

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 147 of 2018

BETWEEN : **ANARETA NEISOLA** of Tunalia Settlement, Nadi, Cleaner in her own capacity and as Administratrix of the Estate of **SIVANIOLO MATAKIBAU** of Tunalia Settlement, Nadi, Fiji, Driver, intestate.

PLAINTIFF

AND : **ABDUL FIRAZ KHAN** of Tunalia, Nadi, Businessman t/a Abdul Firaz Khan Logging.

DEFENDANT

Appearances : Anil J Singh Lawyers for Plaintiff

R U L I N G

1. Before is an ex-parte Notice of Motion filed on 13 July 2018 seeking the following Orders:
 - (a) that since the limitation period was outside the knowledge of the plaintiff leave be granted by this Honorable Court to file the action out of time in the interest of Justice.
 - (b) that the Plaintiff file the Settlement of Claim within 7 days of the Order being sealed.
2. The application is supported by an affidavit sworn by the applicant on 11 July 2018.
3. The background to this case is as follows. The plaintiff's late husband died on 30 June 2014 at his workplace. He was operating a forklift for his employer on some

dangerously steep ground when the machine overturned and crushed him to death.

4. After his death, the plaintiff, being a simple housewife that she is, raising four children, being unfamiliar with legal proceedings, not having any friend or relative who is familiar with the law, and, to quote her, "having very little access to the world at large", did nothing at all to assert a claim against her husband's employer.
5. She deposes that some 15 months after the death of her husband, she met Mr. Singh who wrote a letter on her behalf to her late husband's employer. There was no response from the employer. After some time, Mr. Singh then informed her to go to the Legal Aid Commission to assist her in obtaining Letters of Administration. She did this and Letters of Administration was granted on 29 September 2017.
6. On 13 December 2017, she approached Mr. Singh and asked him again to file a claim on a "no win no fee basis".
7. She also deposes that, apart from her being naïve about the law and its proceedings, it took her a while to figure out from her late husband's pay slip who the employer was.
8. She deposes that she is "very poor" and has four young children to look after. She says that after the death of her husband, she only received \$500 (five hundred dollars) from his Fiji National Provident Fund account.
9. As all practitioners who practice civil law will know, any application to extend time for a personal injury claim must be made pursuant to sections 16 and 17 of the Limitation Act.

10. This Court does have a discretion as to whether or not to grant leave to file or continue proceedings out of time.

11. In Fiji, section 4(1)(i) of the Limitation Act sets the limitation period for personal injury claims at 3 years. If time has run out, the claimant may still seek the leave of the court under section 16(1)(a) of the Limitation Act .

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.

12. The application seeking leave in this case is being made before the plaintiff has filed substantive proceedings to extend time. Section 17(2) of the Limitation Act will apply. Section 17(2) provides:

Application for leave of court

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.

13. Section 17 (2) requires the plaintiff to establish the following:

(i) he must adduce evidence which will be sufficient to establish a cause of action.

(ii) he must fulfil the requirements of section 16(3).

14. To fulfil the requirements of section 16(3), the plaintiff must prove 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.

15. The Fiji Court of Appeal in **Sharma v Sabolalevu** [1999] FJCA 56; [1999] 45 FLR 204 (27 August 1999), though dealing with section 17(3), said the following words which apply equally to section 17(2) in my view:

First, it is apparent that the three elements of s 17(3), including the requirements of s 16(3), must be fulfilled before the court can grant leave. That emerges from s 17(3) providing that the court may grant leave "if but only if" the requirements of the subsection are fulfilled. If these requirements are not fulfilled, the court lacks jurisdiction to grant leave. No question of discretion arises.

If the requirements are fulfilled the court “may” grant leave, that is the court then has a discretion. In exercising that discretion the court will have regard to such matters as the cause or reason for the delay, and whether, and if so to what extent, the defendant may have been prejudiced in his defence by the delay. Further the court can then consider whether, having regard to all the circumstances, it is just to grant leave.

Secondly we emphasise the importance of these provisions limiting the right to bring actions for personal injuries. They can have a significant effect on any person who has suffered injuries as the result of the actions of another. The provisions of s 16 and s 17 are in our view, unnecessarily complex and difficult to understand. Indeed they can fairly be described as convoluted. This is an undesirable feature of legislation that can affect the lives of ordinary citizens. It is our recommendation that the authorities give active consideration to the re-enactment of these provisions in a form that is simple, clear and easy to understand. A useful model is the provisions in the Limitation Act 1980 (UK), which fulfil these requirements, and which replaced the provisions of the 1963 UK Act, which were in terms substantially the same as those in the Fiji Act.

16. In the above case, the Fiji Court of Appeal rejected an argument that even if the plaintiff had not succeeded in adducing evidence, it was still open to the court to exercise a discretion on a balance of prejudice approach. In other words, notwithstanding any prejudice the defendant might suffer, the authorities are clear that if the requirements of section 16(3) and section 17(3) are not fulfilled, the Court does not have any discretion to exercise.
17. Having said that, I must point out also that, even where a plaintiff has in fact adduced sufficient evidence pursuant to section 17(3), and the court has granted leave, it is still open to the defendant to raise the limitation period defence under section 4 of the Limitation Act (see *Abdul v Bi* [2012] FJHC 816; HBA2.2011 (18 January 2012 as per Wati J)).

18. In England, the prejudice that might be suffered by a potential claimant is relevant in the exercise of the court’s discretion. This is because section 33(3) (a) of the UK Act provides that, in considering an application, the court shall have regard to all the circumstances of the case and in particular to the matters

referred to in the subsection (see Court of Appeal in England in **Coad v. Cornwell and Isles of Scilly Health Authority** [1997] 8 Med LR 154).

19. In Fiji unfortunately, the Limitation Act does not allow such a consideration to be taken into account.

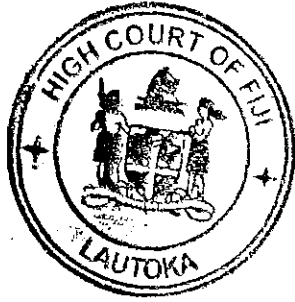
20. The policy reasons behind having a Limitation Act was reiterated by the English Court of Appeal in **Ministry of Defence (Respondent) v AB and Others** (Appellants)[2012] UKSC 9 as follows:

6. The statutes of limitation which stretch back to 1540, have been in place for two main reasons. One is to protect defendants from being vexed by stale claims. They are Acts of peace: see *A'Court v Cross* (1825) 3 Bing 329, 332 (Best CJ). The other is to require claims to be put before the court at a time when the evidence necessary for their fair adjudication is likely to remain available, or, in the words of the preamble to the 1540 Act, at a time before it becomes "above the Remembrance of any living Man...to...know the perfect Certainty of such Things". Conventionally, therefore, they have required the assertion, by claim, of a cause of action within a specified period following its accrual.

21. In this case, I regret that the reasons deposed to in the affidavit of the applicant do not establish the requirements of section 16(3). She did go and see Mr. Singh some 15 months after the death of her husband who did write to the employer. Her claim should have been filed then.

22. To reiterate, section 16(3) requires the plaintiff to prove that material facts relating to the cause of action were, or included facts of a decisive character which were at all times outside the actual or constructive knowledge of the plaintiff until a date which was 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. Knowledge or ignorance of the law is irrelevant in this equation.

23. The effect of the Limitation Act has been criticized numerous times in the past. Until the Act is amended or repealed, I am bound by its current strict provisions. The application is dismissed.



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Anare Tuilevuka
JUDGE
Lautoka.

12 September 2018