

IN THE HIGH COURT OF FIJI AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 79 OF 2006/L

BETWEEN: FRED WEHREBERG OF NISUSU ISLAND **PLAINTIFF**

- AND** : SEKAIA SULUKA DCI380 CRIME OFFICER RAKIRAKI **1ST DEFENDANT**
- : TAUVOLI POLICE OFFICER RAKIRAKI **2ND DEFENDANT**
- : EPARAMA CPL248 POLICE OFFICER RAKIRAKI **3RD DEFENDANT**
- : COMMISSIONER OF POLICE SUVA **4TH DEFENDANT**
- : THE ATTORNEY GENERAL AND MINISTER FOR JUSTICE OF THE GOVERNMENT OF FIJI, SUVA **5TH DEFENDANT**

Appearances : Plaintiff appeared in Person
Ms Lee for the Defendants

Date of Hearing 19th February 2014

Ruling

1. The defendants filed a Notice of Motion supported by an affidavit of Mr John Pickering a Lawyer from the Office of the Solicitor General on 29th November 2013 seeking the following orders:
 - (i) That the Orders delivered by the learned Judge on the 22nd of November 2013 in Chambers be wholly set aside.
 - (ii) That cost of this matter be cost in the Cause.

2. The Orders dated 22nd November 2013, referred to in the said Motion are as follows:
 - (i) The Application to amend the statement of claim of the Plaintiff allowed as there is no representation or objections by the defendants.

- (ii) Cost will be costs in the Cause.
- (iii) Amended statement of Claim be filed on 22nd November 2013 and the copy of the same to be served on the defendants.

The background to this application

3. The Plaintiff has filed this Writ of Summons supported by an affidavit against the defendants on 23rd of March 2006 claiming damages for the physical and mental tortures and cruel, inhuman and disproportionately severe treatment and for malicious prosecution. 1st to 4th Defendants are police officers and the 5th defendant is the Attorney General.
4. Defendants have filed their statement of claim on 28th March, 2006 and the Plaintiff his reply to defence on 2nd October 2006 after which the minutes of the Pre Trial conference has been filed.
5. This matter has been fixed for hearing on several occasions but adjourned for various reasons on such hearing dates.
6. When this case was called before me on the 27th of September 2013, it was fixed for hearing on 28th of January to 31st of January 2014.
7. On the 19th of November 2013 the Plaintiff has filed a Notice of Motion seeking the following Orders from Court.
 - i) That leave be granted to amend the statement of Claim in regard to damages and costs pursuant to Order 20 Rule 5 (1) of the High Court Rules, 1988.
 - ii) That the cost of the Application to be costs in the Cause.
8. When this matter was called in Court on the 22nd November 2013 in respect of the Plaintiffs application there had been no appearance for the defendants and I have delivered the Orders in terms of the Plaintiff Notice of Motion allowing him to amend his Statement of Claim.
9. By the Notice of Motion filed by the defendants Counsel they are now seeking to set aside the said Orders delivered on the 22nd November 2013.

Defendants Position

10. In the affidavit filed in support of the defendants Notice of Motion sworn by John Pickering, Legal Officer of the Attorney Generals Chambers it is stated that:

- i) The Plaintiffs Notice of Motion and Affidavit was served on the Attorney Generals Office on the 19th of November 2013 and was for 1st call on 22nd November 2013.
- ii) That the Orders that they are seeking to set aside were granted on the 22nd November 2013.
- iii) That the defendants have a genuine reason for non appearance on this matter on the 22nd November 2013 in the High Court No. 3.
- iv) That due to an oversight by the defendants the matter was wrongly entered into the Masters diary for 26th of November 2013 resulting in there being no appearance in the Court on that particular day when the matter was called.

(Attached and marked on JPI, copy of the Masters Diary for 26th November 2013)

- v) That he was present before the Master on 22nd November 2013 and could have made an appearance for this case if he was aware of it.
- vi) That Defendants non-appearance was not in anyway due to disrespect the Court or the plaintiff.
- vii) That serious prejudice will be suffered by the defendant if the court does not grant the application to set aside the Orders of 22nd November 2013.
- viii) That the Plaintiff motion is defective as it does not have attached in his Affidavit a copy of the amended Statement of Claim which he seeks to file.
- ix) That the Writ of Summons served on the Attorney General's office is defective as no orders were given to amend it.
- x) That the Plaintiff has made amendments in his claim to include aggravated damages, exemplary damages, interest on damages and to specify general damages. It is prejudicial to the defendant that they have not been given time to address such issues contrary to the High Court Rules as this matter is fixed for Hearing on the 28th to 31st of January, 2014.
- xi) That the Cause of action arose on 8th of May 2003 more than 10 years ago and therefore opposes the amendment at this stage.

xii) That in the interest of fairness and natural justice the defendant's should be given an opportunity to address the issues raised and or sought by the Plaintiff in his amended Claim in this matter.

xiii) That the defendants are entitled to costs in this matter.

11. When this matter was taken up for hearing on the 19th of February 2014 Plaintiff appearing in person and Ms Lee from the Attorney General's department appearing for the defendants made submissions. The Plaintiff has also filed a written submission with supplementary list of Judgments in support of his submission.

12. In the light of the said background I will now consider whether I should set aside the orders delivered on the 22nd November 2013 as sought by the Defendants Notice of Motion.

Non-appearance of the Defendants Lawyers on 22nd November 2013

13. The reasons given by the defendants lawyer for not being present in Court on the 22nd November 2013 is that the matter was wrongly entered onto the Master diary for the 26th November 2013 due to an oversight. They have also attached a copy of the relevant page of the diary maintained by them.

14. According to the Court record when this matter was taken up in High Court No 3 on the previous day being 27th of September 2013 Ms Lee from the Attorney Generals department had appeared and taken notice of the hearing dates on behalf of the defendants. Therefore, the defendants Counsels were well aware that this matter was pending in High Court No. 3 and not in the Masters Court.

15. It is clearly stated in the Notice of Motion served on the defendants that this matter will be called before a Judge in Chambers at the High Court; Lautoka on Friday the 22nd day of November 2013 at hour of 9.30am. In his affidavit Mr Pickering has deposed that the matter was to be called on the 22nd November 2013 according to the affidavit and the Notice of Motion served on them.

16. Considering the above circumstances Court is of the view that entering the case in Masters Court diary for 26th of November 2013 cannot be considered as an act due to an oversight but due to carelessness. Accordingly, I am of the view that the reason given by the defendants lawyer for being not present in court on the 22nd November 2013 cannot be accepted.

Priliminary Objections to the Plaintiffs Affidavit and Writ of Summons

- 17. By the affidavit filed in support of the defendants Notice of Motion Mr Pickering has deposed that the plaintiff motion is defective as a copy of a statement of Claim which he seeks to amend is not attached to the Affidavit and that the amended writ of Summons served on the office of the Attorney General is defective as there is no order to amend the writ.
- 18. I will not consider these objection at this stage as the defendants have failed to appear on the due date and raise these priliminary objections to the Plaintiffs Notice of Motion and the writ.
- 19. It is stated in the said affidavit that it is prejudicial to the defendants that they have not been given time to address the amendments contrary to High Court Rules as this matter is fixed for hearing on the 28th January to 31st January 2014.
- 20. When this matter was taken up on the 20th January 2014 hearing dates given earlier were vacated and hearing adjourned for the 12th of August 2014 to 15th of August 2014. Therefore the defendants cannot now take up the position that they have not been given time to consider the amendments.
- 21. In the affidavit of Mr Pickering it is also stated that
 - (i) The course of action arose on 8th August 2003, more than 10 years ago and therefore opposes the application to amend.
 - (ii) Serious prejudice will be suffered by the defendants if the Orders of 22nd November 2013 are not set aside.

The Law and Analysis

- 22. The plaintiff has made his application to amend the Pleadings under High Court Rules, Order 20 Rule 5 (1) which states

5(1) *"Subject to Order 15, rules 6,8 and 9 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ or any Party to amend his pleadings on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct"*

23. **In Fiji Electricity Authority V Balram others (1970) 18 FLR Page 20**

Goudie J Stated:

"An amendment to pleadings may be permitted by the court at any stage of the proceedings for the purpose of determining the real question in controversy and if it can be made without injustice to the other side should be allowed however late and however negligent may have been first....."

24. The Principal to be applied in allowing amendments is clearly stated by Bowen L J **In Cropper v Smith (1883)26 Ch.D.700 at 710-711:**

"It is a well established principle that the object for the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights.....I know of no kind of error or mistake which, if not fraudulent or intended to over-reach, the Court ought not to correct. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace.....It seems to me that as soon as it appears that they way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right."

25. **In G.L. Baker Ltd v Medway Barlding and Supplies Ltd (1958) I W.L.R 1216 at 1231: Jenkins L. J stated**

"..... but there is no doubt whatever that it is a guiding principal of Cardinal importance on this question that, generally speaking all such amendments ought to be made "as may be necessary for the purpose of determining the real question on controversy between the parties."

26. In considering the wide discretion given to Court by law to allow amendment of Pleadings and the principals laid down by the aforementioned cases I am of the view that plaintiffs delay in making the application for the amendments should not be a reason to disallow it.

27. By the amendments plaintiff has only categorised the claims for damages and claimed the interest on damages. He has not added a new cause of action or changed the scope of action by doing so.

28. In the outcome Plaintiffs amended statement of claim will enable the court to determine the real question of controversy and all the issues arising from the

incident in this action. Therefore, I am of the view that the amendments will not cause any injustice to the defendants.

29. In view of the above reasoning I conclude that Orders delivered by me on 22nd November 2013 should not be set aside.

Accordingly, I make the following Orders:

- 1) The Notice of Motion filed on behalf of the defendants seeking Order to set aside the orders delivered on 22nd November 2013 be dismissed.
- 2) Parties to bear their own costs.

L.S. Abeygunaratne

Judge

14/03/2014

