

**PROCEEDINGS COMMISSIONER, FIJI HUMAN RIGHTS
COMMISSION v COMMISSIONER OF POLICE and Anor**

HIGH COURT — CIVIL JURISDICTION

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JITOKO J

8 April 2003

10 [2003] FJHC 48

Practice and procedure — applications — application to strike out original summons — abuse of process — locus standi — whether the action should be by originating summons or motion — whether the complaint discloses a cause of action — whether proceedings Commissioner has power to act on behalf of complainant — whether 30-day limitation rule is constitutional — High Court Rules O 18 r 18 — High Court (Constitutional Redress) Rules 1988 s 3, 3(2).

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The Plaintiff, through the Proceedings Commissioner, filed an originating summons action against the Defendants for offences allegedly committed by the Police against the Plaintiff. The Plaintiff also filed a complaint against the Police but the complaints had been looked and found to be without substance. The Plaintiff finally sought the assistance of the Human Rights Commission. The Defendants filed an application to strike out the Plaintiff's originating summons on the grounds that the action was statute barred within the 30-day limitation rule, the claim discloses no cause of action and the action is an abuse of process of the court. The Defendants submitted that the appropriate procedure is by way of motion, not summons.

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Held — (1) Where it is clear that there is a defence under the Limitation Act, the Defendant can either plead that defence or seek trial of a preliminary issue. He can also strike out the claim upon the ground that it is frivolous, vexatious and an abuse of the process of the court and support his application with evidence. But in no circumstances can he seek to strike out on the ground that no cause of action is disclosed.

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(2) As far as this case is concerned, the court has already decided that the 30-day limitation rule is unconstitutional and of no legal effect. It therefore follows the defence's argument of no reasonable cause of action must fail.

(3) The use of the word "may" in s 3 suggests permissive rather than obligatory the need to proceed by way of motion. The law clearly stipulates that proceedings by way of motion may be made if by the rules or under any Act the proceedings in question are required or authorised to begun. In the absence of any specific orders under the High Court Rules, together with the permissive nature of the wording as to the procedure under s 3 of the Redress Rules, the court is of the view that the nature of the present proceedings cannot be questioned.

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(4) The Human Rights Commission Act provides a comprehensive scheme or code in the administration and adjudication over complaints of breach of individual's rights. It is in essence a code of its own and self-contained. Its comprehensive suggests to this court that while it contains a very broad right of appeal to the courts, the procedure for conciliation provided under it is to be first pursued and only where it is specifically permitted. Thus, the Proceedings Commissioner does not have any locus standi nor does it possess any residual powers to bring this proceeding on behalf of the complainant.

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Application granted.

Cases referred to

Blainey v Ontario Hockey Association (1986) 26 DLR (4th) 728; *Board of Governors of Seneca College of Applied Arts & Technology v Bhadauria* (1981) 124 DLR (3d) 193; [1981] 2 SCR 181, considered.

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Dismore v Milton [1938] 3 All ER 762; *Leach Nokela Mohlomi v Minister of Defence* (Case CCT 41/95, unreported); *Metuisela Railumu v Commander, Republic of Fiji Military Forces* (Suva High Court, Misc App No HBM 81J of 2002S, 24 December 2002, unreported); *Riches v Director of Public Prosecutions* [1973] 2 All ER 935, cited.

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Ronex Properties Ltd v John Laing Construction Ltd [1982] 3 All ER 961, followed.

S. Shameem for the Plaintiff.

10 *D. Sudhakar* for the Human Rights Commission.

L. Daunivalu, Attorney-General's Chambers, for the Defendants.

Jitoko J. This is an application by the Defendants to Strike Out the Plaintiff's originating summons under O 18 r 18 of the High Court Rules. They rely on limbs (a) and (d) of O 18 r 18(1), namely that the summons disclosed no reasonable cause of action and/or the action is an abuse of the process of the court.

Specifically, the Defendants rely on s 3(2) of the High Court (Constitutional Redress) Rules 1988 in support of the application. The rule will not allow the High Court to entertain an application by an individual for redress under Ch 4 of the Constitution (Bill of Rights), if it is made after 30 days from the date when the matter in question first arose.

The Plaintiff is the Proceedings Commissioner of the Fiji Human Rights Commission acting on behalf of the complainant, one Joti.

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High Court (Constitutional Redress) Rules 1988

Its genesis is found in the Bill of Rights guaranteed under Ch 4 of the Constitution. The Bill of Rights is yet by far one of the most extensive and inclusive of a collection of individual rights to be found anywhere. From the right to life and personal liberty to freedoms of the individual and equality; from right of privacy and protection of property, to the newly defined areas of labour relations and education. The bundle of rights represents almost if not all areas of human activities and relationship.

To enable an individual to seek redress for a contravention of her or his rights, requires the putting in place of rules and procedure. Section 41(10) of the Constitutions is the enabling provision which provides as follows:

(10) The Chief Justice may make rules for the purposes of this section with respect to the practice and procedure of the High Court (including rules with respect to the time within which the applications are to be made to the High Court).

It is pursuant to these powers that the Chief Justice promulgated the High Court (Constitutional Redress) Rules 1998 (Redress Rules) that now governs an application to the High Court either by an individual or by way of case stated.

Limitations of time on application

Section 3 of the Redress Rules deals with the procedure and time for making an application. It states:

3 (1) An application to the High Court for redress under section 41 (sic 1) of the Constitution may be made by motion supported by affidavit—

- 50 (i) claiming a declaration;
- (ii) praying for an injunction;
- (iii) claiming or praying for such other order as may be appropriate.

- (2) an application under paragraph (1) *must not be admitted or entertained after 30 days from the date when the matter at issue first arose.* [Emphasis added.]

The Plaintiff readily concedes that the action, having commenced 2 years and 5 8 months after the event complained of, falls outside the 30-day requirement under s 3(2) of the Rules above. However, the Plaintiff is applying to the court for a declaration that its action is not statute-barred as stipulated under s 3 of the Redress Rules in as much as the section purports to deal with fundamental human rights. In other words, the Plaintiff seeks a declaration from the court that the 10 30-day rule is unconstitutional. In the Plaintiff's view the 30-day limitation, is inconsistent with ss 29(2) and s 41(1) of the Constitution.

Plainly, the Defendants arguments is firmly based on the 30-day rule limitation imposed on the Plaintiff within which to bring this action. The Defendants as a consequence, argue on the grounds that the claim discloses no reasonable cause 15 of action and abuse of process. The Defendants in addition, argue that the appropriate procedure is by way of Motion, not Summons.

Constitutionality of the 30-day limitation rule

This court has already ruled in *Metuisela Railumu v Commander, Republic of* 20 *Fiji Military Forces* HBM0081J of 2002S of 24 December 2002 (unreported) that the 30-day limitation under r 3(2) of the High Court (Constitutional Redress) Rules 1998, is unconstitutional and therefore ultra vires the protective provisions of the Constitution as they relate to individual rights. In the court's view, the test of the limitation period to be placed on those seeking relief under the Redress 25 Rules in the light of its ruling in *Metuisela Railumu* case, is one of reasonableness. The court has to ask itself whether, given all the circumstances of a case, a complainant had adequate time to avail herself or himself the opportunity to seek the appropriate redress or relief sought.

In *Leach Nokela Mohlomi v Minister of Defence* Case CCT 41/95 30 (Unreported), a South African Case, which this court referred to in *Metuisela Railumu v Commander* (supra), a limitation period of 6 months on any action against the State under the country's Defence Act was struck down by the court as constitutionally invalid. The case involved the deliberate shooting of a minor 35 by a soldier. The fact that the complainant was a minor and required the help of his father as natural guardian, which in turn entailed administrative as well as legal processes, before the claim could proceed, was considered by the court to be relevant in deciding whether the period of 6 months was adequate for the exercise of his right, within the spirit of the Constitution. Similarly in the *Metuisela Railumu* case, the soldiers' detention of 25 months, without as much 40 as any indication whether they will sooner or later be brought before a court-martial, did not, in the court's view, offer any real and fair opportunity for them to seek redress within the 30-day limitation period under the Redress Rules.

In the present case, the Plaintiff, through the Proceedings Commissioner, filed an originating summons action against the Defendants on 6 March 2002, for 45 offences allegedly committed by the police against the Plaintiff on 4 July 1999, some two-and-a-half years earlier. But according to the Plaintiff, she had formally lodged a complaint against the police on 16 July 1999 and it was not until 28 October of the same year, that she was informed by a letter by the police that her complaints had been looked into and found to be without substance. The 50 Plaintiff finally sought the assistance of the Human Rights Commission on 31 March 2000, 5 months after the letter from the police. The Human Rights

Commission thereafter proceeded with investigation of the complaint pursuant to its powers under s 31 of the Human Rights Commission Act and which ultimately resulted in the initiation of these proceedings by the Proceedings Commissioner on 6 March 2002.

5 **Reasonable cause of action**

The Defendants submission is that the pleadings disclose that the cause of action had arisen outside the 30-day rule as prescribed under the Redress Rules. As such the action is time-barred. Counsel referred to English cases of *Dismore v Milton* [1938] 3 All ER 762; *Riches v Director of Public Prosecutions* [1973] 2 All ER 935; and *Ronex Properties Ltd v John Laing Construction Ltd* [1982] 3 All ER 961, to support the contention that unless there are clear exceptions provided for under the Act, the limitation rule should prevail.

This court does not agree with the defence's interpretation of the law as carried by the decisions in *Dismore* and *Ronnex Properties* (above). If anything, these cases makes clear that an action could not be struck out as disclosing no reasonable cause of action, merely because the defendant can rely on the English Limitation Acts as a defence. As Donaldson LJ observed in *Ronnex Properties* (above) at 879:

20 Whilst it is possible to have a contractual provision whereby the effluxion of time eliminates a cause of action – and there are some provisions of foreign law which can have that effect – it is trite law that the English Limitation Acts bar the remedy and not the right; and furthermore, that they do not even have this effect unless and until pleaded.

25 This court adopts Donaldson LJ's statement at 880 as reflecting the correct position of law, that is:

30 Where it is thought to be clear that there is a defence under the Limitation Act, the defendant can either plead that defence and seek the trial of a preliminary issue or, in a very clear case, he can seek to strike out the claim upon the ground that it is frivolous, vexatious and an abuse of the process of the court and support his application with evidence. But in no circumstances can he seek to strike out on the ground that no cause of action is disclosed.

35 As far as this case is concerned, the court has already decided that the 30-day limitation rule, upon which the defence argument of reasonable cause of action is based, is unconstitutional and of no legal effect. It therefore follows, that quite apart from the submissions may by counsel on case law, the defence's argument of no reasonable cause of action, must fail.

Originating summons or motion

40 The defence submits that since the Plaintiff is alleging breach of an individual's constitutional rights then the proper procedure in seeking Constitutional redress from the High Court, is through originating motion. It relies on O 5 r 5 of the High Court Rules and s 3 of the Redress Rules to support the argument. However, the Plaintiff points out that the use of the word "may" in s 3 suggests "permissive" rather than "obligatory" the need to proceed by way of motion. The court agrees. O 5 r 5 of the High Court Rules clearly stipulates that proceedings by way of motion may be made "if, but only if, by these rules or by or under any Act the proceedings in question are required or authorised to be so begun". In the absence therefore of any specific orders under the High Court Rules, together with the permissive nature of the wording as to the procedure under s 3 of the Redress Rules, this court is of the view that the nature of the present proceedings, cannot be questioned.

Whether the Proceedings Commissioner has locus

There remains the overriding question, whether the Proceedings Commissioner possesses unlimited jurisdiction and indeed access to the High Court in all matters under the Act.

5 Section 36(1) of the Human Rights Commission Act gives legal authority to the Proceedings Commissioner to bring proceedings in the High Court on behalf of individuals. It states:

Proceedings

10 36— (1) Civil proceedings in the High Court lie at the suit of the Proceedings Commissioner against a person referred to in paragraph (b) or (c) of section 35(1) for unfair discrimination or a contravention of the Bill of Rights.

15 The issue is whether the Proceedings Commissioner's has the powers and seemingly unlimited jurisdiction to bring proceedings on any issue or matter affecting the Bill of Rights, including redress procedures under s 41 of the Constitution.

20 Civil proceedings at the suit of the Proceedings Commissioner, will only lie against an individual for unfair discrimination or a contravention of the Bill of Rights, if the individual comes under para (b) or (c) of s 35(1) of the Act. Section 35 sets out the functions of the Proceedings Commissioner as follows:

Functions of Proceedings Commissioner

25 35 — (1) The functions of the Proceedings Commissioner include —

(a) in relation to a complaint or an investigation of the Commission's own motion — deciding whether an application should be made for an order under section 40 and, if so, making the application;

30 (a) in relation to a complaint resulting from a failure by a party to observe the terms of a settlement on a previous occasion — deciding whether to institute proceedings against the party and, if so, instituting the proceedings;

35 (a) in relation to a complaint or investigation of the Commission's own motion, if it appears to the Proceedings Commissioner that a settlement has not been reached and that no action or further action by the Commission is likely to facilitate a settlement — deciding whether to institute proceedings against the person against whom the complaint was made or to whom the investigation related, and if so, instituting the proceedings.

40 (2) The Proceedings Commissioner must not institute proceedings against a person referred to in paragraph (b) or (c) of sub section (1) unless the Commissioner has given the person an opportunity to be heard."

45 On plain reading of ss 36(1), and 35(1)(b) and (c), it is clear to this court that Proceedings Commissioner suit on behalf an aggrieved individual "for unfair discrimination or a contravention of the Bill of Rights" is limited only to situations described under (b) and (c) of s 35(1) of the Act.

In situations such as it is in this case, where the complaint had been investigated and conciliation process instigated at the behest of the commission (s 34(4)), and where the commission has advised the complainant that her individual rights had been contravened while informing of her right under the Constitution to bring proceedings, (s 34(3)), the question is whether the Proceedings Commissioner can still proceed under s 36(1).

The Human Rights Commission Act provides a comprehensive scheme or code in the administration of and adjudication over complaints of breach of individual's rights. It is in essence a Code of its own and is self-contained. Its comprehensive suggests to this court that, while it contains a very broad right of appeal to the courts, the procedure for conciliation provided under it is to be first pursued and, only where it is specifically permitted, as provided under s 35(1) (b) and (c), can the matter thereafter, be referred to the court.

In *Board of Governors of Seveca College v Bhadauria* (1981) 2 SCR 181; 124 DLR (3rd) 193, the Supreme Court of Canada dealt with the Ontario Human Rights Code relating to a complaint of racial discrimination on the job market. Like the Fiji Human Rights Commission the Scheme under the Ontario Human Rights Code includes administrative enforcement through complaint and settlement procedures; although it goes a step further in providing adjudicative enforcement procedures through the setting up of Board of Enquiries. Part III of the Code deals with complaint procedure and, like the scheme under Fiji's Human Rights Commission Act, the complaints is not limited to individuals alone. The commission is also allowed to initiate a complaint. At 183, 194-5, the Chief Justice of Canada, Mr Justice Laskin, delivering the unanimous decision of the court stated:

In my opinion, the attempt of the respondent to hold the judgment in her favour on the ground that a right of action springs directly from a breach of the Ontario Human Rights Code cannot succeed. The reason lies in the comprehensiveness of the Code in its administrative and adjudicative features of the latter including a wide right of appeal to the courts on both fact and law.

In *Blainey v Ontario Hockey Association* (1986) 26 DLR (4th) 728 at 747-8, Dublin JA said:

Furthermore, it has been held that no right of action springs directly from the breach of Human Rights Code. As previously noted, the Human Rights Code provides a comprehensive scheme for the investigation and adjudication of complaints of discrimination. There is a very broad right of appeal to the Court from the ultimate determination of a board of enquiry constituted under the Human Rights Code. The procedure provided in the Human Rights Code must first be pursued before resort can be made before the Court.

Under Fiji's Human Rights Commission Act, the enforcement scheme, although not as wide as the Ontario Human Rights Code, is just as clear. Part IV of the Act deals with complaints and investigation procedure. It empowers the commission to require information to be produced or provided, including privileged information. There are conciliation processes, available at every stage of the investigation.

The procedure after the investigation is set out at s 34 of the Act. If the commission is of the opinion that the complaint has no substance, it may not proceed with the matter or still conciliate if it is possible to reach a settlement. If however, pursuant to s 27(1), the commission will not investigate further, then it can still advise the complainant of alternative available remedies. But where the commission is, after the investigation, of the view, that the complaint has substance, the commission is obliged to conciliate between the parties, and to "use its best endeavours to effect a settlement in relation to the complaint" (s 34(4)).

Section 34(6) enables the commission, at the completion of its investigation and conciliation work, to advise, refer, or recommend actions to be taken by the parties to the complaint and competent authorities to bring about compliance with the law. As for the parties or complainants, the commission may,
5 notwithstanding conciliation or other alternative remedies, still advise them of their rights available under s 41 of the Constitution, if the matters complaint of relate to breaches of their Bill of Rights.

Given the very elaborate nature of the scheme of investigation and other administrative arrangements that it intended to secure the protection and
10 enforcement of the rights of an individual, contained in the Human Rights Commission Act, it surely could not have been the intention of the legislature to further grant the Commission with unimpeded jurisdiction, in the person of the Proceedings Commissioner, to the High Courts in all matters that have been dealt with under its authority.

15 In this court's view, the commission has already disposed of the complaint by adopting the procedures available to the commission under s 34 of the Act. The complainant had been advised of her rights to bring a s 41 proceedings, after the conciliation process failed to produce any settlement. As a result, this court believes that the matter can no longer belong to categories (b) or (c) of s 35 and
20 for which the Proceedings Commissioner is authorised to bring an action on behalf of the complainant. To decide otherwise would mean that the Human Rights Commission, while exercising its powers under the administrative, investigative, and conciliation processes available to it under the Act, quite apart from its powers to recommend to relevant authorities, censorship and
25 prosecution, continues to have direct and unbridled access to the courts in all matters including those that it may have already dealt with under its own Act. The courts exist separately from the different regime established under the Act. Where however it becomes part of the enforcement machinery of the Act, it is limited only in respect of matters that fall under s 35(b) and (c) of the same.

30 In this case, the fact that complainant's maybe an indigent is not enough reason for the commission to intercede through the Proceedings Commissioner in bringing this action.

In the result the court finds as follows:

- 35 (1) That the 30-day limitation under s 3(2) of the High Court (Constitutional Redress) Rules 1998 is unconstitutional and therefore of no legal effect.
- (2) That the Proceedings Commissioner does not have any locus standi nor does it possess any residual powers to bring these proceedings on behalf of the complainant.
- 40 (3) The complainant nevertheless is entitled to bring her own action seeking the redress originally sought and applied for on her behalf by the Plaintiff.

The Plaintiff's originating summons is struck out and HBC Action 93/02 is hereby dismissed.

45 Each party to bear its own costs.

Application granted.