

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

Civil Action No. 216 of 2015

**BETWEEN** : **RICHARD BEYER** of Lot 232 Kikau Place, Pacific Harbour,  
Food Scientist

**APPELLANT**

**AND** : **SETH MAHARAJ** of Lot 233 Kikau Place, Pacific Harbour  
Harbour, Businessman

**RESPONDENT**

**Counsel** : **Ms. B. Malimali for Applicant**  
**Mr. G. O'Driscoll for Respondent**

**Date of Hearing** : **18 November, 2015**

**Date of Judgment** : **15 February, 2016**

**JUDGMENT**

**INTRODUCTION**

1. The Applicant filed an action in the Magistrate's Court seeking damages and this was struck out for instituting the action outside the limitation period. In this Originating Summons the Applicant is seeking an order that said ruling of the learned Magistrate overturned on error of law. In addition to that a declaration is sought that the learned Magistrate erred in law on the basis that there was no power vested with under the Magistrates' Courts Act (Cap14). The Respondent raised a preliminary objection as to abuse of process as the Applicant had not appealed against the decision of the learned Magistrate. The learned Magistrate struck off the writ of summons on the basis that the Applicant had neither filed the action within limitation time nor had sought extension of the limitation time.

## ANALYSIS

2. The Originating Summons dated 25<sup>th</sup> June, 2015 sought following orders
  1. An order that the written ruling on Motion to Strike Out the Action in Magistrates' Court Civil Action No 65 of 2011, dated and delivered on 2.6.15 was erroneous and should be overturned.
  2. A declaration the learned Magistrate erred in law when he exercised powers that were not available to him under the Magistrates' Courts Act (Cap14).
  3. A declaration that the learned Magistrate erred in fact and in law when he struck out the Action even though it is clear from the pleadings that the cause arose after the breach of a Settlement Agreement between the parties.
3. The contention of the Applicant in short, is that the learned Magistrate does not have power to strike out a statement of claim time barred under the statute.
4. The crux of the argument of the Applicant is that the learned Magistrate lacks powers under the Magistrates Courts Act (Cap14) to strike out the writ of summons already filed.

### Preliminary Objection

5. The counsel for the Respondent stated that correct procedure for the Applicant was to appeal against the ruling of the learned Magistrate in terms of the Magistrates' Courts Act (Cap 14). The counsel for the Applicant stated that though she had filed a notice of appeal within stipulated time no petition of appeal was filed due to an oversight, but Originating process is equally available in this instance.
6. For the above contention two decisions were submitted. In *Fiji High Court Civil Action No 139 of 1994 Lila Wati et al Vs Alitia Vakaraubula* (unreported) decided on 6<sup>th</sup> August, 1996, Fatiaki J (as he then was) held that even without a formal Originating process when the assistance of the court is sought, for enforcement of a judgment of a lower court, by an officer of the court (in that instance the Chief Registrar) such assistance could be granted. His lordship after considering several local and foreign authorities quashed a consent judgment and also writ of possession granted by the Magistrate's Court. So, in that instance even without an intervention by either of the



parties to the action, the High Court exercising its supervisory powers under the Constitution quashed not only one decision, but two decisions including a consent judgment. This highlighted the wide supervisory powers of the High Court in order to meet the justice. One of the judgments cited by Fatiaki J (as he then was) *Mahadeo Sharma & others Vs Carisse Caldwell* (1975) 21 FLR 85.

7. In *Mahadeo Sharma* (supra) Fiji Court of Appeal affirmed a decision of High Court that quashed a 7 year old consent judgment entered on behalf of the minor on an allegation of improper consent obtained from the mother of the child. In that case the consent judgment of the Magistrate's Court was quashed by the High Court by an Originating Summons. This judgment of the Court of Appeal affirmed that the High Court's decision, but the court of appeal fell short of giving a blank cheque to parties to challenge the decisions of the lower courts by way of Originating Summons when there is established procedure for a right of appeal.

8. Fiji Court of Appeal in *Mahadeo Sharma* (supra) Gould V.P held,

*'The final difficult question is whether the orders made by the learned judge in these proceedings can be permitted to stand, on the basis that all essential parties were before him and that he would have had jurisdiction to make the orders if sitting in an appellate capacity . The question of delay which he had to consider would be the same if he had to consider would be the same if he had had to consider it on an application for enlargement of time for appeal. On the one hand it is undesirable, in the interest of uniformity, to condone breaches of proper procedure. On the other hand, it is undesirable, in the interests of uniformity, to condone breaches of proper procedure. On the other hand, the wide supervisory powers given to the Supreme Court indicate a desire on the part of the legislature to subordinate procedural matters to substantive interests, which is in accord with modern tendencies. That the interests of an infant are concerned would not be permitted to encourage deviation from proper principle. Having given this matter my best consideration I think in the circumstances that it is proper to regard the defect as procedural rather than basically jurisdictional and it is in the better 'interest of justice that orders made by the learned judge be permitted to stand.'* (emphasis mine)

9. So the Fiji Court of Appeal in *Mahadeo Sharma* (supra) was critical about the procedure adopted to quash the decision of the Magistrate's Court. In fact the Fiji Court of Appeal

categorically stated that such a procedure was defective. So to use that judgment to substantiate procedure adopted by the Applicant in the present action would not help him. The procedure for an appeal against a decision of the Magistrate, are clearly laid down and needs no repetition here. If that procedure is not followed there should be some explanation for not following the correct procedure and good reason for the court to intervene with the decision of the learned Magistrate. If the decision of the Magistrate is arbitrary or wrong on the face of it that may give a reason for the High Court to consider the Originating process as a mere procedural defect, in the exercise of wide supervisory jurisdiction.

10. In my judgment the decision of the learned Magistrate delivered on 2<sup>nd</sup> June, 2015 cannot be considered defective on the face of it. The learned Magistrate has carefully analyzed the Section 16 (3) and Section 17(3) of the Limitation Act (Cap 35) before striking out the action.
11. The applicant had filed a writ of summons in the Magistrate's Court for the damages for alleged assault by the Defendant. According to the ruling of the Magistrate the said action was filed after 3 years 5½ months after the alleged incident. These facts were not disputed.
12. There was no application for extension of time for limitation filed in the Magistrate's Court. The facts of this case do not support intervention of this court to interfere with the ruling of the learned Magistrate delivered on 2<sup>nd</sup> June, 2015. If the Applicant was not satisfied with the ruling of the Magistrate correct procedure for an appeal relating to ruling should have been followed. The Originating process is not the procedure for an appeal, though there can be exceptions as stated in the case of *Mahadeo Sharma & Others Vs Carisse Caldwell* (1975) 21 FLR 85 in the better 'interest of justice'.
13. In the circumstances I allow the preliminary objection raised by the counsel for the Respondent. Though this was raised as preliminary issue earlier I refrained from deciding on the preliminary issue separately without hearing of the substantive Originating



Summons as the preliminary issue invariably involved the merits of the Originating Summons. Having considered all the undisputed facts before me I agree that the Applicants have abused the process by resorting to Originating Summons when they had already filed a notice of appeal.

14. Without following the correct procedure for appeal against the ruling dated 2<sup>nd</sup> June, 2015 a fresh application for the same relief by way of Originating Summons is an abuse of procedure. The two cases that were discussed in the judgment can easily be distinguished from the present action. In the said cases the appeal processes were not invoked at all and subsequently abandoned like in this case. The said cases were where the wide discretion of the supervisory power were exercised in the better interest of the justice. In sharp contrast if such supervisory power is exercised in the present case it cannot be said in the '*better interest of the justice*' but condoning an abuse of process by the Applicant. Since I have held that filing an Originating Summons in the present case as an abuse of process I need not consider other issue whether the learned Magistrate could strike out the writ of summons that was time barred, but I deal with the said issue below.
15. Without prejudice to what I have stated in regard to the manner and procedure adopted by the Applicant, I now deal with the issue of whether the learned Magistrate had power to strike out the writ of summons filed by the Applicant as it was time barred.
16. The Limitation Act (Cap 35) applies to all the actions filed in a court of law. Section 2 of the Limitation Act(Cap 35) defines Action and Court in the following manner;  
*"action" includes any proceedings in a court of law;*  
*"court", in relation to an action, means the court in which the action has been, or is Intended to be, brought*
17. The Civil Action No 65 of 2011 was filed in the Magistrate's Court and that action was filed in the said court of law and the Limitation Act (Cap 35) applies to it. The provision contained in the Limitation Act (Cap 35) applies to all the courts and also to any of the proceedings in court of law. This Limitation Act (Cap 35) applies not only to the court in

which an action is instituted but also to an intending court before the action was instituted.(See Section 2 of Limitation Act (Cap 35). So an extension of time period can be brought in terms of sections 16 and 17 of Limitation Act (Cap 35) in the same court before the institution of the action.

18. Since the Limitation Act (Cap35) applies to court of law in which the action is filed, the applicability of Limitation Act (Cap35) to the Magistrate's Court cannot create any confusion.
19. If an action is filed in violation of the limitation period it should be struck out as soon as it is brought to the notice of the learned Magistrate. This is what had happened in this instance. The Applicant could not file an action for damages after 3 years from the date of alleged assault, without seeking an extension of time. In such a scenario the writ of summons filed in the Magistrate's Court was defective *in limine* and needs to be struck off.
20. It has now become a fad to blame the court registry for acceptance of writ of summons outside the limitation period. The acceptance of writ by the registry is not a waiver of right of the other party who were yet to serve the summons.
21. It should also be noted that some of the pleadings are so vague that the registry is not the best place to deal with issues of limitation and a judicial act should not be left solely at the hands of the registry.
22. The Respondent who was the defendant in Civil Action 65 of 2011 in Magistrate's Court filed a motion seeking strike out of the action as it was filed outside the jurisdiction. The learned Magistrate struck off the action as it was time barred.
23. The learned Counsel for the Applicant states that there is no provision in Magistrates' Courts Act (Cap14) or the Rules made under that allowing a Magistrate to deal with strike out application. This is correct, but this does not mean that a Magistrate is bound to hear an action to the conclusion, that was filed outside the limitation period. Such a writ



of summons is defective *in limine* and must be dealt by the court as soon as it is brought to the notice.

24. The Limitation Act (Cap 35) provides jurisdiction for a court of law to reject any action filed outside the limitation period subject to the provisions in the said Act. If that is not stated specifically that is implied and the purpose of the limitation is not served if that is not done.
25. In an action filed to recover damages for personal injury needs to be filed within the limitation period. The said period is not an inflexible one and the same Act provides for extension of time with the leave of the court. This extension can be granted by the intending court where action will be instituted, including a Magistrate's Court.
26. The procedure for seeking extension of time is not laid down in the Limitation Act (Cap 35). It also does not state which court should exercise such power of extension of time period. That does not mean that extension of time cannot be granted by a Magistrate's Court. By the same token if an action is filed outside the limitation period, the procedure for dismissal or strike out of the action is not contained in the Limitation Act (Cap 35), but this lacuna does not deprive a Magistrate from striking out a writ that is time barred.
27. If there are not clear provisions in the Magistrate Court Rules that should not be considered as the end of the matter. The guidance could be found in the Magistrate Court Rules Order 3 rule 8 which deal with

*'Application of Supreme Court Rules*

***8. In the event of there being no provision in these Rules to meet the circumstances arising in any particular cause, matter, case or event, the court and/or the clerk of the court and/or the parties shall be guided by any relevant provision contained in the Supreme Court Rules. (emphasis added)***

28. So what the court below has to determine before seeking guidance from the High Court Rules of 1988 is whether there is no provision in the Magistrates' Courts Rules 'to meet the circumstances arising in any particular cause, matter, case or event.' In my judgment

this requirement is fulfilled in this instance, though the learned Magistrate has not addressed this issue in the ruling dated 2<sup>nd</sup> June, 2015.

29. The guidance is found in the Order 18 rule 18 of the High Court Rules of 1988 which deals with striking out of pleadings. It can be used as a guidance to strike out pleadings and also to dismiss the action in the court below. It should be borne in mind the basis of strike out is the right of the Respondent when the alleged claim is time barred, subject only to the extension of time period. He can ask the court for dismissal of the action without considering the merits (see *Yew Bon Tew v Kenderann Bas Mara* 1982 3All ER 833). The court in which the action is filed has the necessary jurisdiction either to extend the limitation period in terms of Sec 16 and 17 of the Limitation Act (Cap 35) or to refuse and extension before the action was filed. At the same time it has jurisdiction to strike out any pleading and dismiss the action that is time barred. In the Magistrate's Court this power is exercised using Order 18 rule 18 of the High Court Rules of 1988 as a guidance. It is an abuse of process to file the action that is statute barred in the Magistrate's Court.

### CONCLUSION


30. This Originating Summons needs to be struck off *in limine* for abuse of process. Even if am wrong on that the learned Magistrate had necessary power to strike out an action that is statute barred and he had correctly applied the Limitation Act (Cap 35) to strike out the action. The cost of this action is summarily assessed at \$2,000.

### FINAL ORDERS

- a. The Originating Summons struck off, the action dismissed.
- b. The cost is summarily assessed at \$2,000.

Dated at Suva this 15<sup>th</sup> day of February, 2016



  
Justice Deepthi Amaratunga  
High Court, Suva