

**IN THE SUPREME COURT, FIJI ISLANDS**  
**AT SUVA**

**CIVIL APPEAL NO. CAV 0004/2007**  
(Fiji Court of Civil Appeal No Misc20/2006)

**BETWEEN:**

**MARIAPPA GOUNDER AND**  
**RAJNESH MUDLIAR**

**Petitioners**

**AND:**

**KALESI LEWABUA**

**Respondent**

**Coram:**                   **The Hon Justice Keith Mason, Judge of the Supreme Court**  
**The Hon Justice Robert French, Judge of the Supreme Court**  
**The Hon Justice Kenneth Handley, Judge of the Supreme Court**

**Hearing:**               **Tuesday, 19<sup>th</sup> February 2008, Suva**

**Counsel:**               **S Maharaj for the Petitioners**  
**A K Narayan the Respondent**

**Date of Judgment:**   **Monday, 25<sup>th</sup> February 2008, Suva**

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**JUDGMENT OF THE COURT**

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1           This is an application for special leave to appeal from the decision of Scott JA who on  
20 April 2007 dismissed the petitioners' summons for leave to appeal to the Court of Appeal  
out of time. Leave was refused because the judge considered that the proposed appeal from  
interlocutory decisions of Connors J had no prospects of success.

2           On 22 September 2006 Connors J dismissed the petitioners' summons under O 18  
r 18 to strike out the plaintiff's action as frivolous and vexatious because it was time barred.  
On the respondent's summons he struck out pars 7, 8 and 9 of the statement of defence which

raised a limitation defence, challenged the ex-parte order of Finnigan J which granted leave to commence proceedings out of time, and pleaded breaches of ss 11(2)(a) and 16(1) of the *Motor Vehicle (Third Party Insurance) Act (Cap 177)* (the *Third Party Act*).

3           The order of Scott JA refusing leave to appeal to the Court of Appeal out of time was in form interlocutory because a further application for leave was not barred as a matter of law. However in substance it was final because it was a dismissal on the merits and the applicants did not have additional evidence or a new point of law. Mr Narayan, counsel for the respondent, did not object to the competency of the petition, and did not argue that an appeal lay from Scott JA to a Full Court of the Court of Appeal. In these circumstances we are prepared to treat the petition as competent. We are prepared to treat it as a final judgment of the Court of Appeal for the purposes of s 122(1) of the Constitution – see generally *Tubuli v The State* (CAV0009/06).

4           The proceedings arise out of a motor vehicle accident on 17 July 2002 when a heavy goods vehicle owned by the second petitioner and driven by the first struck and killed the respondent's husband on Koronubu Road, Ba.

5           The respondent is administratrix of the deceased's estate having been appointed such by the High Court on 24 November 2003.

6           On 15 September 2005 the respondent's solicitors issued a writ with an attached statement of claim from the High Court Registry at Lautoka which was promptly served on the third party insurer for the petitioners. The statement of claim pleaded causes of action based on the negligence of the defendants under the *Compensation to Relatives Act (Cap 29)* and the *Law Reform (Miscellaneous Provisions) (Death and Interest) Act (Cap 27)*. The proceedings had been commenced after the expiration of the limitation period but on 6 September Finnigan J had granted leave, ex parte, under ss 16(1) and 17(1) of the *Limitation Act (Cap 35)*, for the commencement of the proceedings.

7           The ex parte order reserved liberty to the defendants to raise a limitation defence and for this to be determined as a preliminary issue. In any event the order having been obtained without notice to the prospective defendants, they were entitled, as of right, to apply on notice for its discharge: *Owners of SS Kalibia v Wilson* (1910) 11 CLR 689, 694.

8 In their defence the defendants pleaded that the plaintiff should not have been granted  
leave and that the action was statute barred. They also pleaded alleged breaches of the *Third  
Party Act*. In due course the plaintiff moved before Connors J to strike out the relevant  
paragraphs of the defence, and the defendants moved for summary dismissal.

9 Connors J noted correctly (par [4]) that the relevant limitation period was three years.  
He then referred to Privy Council decisions, cited by counsel for the plaintiff, that established  
that an administrator cannot commence proceedings before grant, and time only commences  
to run against an administrator on grant.

10 Connors J did not apply those cases but said (par [11]):

***“On the evidence that has been placed before me I see no basis to demur  
from the order made by the learned judge to grant leave to commence the  
proceedings and I am not satisfied that the limitation defence as pleaded by  
the defendants has merit.”***

11 He struck out the defence under s 11(2)(a) of the *Third Party Act* because it was clear  
that the plaintiff’s solicitors had given timely notice of the proceedings to the insurer, and the  
defence under s 16(1) because breach of that section could not affect the rights of the  
plaintiff. His decision in these respects was clearly correct.

12 Scott JA held that Connors J had decided the limitation issue in favour of the plaintiff  
on two grounds, that leave had been properly granted, and following the Privy Council  
decisions, that time did not commence to run against the plaintiff until the grant of  
administration.

13 As to the first he said that:

***“In view of the contents of Thomas Naua’s affidavit sworn on 9 August  
2006 I have some reservations about the first principal conclusion reached  
by the High Court.”***

14 He held however that the Privy Council cases “relied on by the High Court seemed to  
me to present an insuperable obstacle in the appellants’ path” and he refused leave to appeal  
out of time.

15 The limitation period for the action under the *Compensation to Relatives Act* was

3 years running from the date of death (s 8), and in any event dependants can sue in their own right if an executor or administrator has not commenced proceedings within 6 months of the death of the deceased (s 10).

16 The limitation period for the action under the *Law Reform Act* which provided for the survival of the cause of action vested in the deceased the moment before his death is also 3 years. Section 2(1) of that Act provided for the survival of his cause of action for the benefit of his estate, and even if he was killed “instantly” he had a cause of action before he died. Time therefore began to run before his death even if only for a split second. The point has been treated as settled since *Morgan v Scoulding* [1938] 1 KB 786, 789-90 where Lewis J said:

*“What was the injury, what was the cause of action? In this case the cause of action was the defendant negligently colliding with the deceased, whereby the deceased was ... killed. The cause of action was not the death, but the negligence of the defendant in colliding with the deceased man ... That happened before the death, and, although there may have only been a split second, or a very short interval of time, between that collision and the man’s death, the cause of action arose before his death., If it did arise before his death, then that cause of action would descend to the administrator.”*

17 The cause of action of the deceased which survived his death was complete in his lifetime and time began to run immediately. It is a well-established principle that once this happens time continues to run even if proceedings cannot be commenced until an administrator is appointed: Halsbury’s Laws of England (4<sup>th</sup> ed) Vol 28 (reissue 1997) par 825; *Sheldon v R.M. Outhwaite (Underwriting Agencies) Ltd* [1996] AC 102.

18 The Privy Council cases cited by Scott JA: *Chan Kit San v Ho Fung Hang* [1902] AC 257, and *Chetty v Chetty* [1916] 1 AC 603 are not relevant to either of the causes of action pleaded by the plaintiff. Those cases concerned claims to an account in respect of a partnership dissolved by the death of the intestate when time had not commenced to run in his lifetime. The fact that time does not commence to run in such a case until an administrator is appointed does not assist this plaintiff having regard to the express provision in the *Compensation to Relatives Act* that time runs from death, and the accrual of the other cause of action in the lifetime of the deceased.

19 The question for this Court therefore is whether the decision of Connors J that leave

was properly granted by Finnigan J can be supported despite the doubt expressed by Scott JA.

20 Section 16(1) of the *Limitation Act* applied to both causes of action because the statement of claim pleaded claims to damages for personal injuries “to any other person” (subs (2)). The grant of leave depends on satisfaction of the requirements of subs (3). This requires proof that:

***“... 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.”***

21 According to her first affidavit of 2 September 2005 the widow did not witness the accident in which her husband was killed, and could not give evidence to establish a prima facie case of negligence. She consulted solicitors without undue delay who obtained a grant of administration and sought particulars of the ownership of the vehicle from the Land Transport Authority. These were obtained on 1 December 2004.

22 According to her affidavit on 12 January 2005 the solicitors asked the Ba police traffic department for copies of the witness statements and other documents created during the police investigation of the accident. It appears however from Mr Naua’s affidavit of 19 August 2006 that the first of these letters had been sent earlier on 25 October 2004. Follow-up letters were sent by the solicitors on 29 April and 15 June, but the documents were not received until 18 July 2005 after the limitation period had expired, and then only as a result of the intervention of the Commissioner of Police.

23 In her second affidavit of 2 June 2006, which incorporated her earlier affidavit, she itemised the documents obtained from the police and said that the documents showed that the accident occurred on the grass verge of the road indicating that the driver had lost control of the vehicle, and that it was being driven at an excessive speed, and it was in a sound mechanical condition.

24 This evidence was not contradicted by the petitioners, and the widow and the solicitor

Sheetel Naidu were not cross-examined.

25 Thus there was ample evidence before Connors J of the matters referred to in s 16(3) of the *Limitation Act*. Mr Maharaj submitted that the widow and her solicitors could have relied on the doctrine of res ipsa loquitur (the facts speak for themselves) based simply on the fact that the defendants' truck had struck and killed the deceased as prima facie evidence of negligence and commenced proceedings within the limitation period. This was an unusual submission from counsel appearing for an insurer but it cannot be accepted. It was not otherwise suggested by Mr Maharaj that the affidavit evidence of the widow did not satisfy the requirements of s 21 of the Act and establish that the material facts in the police documents were outside her actual and constructive knowledge before they were received by her solicitors.

26 Scott JA said that his doubts about the propriety of the conclusion of Connors J that the requirements of s 16(3) had been satisfied were based on the affidavit by Mr Naua of 9 August 2006. This relevantly set out the chronology of events which was not in dispute, and relied on the various delays, and the alleged lack of explanation for them.

27 In our judgment there were no unexplained delays, and no undue delay so far as the widow and her solicitors are concerned. The delays were shown to be due to the failure of the police over many months to supply the documents that had been requested. Connors J was entitled to find that s 16(3) had been complied with and to strike out the limitation defence.

28 The petition is therefore dismissed with costs.



**Hon Justice Keith Mason**  
**Judge of the Supreme Court**



**Hon Justice Robert French**  
**Judge of the Supreme Court**



**Hon Justice Kenneth Handley**  
**Judge of the Supreme Court**

**Solicitors:**

**Suresh Maharaj & Associates, Lautoka for the Petitioners**  
**AK Lawyers, Ba for the Respondent**