

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 107 of 2015

BETWEEN : **ANA KASAIMATUKU** of 21 Senibuadromo Street, Suva Point, Suva,
Project Officer
PLAINTIFF

AND : **VULI VAKALOLOMA** whose address is not known to the Plaintiff
FIRST DEFENDANT

AND : **JOSEPH ALI** of Wainibuku Subdivision, Nasiru, Suva, Businessman
SECOND DEFENDANT

Counsel : **Mr. D. Singh for the Plaintiff**
Mr. E. Narayan for the Defendant

Date of Hearing : **30th April, 2018**

Date of Judgment : **18th May, 2018**

JUDGMENT

INTRODUCTION

1. The Plaintiff filed summons seeking leave to file the writ of summons and amended writ of summons out of time on 29.12.2017. The Plaintiff admitted that the writ of summons was filed outside the stipulated 3 year period for limitation on personal injury. The Plaintiff states in the affidavit, that the reason for the delay in the filing of the writ of summons is not known. The writ of summons was filed on 26.12.2015. The date of the accident was 19th December, 2012. So the time period for institution of an action ended on 19th December, 2015. Extension of time period for limitation is allowed in terms of Sections 16 and 17 of Limitation Act 1971. Sections 19 - 21 define the terms contained in Section 16 of Limitation Act 1971 and Section 22 define a term contained in Sections 20 and 21 of Limitation Act 1971.

ANALYSIS

2. The affidavit in support of the Plaintiff states that the reason for filing the action outside the time period of limitation is not known.
3. The solicitor of the Plaintiff who filed the action had filed an affidavit and according to that he was unaware of the delay. (See paragraph 3)
4. It had not occurred to the solicitor that the time period had expired, when the writ of summons was filed.
5. The solicitor also said that there was a difficulty in ascertaining the correct names of the Defendants.
6. The Plaintiff in the affidavit in support annexed as 'C' the sentencing order of the Magistrate and this indicate that a criminal action was filed against the Defendant and he was convicted upon a guilty plea.
7. The contention of the Plaintiff's counsel is that the cause of action starts on the date of conviction. For that he relied on Fiji High Court decision Cakau v Habib (unreported)(decided on 18th June,1999). In that it was held that relevant date for the limitation is the date the claimant sought legal advice. With respect I do not agree. If the date a client meets a legal practitioner is to be determined as a relevant date it will lead to uncertainty. In Cakau (supra) the driver of the vehicle that met with the accident was also convicted in the criminal action prior to that date. It was further held that fault of the lawyer was not a reason to deny the leave for extension of limitation for personal injury action. Again with respect, I do not agree with that.
8. In the said judgment Thomas v Lord Clanmorris (1990) 1 Ch.D. 718 was referred. It was a case of determination of accrual of cause of action in a case where false statements in a prospectus under Directors Liability Act, 1890 (UK). The laws discussed in that case were Section 3 of Civil Procedure Act, 1833(U.K) and also Directors Liability Act (UK).

9. A statute of limitation cannot begin to run unless a party liable to be sued and a party capable of suing. (*Thomas* (supra))
10. This has no application to personal injury claim as always there is a party capable of suing, unless there is some disability, and a party liable to be sued is the party who caused or contributed to the said injury.
11. This is to be contrasted with a claim based on false statement in a prospectus, where limitation started not from the time of the making of the prospectus, but upon the subscription of shares based on that false statements in the prospectus.
12. The extension of the time for limitation is allowed in terms of Section 16 & 17 of Limitation Act 1971 but this is granted only for limited purposes only and negligence or mistake of a lawyer is not a ground under which extension can be granted. If that is the case there will be plethora of applications for leave for extension of time and Limitation Act 1971 will not effectively operate for personal injury actions.
13. The following provisions are to be fulfilled in order to extend the time period for personal injury in term of the Limitation Act and they are as follow.

***SPECIAL PROVISIONS APPLICABLE TO CERTAIN ACTIONS IN
RESPECT OF PERSONAL INJURIES***

Extension of time limit for actions in respect of personal injuries

16.-(1) The provisions of subsection (1) of section 4 shall not afford any defence to an action to which this section applies, in so far as the action relates to any cause of action in respect of which-

(a) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and

(b) the requirements of subsection (3) are fulfilled.

(2) This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under any Act or independently of any contract or any such provision) where the damages claimed by the plaintiff for the

negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.

(3) The requirements of this subsection shall be fulfilled in relation to a cause of action if it is proved that the material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which-

(a) either was after the end of the three-year period relating to that cause of action or was not earlier than twelve months before the end of that period; and

(b) in either case, was a date not earlier than twelve months before the date on which the action was brought.

(4) For the purposes of subsection (3), reference to the three-year period relating to a cause of action means a reference to the period of three years from the date on which that cause of action accrued.

Provided that-

(a) in relation to any cause of action in respect of which, by virtue of section 11, an action could have been brought after the end of the period of three years from the date on which that cause of action accrued, any such reference to the three-year period relating to that cause of action shall be construed as a reference to the period up to the end of which an action could, by virtue of that section, have been brought in respect thereof;

(b) in relation to a cause of action in respect of which, by virtue of section 15, the period of limitation did not begin to run until a date after the cause of action accrued, any such reference to the three-year period relating to that cause of action shall be construed as a reference to the period of three years from the date on which, by virtue of that section, the period of limitation began to run.

(5) Nothing in this section shall be construed as excluding or otherwise affecting-

(a) any defence which, in any action to which this section applies, may be available by virtue of any provisions of any Act other than those contained in subsection (1) of section 4 (whether it is an Act imposing a period of limitation or not) or by virtue of any rule of law or equity; or

(b) the operation of any Act or of any rule of law or equity which, apart from this section would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.

17.-(1) Any application for the leave of the court for the purposes of section 16 shall be made ex parte, except in so far as rules of court may otherwise provide in relation to applications which are made after the commencement of a relevant action.

(2) Where such an application is made before the commencement of any relevant action, the court may grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if such an action were brought forthwith and like evidence were adduced in that action, that evidence would, in the absence of any evidence to the contrary, be sufficient-

(a) to establish that cause of action, apart from any defence under subsection (1) of section 4; and

(b) to fulfil the requirements of subsection (3) of section 16 in relation to that cause of action.

(3) Where such an application is made after the commencement of a relevant action, the court may grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if the like evidence were adduced in that action, that evidence would, in the absence of any evidence to the contrary, be sufficient-

(a) to establish that cause of action, apart from any defence under subsection (1) of section 4; and

(b) to fulfil the requirements of subsection (3) of section 16 in relation to that cause of action.

and it also appears to the court that, until after the commencement of that action, it was outside the knowledge (actual or constructive) of the plaintiff that the matters constituting that cause of action had occurred on such a date as, apart from the last preceding section, to afford a defence under subsection (1) of section 4.

(4) In this section, "relevant action", in relation to an application for the leave of the court, means any action in connection with which the leave sought by the application is required.

18.

Meaning of "material facts relating to a cause of action"

19. In sections 16 and 18 any reference to material facts relating to a cause of action means a reference to any one or more of the following. -

(a) the fact that personal injuries resulted from the negligence, nuisance or breach of duty constituting that cause of action;

(b) the nature or extent of the personal injuries resulting from that negligence, nuisance or breach of duty;

(c) the fact that the personal injuries so resulting were attributable to that negligence, nuisance or breach of duty, or the extent to which any of those personal injuries were so attributable.

Meaning of "facts of a decisive character"

20. For the purposes of sections 16 and 18, any of the material facts relating to a cause of action shall be taken, at any particular time, to have been facts of a decisive character if they were facts which a reasonable person, knowing those facts and having obtained appropriate advice within the meaning of section 22 with respect to them, would have regarded at that time as determining, in relation to that cause of action, that, apart from any defence under subsection (1) of section 4, an action would have a reasonable prospect of succeeding and of resulting in the award of damages sufficient to justify the bringing of the action.

When facts will be taken as outside the knowledge of a person

21.-(1) Subject to the provisions of subsection (2), for the purposes of sections 16 to 18 a fact shall, at any time, be taken to have been outside the knowledge, actual or constructive, of a person if, but only if-

(a) he did not then know that fact.

(b) in so far as that fact was capable of being ascertained by him, he had taken all such action, if any, as it was reasonable for him to have taken before that time for the purpose of ascertaining it, and

(c) in so far as there existed, and were known to him, circumstances from which with appropriate advice within the meaning of section 22 that fact might have been ascertained or inferred, he had taken

all such action, if any, as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice as aforesaid with respect to those circumstances.

(2) In the application of subsection (1) to a person at a time when he was under a disability and was in the custody of a parent, any reference to that person in paragraph (a), (b) or (c) of that subsection shall be construed as a reference to that parent.

Meaning of "appropriate advice"

22. In sections 20 and 21 "appropriate advice", in relation to any fact or circumstances, means the advice of competent persons qualified, in their respective spheres, to advise on the medical, legal or other aspects of that fact or those circumstances, as the case may be.'

14. So, what the Plaintiff needs to satisfy in a personal injury action in order to seek extension of the time are the requirements contained in Section 16(3) of Limitation Act 1971. The solicitor's negligence does not form part of the said provision. Though the delay is not excessive there is no general discretion granted to extend the time for limitation, it is statutorily laid down and court can grant extension only in terms of the said statutory provisions. The Plaintiff had failed to fulfil the statutory provisions. In the Fiji High Court case Cakau v Habib (unreported)(decided on 18th June, 1999) , there is no indication as to the how a solicitor's delay in a filing an action falls within the statutory provisions. Though nearly two decades have passed since the said judgment I could not find a single case where this ratio was applied or cited in Fiji. So, with respect I am not inclined to apply the ratio of the said decision. So the summons filed by the Plaintiff seeking leave in terms of Section 16(3) and 17(1) of Limitation Act 1971 is struck off. By virtue of the said striking out the entire action needs to be struck out. The Defendant had filed summons for strike out on 7th December, 2017 and the Plaintiff filed the present summons seeking leave after that. At the hearing both parties consented to deal with only one summons as the determination of the later summons will determine the entire action. So the action needs to be dismissed, too. Considering the circumstances I do not wish to award any costs.

FINAL ORDERS

- a. The Summons filed on 29.12.2011 is struck off.
- b. By virtue of the refusal to grant leave the entire action is dismissed.
- c. No costs.

Dated at Suva this 18th day of May, 2018



[Handwritten Signature]
Justice Deepthi Amaratunga
High Court, Suva