in running down accidents. When such persons as the plaintiffs here, take advantage of it for convenience, it imposes no further duty on them to take procedural steps against the insurer before they are due. I am fortified in my view of the matter when I consider that the joinder of an insurer as a co-defendant is not mandatory. It is for convenience,

efficiency and the avoidance of hardship that used to be caused by the plaintiff having to start afresh in an indemnity action against insurers after the conclusion of drawn out civil litigation against owners and drivers. There is however no bar to a plaintiff awaiting the outcome of the assessment before initiating action against it. A plaintiff does not lose the right to enforce the insurers statutory duty then.

12. There has already been significant unexplained delay in the prosecution of the action against the first and second defendants. I noted with some concern that several of the plaintiffs were infants of tender years at the time of the collision. They are the persons ultimately entitled to the benefits of the judgment obtained against the defendants. In the light of this too, the parties were urged to get on with the assessment of damages.

Dated this 10th day of May 2012

CAROL GOBIN

JUDGE