

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION
CIVIL ACTION NO. HBC 223 OF 2003L

NO. 04/2007

BETWEEN:

FRED WEHREBERG and WALBURGA WEHREBERG

Plaintiff

A N D:

COMMISSIONER OF POLICE

1st Defendant

A N D:

THE ATTORNEY GENERAL AND MINISTER FOR JUSTICE

2nd Defendant

Plaintiffs in Person

Mr. A. Tuilevuka for the defendants

Mr. U. Ratuveli of the Human Rights Commission as Amicus

Date of Hearing: 10 January 2007

Date of Judgment: 16 January 2007

FINAL JUDGMENT

- [1] An interim judgment was delivered in this matter on the 13th May 2005 following a hearing on the 12th April 2005.
- [2] The facts are canvassed in that Interim Judgment and are not repeated here.
- [3] Following upon the Interim Judgment the defendants declined to give the apology referred to in that judgment and to pay the costs assessed.

- [4] As a result of the defendant's failure it has become necessary for the matter to be further considered by the Court and for a final judgment to issue.
- [5] On the 26th September 2005 the plaintiffs filed a notice of motion which sought that the defendants pay monetary compensation for loss and damages. This notice of motion was supported by an affidavit of the plaintiff, Fred Wehrenberg, sworn on the 26th September 2005. The motion was opposed by the defendants who relied upon an affidavit of Monilola Oladipo-Ajala sworn on the 14th March 2006. The plaintiff, Fred Wehrenberg filed an affidavit in reply which was sworn on the 26th April 2006.
- [6] The proceedings were commenced by way of notice of motion which was amended to be an Originating Summons by Byrne J. on the 17th October 2003. That summons sought an order for damages for distress, anguish and pain, loss of the pleasures of amenities of life, time and finances. The notice of motion appears to do no more than reiterate the orders sought in the Originating Summons already before the Court.
- [7] As a result of the failure by the defendants to act in accordance with the proposal in the Interim Judgment there seems no alternate but for the Court to award damages to the plaintiffs and to proceed to consider the declarations sought by the plaintiffs in the Originating Summons.
- [8] In the Interim Judgment a finding was made that the police officers had discriminated against the plaintiffs and that they breached the agreement reached at the conciliation meeting on the 26th March 2002. It follows therefore that the first two declarations sought by the plaintiffs should be granted.

- [9] With respect to the damages, the plaintiffs rely upon the affidavits referred to and the material exhibited before the Court. Much of the material and many of the claims are unsubstantiated in any proper manner.
- [10] Counsel for the Defendants and Counsel for the Human Rights Commission both refer the Court to the decision of the Fiji Court of Appeal in *The Proceedings Commissioner, Fiji Human Rights Commissioner v Commissioner of Police and the Attorney General of Fiji* - Civil Appeal No. ABU0003 of 2006.
- [11] In addition to the reference to this authority, counsel for the defendants submits that many of the claims made by the plaintiffs are statute barred. The plaintiffs claim that this is not so on the basis that the claim is a "specialty" and therefore the relevant limitation period is 12 years under section 4 of the Limitation Act. A "specialty" can of course only exist where a particular obligation has been specifically declared by statute to be a specialty. The Court has not been referred to any legislation that has declared any relevant obligations to be a specialty and according the plaintiff's submission in this regard is rejected.
- [12] Neither the Originating Summons nor the Notice of Motion particularized the damages in accordance with the provisions of section 39 of the Human Rights Commission Act 1999. The plaintiffs have however in their affidavit in support of the Notice of Motion sought to detail the special damages they claim together with the general damages. There is no claim made in the pleadings or the affidavits for exemplary damages.

[13] Apart from the statements made in paragraph 6 of the plaintiffs' affidavit in support of the notice of motion, the exhibited statements and the statements made in the affidavit in reply, there is no evidence to prove the quantum of the damages claimed by way of special damages. No receipts, invoices, valuations or other items of evidence have been produced to the Court. In the circumstances the plaintiffs' claim for damages under the heading Special Damages must fail.

[14] The Fiji Court of Appeal in *Proceedings Commissioner, Fiji Human Rights Commissioner v Commissioner of Police* at paragraph 50 and onwards considered the issues relevant to a determination of an appropriate award of damages for a breach of the Bill of Rights. The Court highlighted that any award must take account of "the cost and values prevailing in Fiji rather than by attempting to mimic awards in other jurisdictions". At paragraph 56 the Court of Appeal said:

"[56] - On the other hand, it has also been recognized that awards of damages, in these cases, should not be too low, because that would diminish the respect for the essential policies which underpin the legislation."

[15] At paragraph 63 the Court said:

"Secondly of relevance is the subsequent conduct of the Public Authority responsible for the breach. The provision of a timely apology, or the making of immediate reparations, will justify a lower award than would otherwise be the case."

[16] And further at paragraph 64 the Court said:

“On the other hand the maintenance of an unjustifiable stance by a defendant as to the correctness of its actions, the refusal to participate meaningfully and bona fide in a conciliation, or the exaction of revenge in response to a lawful complaint, or in response to the bringing of proceedings, will be relevant in assessing damages. This follows from the fact that conduct of this kind will only reinforce and prolong the hurt to feelings, the loss of dignity and the humiliation arising from the breach itself, and the complainant’s sense of injustice.”

[17] In this matter as is apparent from the Interim Judgment the conduct of the defendants has been such as to increase any award of damages. Of note, the defendants refused to execute the agreement reached in conciliation by the Human Rights Commission and further refused to give the apology detailed in the Interim Judgment.

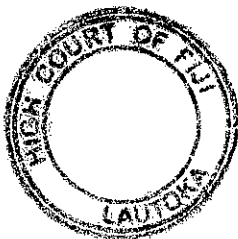
[18] Also of significance is the period of time over which the breach has occurred. It is now some 15 or 16 years since the allegations of the plaintiff against the defendants first commenced. As I said in the interim judgment, no award of damages will adequately compensate the plaintiffs for what they have suffered, some of which has clearly occurred as a result of the plaintiffs’ own behaviour but behaviour which does not justify a public authority such as the Police Force behaving in the manner that I find that it has.

[19] Again looking to the decision of the Fiji Court of Appeal in *Proceedings Commissioner, Fiji Human Rights Commission v Commissioner of Police* for guidance, I consider that any award of damages in this matter must be significantly greater than that awarded by the Court of Appeal in that matter. The factors that increase the award are the failure of the defendants to properly and adequately participate in the conciliation process and their failure to apologize at any point in time notwithstanding the Interim Judgment previously issued by the Court together with the extensive period of time over which the breach has occurred. Doing the best I can I award the plaintiffs Thirty Thousand Dollars (\$30,000.00) each by way of damages.

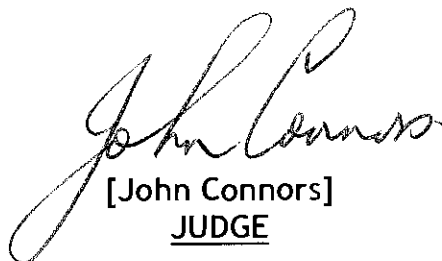
[20] I see no reason why the costs detailed in the Interim Judgment should not be confirmed together with a further order for costs with respect to the further hearing of the matter.

Orders of the Court

1. The defendants are to pay to each of the plaintiffs the sum of Thirty Thousand Dollars (\$30,000.00) by way of damages.
2. The defendants are to pay the plaintiffs' costs assessed in the total sum of Five Thousand Dollars (\$5,000.00).



At Lautoka
16 January 2007


[John Connors]
JUDGE