

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 63 of 2011

BETWEEN : **SAINIMILI DIMEKE** an infant student of Navasa Zone 3, Koronivia, Nausori, suing by her father and next friend Jiuta Baiya Qaraniqio of Koronivia, Nausori.

PLAINTIFF

AND : **SUSHIL KUMAR** of Lakena Hill, Nausori, taxi driver.

1ST DEFENDANT

AND : **BESS D ZEEARD** of Lot 26 Kuluva Street, New Town, Suva, taxi owner.

2ND DEFENDANT

BEFORE : **Justice Deepthi Amaratunga**

COUNSEL : **Mr. D. Singh** for the Plaintiff
Ms. P. Narayan for the Defendant

Date of Hearing : 5th November, 2012

Date of Decision : 3rd July, 2013

DECISION

A. INTRODUCTION

1. This is an application of the Defendant to strike out the statement of claim based on the Limitation Act. The statement of claim was filed and issued from the registry on the 8th March, 2011. The allegation of the Plaintiff's solicitor is that he filed the writ of summons on 25th February, 2011, but the writ of summons bears a stamping of a seal which denotes as 'filed' indicating the date of filing as 8th March, 2011. The alleged cause of action arose on 1st March, 2008 and obviously the action was filed outside the limitation period. If the allegation is correct, the solicitor who is aware of the consequences would have raised the issue at the time of the issuance with the registry of any delay on their part. This is an afterthought to circumvent the inherent deficiency of the writ of summons which was filed after the expiration of time period for limitation.

B. ANALYSIS

2. The Defendant in the statement of defence pleaded the defence under the Limitation Act. The alleged negligence occurred on 1st March, 2008 and the writ of summons filed in the court registry on 8th March, 2011. The time period for limitation for a personal injury based on negligence is 3 years and when the registry had accepted the writ of summons for filing it was 8th March, 2011. There is a stamping on the writ of summons indicating the date of issue and the date of filing indicating that both these dates are the same. The date of filing as well as the date of issuance was 8th March, 2011 and two different stampings are being used, indicating that the writ of summons was filed outside the limitation period prescribed in the Limitation Act.
3. The affidavit in opposition of the law clerk of the Plaintiff's solicitor, has filed a receipt dated 25th February, 2011, but there is no evidence to support that the said receipt was regarding the writ of summon filed in this action. In any event if the solicitor was aware of the time period for Limitation why was it submitted for filing on 25th February, 2011 and remained silent for more than two weeks, before filing it on 8th March, 2011. If the solicitor was aware of the expiration of the limitation time, which he ought to as a person skilled in the profession, why he did not took up the matter with the registry at the time of filing, till the issue was raised in the strike out application needs an explanation and in the proper analysis of the evidence before me the behaviour of the solicitor for the Plaintiff cannot be considered as ordinary behaviour and the contention of the Plaintiff cannot be accepted. If the Plaintiff's action was filed on 25th February, 2011 the solicitor was aware of the expiration of the limitation period within 5 days would have been a concern and no right thinking person would wait till 8th March, 2011 for the issuance of the writ of summons knowing that the time period had expired at that time and would have raised the issue immediately with the registry if this happened due the delay of the registry staff. Obviously, the contention of the Plaintiff cannot be accepted under the circumstances.
4. In contrary to the position taken by the Plaintiff, the stamping of the filing of the documents and also issuance bears the same date indicating that on the date of filing, it was issued by the registry. Even without this evidence it is

natural for a person to consider the Limitation period when that person files the writ of summons closer to the expiration of the three year time period, which is rare and would not wait till that time expired, while the documents were at the registry without issuance of the same. This is highly improbable and no reasonable person would act in such manner. If such thing happened the issue would have been raised with the registry at first opportunity rather than waiting till the issue is raised years after the incident! This is obviously an afterthought and the photocopy of the receipt cannot be considered as evidence of filing of the writ of summons of this action, on a particular day when the stamping on the writ of summons, denotes otherwise.

C. CONCLUSION

5. The Plaintiff had filed the writ of summons outside the Limitation period without seeking extension of time period in terms of the Limitation Act. In such an instance the extension is granted with the leave of the court and the extension would have granted considering the rules of extension of the limitation period. In order to circumvent the said process the writ of summons was filed without seeking leave of the court. The contention of the Plaintiff that the writ of summons was filed within the limitation period cannot be accepted on the proper analysis of the evidence before me and the action is struck off. I will not grant any costs considering the circumstances of the case.

D. FINAL ORDER

- a. The Writ of summons and the statement of claim are struck off.
- b. No costs.

Dated at **Suva** this **3rd day** of **July, 2013**.

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Justice Deepthi Amaratunga
High Court, Suva