

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 229 of 2007

BETWEEN : **KARALO MATANIBUKALEVU** of Lot 51, Yaro Street, Nakasi,
Unemployed.

Plaintiff

AND : **THE PERMANENT SECRETARY, MINISTRY OF FISHERIES**
AND FORESTS.

1st Defendant

AND : **THE ATTORNEY GENERAL OF FIJI**, Levels 5-7, Suvavou House,
Suva.

2nd Defendant

Counsel : **MR D SINGH** of **Daniel Singh Lawyers** for the **Plaintiff**

MR PICKERING J. of the **Office of the Attorney General** for the
Defendant

Date of Judgment: **15th November, 2013**

INTERLOCUTORY JUDGMENT

1. This matter was fixed for Trial on 29th and 30th May 2013 and at the outset Mr Green, Counsel for the 1st and 2nd Defendants stated that prior to commencement of the trial the court should make a ruling on preliminary issue as to whether this action could sustain since the Factories Act (Cap 99) being repealed. At this stage Mr Singh D. counsel for the Plaintiff stated he should be given an opportunity to amend the pleadings to comply with the new issue raised by the Defendant. After hearing both parties, the court decided to take up the hearing of the summons filed by the Defendants on 28th May 2013. Further directed, the Plaintiff to file the application seeking leave to amend within 14 days.

2. The matter was taken up by the court on 2nd August 2013 hearing of the summons filed by the Defendants on 28th May 2013, was fixed for 16th September 2013 and hearing proceeded on the said day. The Plaintiff too had filed summons for leave to amend the Statement of Claim on 17th June 2013.
3. By the summons filed on 28th May 2013, the Defendants sought the following Orders:
 - “(i) whether the claim in the current proceedings against the 1st and 2nd Defendants is sustainable even the Preliminary Legislation in this matter the Factories Act (Cap 99) has been repealed;*
 - (ii) if the court determines the above issues, in favour of the First and Second Defendants, the court proceeds to grant such reliefs consequential therein and or discontinue the proceedings in this matter;*
 - (iii) costs of this Application be costs in the cause.”*
4. Ajay Singh, Civil Servant and Litigation Clerk of the 2nd Defendant sworn an Affidavit dated 28th May 2013 in support of the Summons and stated inter-alia:
 - (i) the Government is being sued for negligence pursuant to Sections 24 and 63 of the Factories Act (Cap 99). Pursuant to Section 61 of the Health and Safety at Work Act (1996);*
 - (ii) all the associated Health and Safety Legislation under Section 60 of the Health and Safety at Work Act shall be progressively replaced with appropriate regulations, standards and codes of practices under the Act, within five years from the date of commencement of this Act. Regulation 67 of the Health and Safety at Work (General Work Place Conditions) Regulations 2003 repeals Sections 24 and 63 of the Factories Act (Cap 99);*
 - (iii) there is no legal basis to pursue this matter as Factories Act (Cap 99) has been repealed;*
 - (iv) it was stated if the issue above determines in favour of the First and Second Defendants, the court proceeds to grant such reliefs consequential therein and/or discontinue the proceedings in this matter;*
 - (v) the Defendants sought prayed for the Orders in the summons.*

5. When the matter was taken up for hearing by this court on 16th September 2013, both parties tendered their written submissions and made oral submissions. No Affidavit was filed in response by the Plaintiff in response to the Affidavit dated 28th May 2013.

6. **Facts**

6.1 The Plaintiff was employed by the 1st Defendant as an ice plant attendant at the First Defendant's premises at Vunisea Fisheries Station.

6.2 On 1st April 2007 the Plaintiff, during the course of his employment was ordered by his superior to start a generator which blew dust, grill, grime and smoke into the Plaintiff's eyes causing him to be permanently blinded in his right eye and partially blind in the left eye which was denied by the 1st Defendant as stated in the Statement of Defence it was alleged that the Plaintiff was instructed only to fill water in the generator.

6.3 The Plaintiff claimed damages in terms of paragraphs (a), (b), (c), (d), (e) and (f) of the Statement of Claim.

6.4 The 1st and 2nd Defendants in their Statement of Defence denied that the Plaintiff instructed to start the engine during the course of his employment at the premises and it was breach of his employment condition and he acted beyond the duties of the post he held with the 1st Defendant. Further, it was stated that the accident would have been avoided if the Plaintiff followed the instructions of his supervisor. As such there is no issue of alleged breach of statutory duty/and or negligence by the 1st Defendant.

6.5 The Defendants also stated that the 1st Defendant supplied to the Plaintiff all equipments for safety of his work and stated the duties of the Plaintiff:

- (i) Assist in the ice sales when required or instructed by the supervisor;
- (ii) Assist and undertake duties for the maintenance of the Vunisea Ice Plant;
- (iii) General cleaning of Vunisea Fisheries complex;
- (iv) Maintenance and general work or the cleaning of Ice Plant.

7. Law, Analysis and Conclusions

In this matter the issues to be decided:

- (a) *As to whether the Defendants application to this court on the preliminary issue should be allowed (i.e. the current proceedings against the 1st and 2nd Defendants) on the basis that Factories Act (Cap 99) had been repealed?*
- (b) *As to whether if the preliminary issue is decided in favour of the 1st and 2nd Defendants as to whether this action should be discontinued or leave to be granted to amend the Statement of Claim?*

7.1 Section 61 of the Health and Safety at Work Act 1996 states:

“61. All the associated Health and Safety Legislation under Section 60 of this Act shall be progressively replaced with appropriate regulations, standards and codes of practices under this Act, within five years from the date of the commencement of this Act”.

7.2 Part 27 – Repeal of Act No. 4 of 1996 under the heading Repeal states:

“67(1) The Factories Act 1997 is amended by repealing Sections 10; 11; 12; 13; 16; 17; 18; 19; 20; 21; 23; 24; 25; 26; 27; 28; 29; 30; 31; 32; 54; 55; 56; 57; 58; 59; 60; 61; 63; 64 and 65.

(2) The following Regulations and Orders made under the Factories Act 1971 are repealed:

- (a) Factories (first Aid) Order;*
- (b) Factories (General Register) Order; and*
- (c) Factories (Protection of Eyes) Order.”*

7.3 Section 24 and Section 63 which is relevant to this case being expressly repealed. Section 24 deals with “Safe means of access and safe places of employment” Section 63 deals with protection of eyes and it states:

“63. Suitable eye protection shall be provided for all employed persons where there are circumstances involving special danger to their eyes.”

7.4 As stated in the Writ of Summons filed on 30th May 2007 that the Defendants failed to make and keep the Plaintiff's work place safe contrary to Section 24 of the Factories Act: Paragraph 4(ii) of the Statement of Claim:

"4. (ii) Failing to make and keep the Plaintiff's work place safe contrary to Section 24 of the Factories Act."

7.5 In furtherance to the above, the Plaintiff stated in this Statement of Claim, paragraph 4(i):

"4 (i) Failing to provide the Plaintiff with eye protection, face masks or goggles for his use in operating the said generator contraction to Section 63 of the Factories Act."

7.6 It is important to note that the Defendants had not taken up the Preliminary issue in the Statement of Defence filed on 10th July 2007.

7.7 The Pre-Trial Conference minutes were filed on 26th January 2012 and there too the Defendants have failed to bring this issue at that stage too. I reproduce the issues as stated in the Pre-Trial Conference minutes.

"The following matters are in issue:

1. *Whether the alleged accident happened on 14th February, 2007 or 22nd February, 2007?*
2. *Whether the Plaintiff's eyes were injured when he started the ice plant cooling generator?*
3. *Whether the Plaintiff's alleged injury was caused by dust, grit, grime, soot and smoke emitted from the muffler of the ice plant cooling generator?*
4. *Whether the Plaintiff breached his employment conditions in starting the generator?*
5. *Whether there was sole or contributory negligence on the part of the Plaintiff in the resultant injuries to his eyes?*
6. *Whether there was negligence and/or breach of statutory duty on the part of the 1st Defendant in failing to provide a safe work place and proper system of work or proper plant?*
7. *If negligence or breach of statutory duty is proven against the 1st Defendant then the quantum of awards under the following heads:-*

- (a) General damages for pain, suffering and loss of amenities of life;
- (b) Special damages;
- (c) Future economic loss;
- (d) Cost of future care;
- (e) Interest;
- (f) Cost.”

- 7.8 When the matter was taken up on 30th November 2012 to fix for Trial, Mr Singh D. appeared for the Plaintiff and Mr Pickering J. appeared for the 1st and Second Defendants and it was fixed for Trial on 18th and 19th March 2013. This was called on 20th March 2013 since the trial dates were vacated by the court on its own motion and the matter was refixed for trial on 29th and 30th of May 2013. Mr Singh D. appeared for the Plaintiff and Green R appeared for the Defendants.
- 7.9 When the matter was taken up for Trial on 29th May 2013, for the 1st time since 2007, Mr Green R. stated that the Defendants filed a motion dated 28th May 2013 that this matter cannot be proceeded under Factories Act (Cap 99) and the copy of the motion was not served on the Plaintiff at this stage. The Plaintiff’s counsel stated that he should be granted leave to file the amended Statement of Claim and time was granted by this court and the Plaintiff had filed his Summons for Leave to amend the Statement of Claim on 12th June 2013.
- 7.10 At the Hearing, Pickering J. counsel for the 1st and 2nd Defendants made submissions relying on the written submissions dated 16th September 2013. He submitted that all the proceedings commenced under Factories Act (Cap 99) is nullity and the matter should be struck out. Mr Singh D. in reply stated the court has the power to proceed with the case by using its discretion since this is a personal injury case. The Plaintiff too filed his written submissions dated 16th September 2013 which he relied upon.
- 7.11 The First and 2nd Defendants submitted that Sections 24 and 63 under which the Plaintiff initiated this action being repealed by Act No. 4 of 1996 (*refer to paragraph 7.2 of this Judgment*). The Defendants quoted Section 15 of the Interpretation Act which states:

“.....where any written law repealing in whole or in part any former written law is itself repealed, such last repeat shall not revive the law or provisions before repealed unless words are added reviving such written law provisions.....”

The Defendants further submitted effect of the repeal of Common Law is that law ceases to operate and attempt to use the particular repealed legislation is nullity. The Defendants quoted the Judgment in the case of *Start Mortgages Ltd v. Robert Gunn & Another* [2011] IEHC 275 statement by Ms Justice Dunne:

“.....a right must become vested by the date of repeal in order to survive the repeal and to be enforceable notwithstanding the repeal of the particular statutory provision.....” and it was further stated.....once the right acquired before the repeal, proceedings could be instituted”

The Defendants submitted in the present case the Plaintiff cannot rely in its current form of the Statement of Claim which I agree. The incident occurred in 2007 and the Health and Safety at Work (*General Workplace Condition*) Regulations were gazetted by Legal Notice No. 25 in 2003.

7.12 The above position was not challenged by the Plaintiff. In the case of *Watson v. Winch* [1916] 1KB 688 Lord Reading observed *that a by-law made under a repealed Act ceases to have any validity unless the repealing Act contains some provisions preserving the validity of the by-law notwithstanding the repeal.*

7.13 This court is convinced that the present case should have filed under the Repealed Act No. 4 of 1996 and the Regulations made in 2003 by Legal Notice No. 25. As such there is no necessity to consider further submissions or case law with regard to interpretation. There is no counter argument made by the Plaintiff’s counsel on this issue and admitted the Factories Act 1971 was repealed and I conclude that the Plaintiff cannot proceed in this case in its present form of the Statement of Claim.

8. **Having concluded that the present case cannot be proceeded under the Factories Act 1971, now the issue is as to whether this court can grant leave to amend the Statement of Claim as pleaded by the Plaintiff or whether this action should be discontinued/struck out. [Refer to paragraph 7(b)]**

9. The summons filed by the Plaintiff was supported by the Affidavit dated 12th June 2013 sworn by Jagdish Prasad, the Law Clerk of the Plaintiff deposed inter-alia.

9.1 That pursuant to Regulations 24 and 67 of the Health and Safety at Work (General Work Place Conditions) Regulation 2003, Section 24 and 63 of the Factories Act were repealed and the said repeal was overlooked by the solicitors for the Plaintiff through inadvertence.

- 9.2 The amendment is necessary for determining the real issue in controversy between the parties.
- 9.3 Mr Daniel Singh Solicitor for the Plaintiff has instructed the deponent that the repeal of Section 24 and 63 of the Factories Act had been overlooked by him through inadvertence.
- 9.4 The amendment is necessary for determining the real issue between the parties and granting leave for the amendment will be in the interest of justice. Further the amendment will not change nature or scope of the case.
- 9.5 By granting leave to amend there won't be any prejudice caused to the Defendants. Amended Statement of Claim was annexed to the Affidavit as Annexure marked "A".
10. It is the finding of this court that the Plaintiff cannot sustain this action in its present form of the Statement of Claim as such now this court should decide as to whether the application for the amendment of the Statement of Claim be granted or refused.

Law

11. The Plaintiff's solicitor had admitted that omitting of the applicable law was a mistake on his part and further stated that the said amendment is not prejudicial to the Defendant's neither it will not change the nature of the case.
12. Amendments in the Draft Amended Statement of Claim suggest.
- 12.1 The words in paragraph 1 of the Statement of Claim, "*of the Factories Act Applied*" to replace with new addition "*of the Occupiers Act, Health and Safety at Work Act 1996 and Health and Safety at Work (General Work Place Conditions) Regulation 2003*".
- 12.2 To replace the averment in paragraph (i) under the heading *Particulars of Negligence* and to add a new paragraph:

Paragraph (i) stated in the Statement of Claim

"(i) Failing to provide the Plaintiff with eye protectors, face masks or goggles for his use in operating the said generator contrary to Section

63 of the Factories Act” paragraph (i) to be replaced with new paragraph (i);

“(i) Failing to provide the Plaintiff with any or any suitable protective face gear or goggles or effective eye screen to enable him to carry out the said work in safety, and to protect the eyes and the face of the Plaintiff while he was carrying out the said work contrary to Regulation 53(3)(a) (iii) of the Health and Safety at Work (General Work Place Conditions) Regulations 2003.”

12.4 Averment in paragraph (ii) states:

“(ii) Failing to make and keep the Plaintiff’s work place safe contrary to Section 24 of the Factories Act”.

The said paragraph (ii) to be replaced with:

“(ii) Failing to provide a safe system of work pursuant to Section 9(2) (a) of the Health and Safety at Work Act, 1996.”

12.5 To introduce new averment as paragraph (iii):

“(iii) Failing to take any or adequate or necessary measures whether by way or regular inspection, testing examination or otherwise to ascertain whether it was safe for the Plaintiff to work therein or there with.”

12.6 The averment in paragraph (iii) to be amended and replaced with paragraph (iv):

“(iii) Failing to adequately train and supervise the Plaintiff in operating the said generator or to give him any or any adequate instructions in a safe method of performing the task and/or warn the Plaintiff of dangers of facing the vent of the generator when starting it in view of the fact that the Plaintiff has never started such a generator.”

The above paragraph (iii) to be amended and replaced with paragraph (iv) to state as:

“(iv) Failing to adequately train and supervise the Plaintiff in operating the said generator or to give him any or any adequate instructions in a safe method of performing the task and/or warn the Plaintiff of the dangers of facing the vent of the generator when starting it in view of the fact the Plaintiff had ever started such a generator before in breach of Section 9(i)(c) of the Health and Safety at Work Act, 1996.”

12.7 To the averment in paragraph (iv), no amendments suggested and to read as paragraph (v).

12.8 Averment in paragraph (v) states:

“(v) Failing to institute any or any adequate system of work.”

To amend and replace the paragraph (v) as paragraph (vi) and to state as:

“(vi) Failing to take any or adequate or necessary measures whether by way or regular inspection, testing, examination or otherwise to ascertain whether it was safe for the Plaintiff to work therein or there with.”

12.9 Paragraph (vi), no amendments suggested and to read as paragraph (vii).

13. Under the heading **PARTICULARS OF INJURIES** states as:

“He was treated at Vunisea Hospital in Kadavu, admitted and then transferred to CWM Hospital. He was noted to have bilateral redness of the eyes and upon doing his visual activity he was noted to be completely blind in the right eye and partially blind in the left eye.

He was then transferred to CWM Hospital Eye Department for expert review and the above findings were confirmed.”

To replace the above paragraph with:

“Nature of bilateral redness of both eyes with minute foreign bodies permanent incapacity total blindness right eye 40%. The examination from the Eye Department from CWM Hospital has been confirmed of permanent

incapacity of right eye with blurry vision of left eye from Medical Report of Dr. Evelyn Tuivaga dated 25th April 2007.”

14. To add a new paragraph under Schedule of Damages stating:

“The Plaintiff claims interest under Law Reform (Miscellaneous Provision) (Death Interest) Act Cap 27 on the award of General Damages at the rate of 6% per annum from the date of service of the Writ and at the rate of 3% per annum on Special Damages.”

15. The basic principles adopted by most of the cases were that if the justice requires such amendment, it should be allowed. Lord Atkin in the case of **Bell v. Lever Brothers Ltd** [1932] Ac 161 at 216 stated:

“Further I think that the Court of Appeal cannot without an amendment decide a case upon an unpleaded issue of law which depends upon an unpleaded issue of fact. If the issue of fact can be fairly determined upon the existing evidence they may of course amend; but in any such amendment appears to me to be necessary.”

In the present case by amending the pleadings, it will not change the basis of the cause of action. On perusal of the pleadings the incident which occurred on the day i.e. 14th of February 2007 was admitted by the Defendants. The substance of the denial by the Defendants was that the Plaintiff did not act within the scope of his duties and it is against the instructions from his supervisor. If the Plaintiff’s Application for Leave is not allowed by this court and if his case is struck out, incurable damage will be cause to the Plaintiff. On the other hand, by granting Leave to amend the Statement of Claim, it will not cause prejudice to the Defendants. The purpose of granting Leave to amend the Statement of Claim is not to prevent the Plaintiff’s access to justice. The fault and/or the mistake was not an act of the Plaintiff, admittedly it was the Solicitor who acted for him. The Plaintiff had not submitted incorrect facts to his solicitor to present his Statement of Claim and not attempted to mislead the court. As such I find the Plaintiff had not misled the Court or abused the process of this court.

16. The above findings by this court is in line with the White Book (*The Supreme Court Practice 1988*) in page 350 Order 20 Rule 8 paragraph 20/5-8/6 under the heading **General Principles for grant of leave to amend** – *“It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made “for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings”*

(see *per Jenkins L.J.* in ***G. L. Baker Ltd v. Medway Building & Supplies Ltd*** [1958] 1 W.L.R. 1216, p.1231; [1958] 3 All E.R. 540, p. 546).

*It is a well established principle that the object of the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights....I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace....It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right (per Bowen L.J. in ***Cropper v. Smith*** (1883) 26 Ch. D. 700, p. 710-711, with which observations A.L. Smith L.J. expressed “emphatic agreement” in ***Shoe Machinery Co. v. Cultam*** [1896] 1 Ch. 108, p.112).”*

17. Admittedly the mistake of pleading the incorrect enactment is an omission by the Solicitor for the Plaintiff. Should the Plaintiff be punished for the mistake of the Lawyer? In this regard principle stated in Halsbury’s (*Ref Halsbury’s Laws of England 2nd e. 1937 pp 256 et seq*) which states:

“If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend is granted if the amendment can be made without injustice to the other side. There is no injustice if the other side can be compensated for costs, but if owing to the way in which the pleading has been framed, the other party has been put into such a position that injury would be done to him by the amendment, court will not give leave.”

This court is of the view the amendment can be granted only limiting to the correction of the enactment not other amendments suggested by the Plaintiff which will be injurious to the Defendants. As stated in Halsbury’s it is to repair the omission by the solicitor due to negligence or carelessness which had caused injustice to the Plaintiff.

18. I further conclude when the counsel becomes aware of a mistake in the pleading he drafted an amendment may be sought to correct the error whether it is pointed out by the Defendant or not. The court had to decide on the facts and should come to a conclusion whether the issue cause injustice to the Defendants.. However, the success depend more on the type of amendment sought. In this case by granting leave for the amendment

(restricted to correction) will not affect the Defendants. However, on perusal of the amendments sought are not only restricted to the omissions made by the solicitor. In the process he is attempting to bring in new cause of action and relief by way of amendment and such amendments are prejudicial to the Defendants and cannot be allowed.

19. 19.1 Order 25 Rule 5(1) of the High Court Rules 1988 states:

“5(1) Subject to Order 15 Rule 6, 7, 8 and the following provisions of this rule, court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.”

In my view pursuant to this rule, court is empowered to use its discretion granting the amendments if it is justifiable and such amendments are not prejudicial to the other party.

19.2 I wish to quote the cases cited by Goudie J. in the Supreme Court Case of ***Fiji Electricity Authority v. Balram and Sons*** (1972) 18 FLR 20 at 21.

19.2.1 In case of ***G.L. Baker Ltd v. Medway Building Supplies Ltd*** [1958] 1 WLR page 1231 as per Jenkin L.J. *“Order 20 Rule 5 of the Supreme Court made it abundantly clear that the court has jurisdiction at any stage of the proceedings to allow the Plaintiff to amend his writ, or any party to amend his pleadings, and that all such amendments ought to be made for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings.”*

In the present case it's correcting of an error made by the solicitor.

19.2.2 In ***Clarapede v. Commercial Union Association*** 32 W.R. page 263 as per Brett M.R.:

“However negligent or careless may have been the first omission, and however, late the proposed amendment, the amendment should be allowed if it can be made without injustice to other side.”

20. Underlying all the above principles that I conclude the leave should be granted to the Plaintiff to amend the Statement of Claim where the Defendants has not been misled, or substantially injured by the error.

21. Accordingly, I make the following **Orders**:

(1) The claim in the current proceedings against the First and Second Defendants is not sustainable and it does not warrant the court to discontinue the proceedings and leave for the amendment of the Statement of Claim is granted on the following basis:

(a) The Leave for amendment of the Statement of Claim is granted subject to payment of the costs to the Defendants as stated in paragraph 3 and only the following amendments are allowed and all other averments in the Statement of Claim is to remain unchanged;

(i) amendment proposed to paragraph 1 of the Statement of Claim allowed;

(ii) under PARTICULARS of NEGLIGENCE inclusion of the amendments in paragraph (i); (ii); (iv) detailed in the Draft amended Statement of Claim allowed.

(b) The following amendments in the Draft amended Statement of Claim are refused:

(i) under PARTICULARS of NEGLIGENCE paragraph (iii);

(ii) under PARTICULARS of INJURIES, inclusion of the new paragraph;

(iii) the inclusion of the paragraph under Schedule of Special Damages;

(iv) inclusion of paragraph (c) and (g) to the prayer of the Statement of Claim.

- (2) *The Plaintiff is ordered to pay summarily assessed costs of \$750.00 each totaling to (\$1500.00) to the 1st and 2nd Defendants within 14 days of this Judgment prior to filing of the amended Statement of Claim;*
- (3) *The Plaintiff is ordered to file and serve amended Statement of Claim as ordered in paragraphs (a) and (b) above within 21 days;*
- (4) *The Defendant is ordered to file and serve amended Statement of Defence within 21 days of serving of the amended Statement of Claim;*
- (5) *The Plaintiff is ordered to file and serve if any reply to the amended Statement of Defence within 7 days.*

Delivered at Suva this 15th Day of November, 2013.



.....
C. KOTIGALAGE
JUDGE