IN THE HIGH COURT OF FIJI
AT LAUTOKA
[CIVIL JURISDICTION]

HBC
CIVIL ACTION NO. 79 OF 2006

BETWEEN: **FRED WEHRENBERG** of Naisusu Island, Cakaudrove.

PLAINTIFF

AND: **SEKAIA SULUKA** DC 1380 Crime Officer, Rakiraki, Ra.

1ST DEFENDANT

TAUVOLI Police Officer, Rakiraki, Ra.

2ND DEFENDANT

EPARAMA CPL 248 Police Officer, Rakiraki, Ra.

3RD DEFENDANT

COMMISSIONER OF POLICE Vinod Patel Building, Nabua, Suva.

4TH DEFENDANT

THE ATTORNEY GENERAL AND MINISTER FOR JUSTICE, Suvavou House, Victoria Parade, Suva.

5TH DEFENDANT

Before:

Priyantha Nāwāna J.

Counsel:

Plaintiff	:	In Person
Defendants	:	Mr R Green with Mr J Lewaravu and Ms M Lee of the Attorney-General's Chambers
Written-submissions	:	19 Oct. and 19 Nov. 2012 (Defendants) 29 Oct. and 07 Dec. 2012 (Plaintiff)
Date of Hearing	:	05 April 2013
Date of Ruling	:	08 April 2013

R U L I N G

1. The plaintiff instituted this action by a writ of summons dated 23 March 2006 seeking special damages, general damages, damages for mental anguish, pain and suffering and costs against 1st-3rd defendants, the Commissioner of Police and the Attorney-General.

2. The claims were founded on alleged improper and/or unlawful conducts - including trespass, intimidation and physical assault - directed at the plaintiff on 08 May 2003 by 1st-3rd defendants whilst being in police service at Rakiraki. Liability for the alleged conducts was sought to be imputed on the state by citing the Commissioner of Police and the Attorney-General as the 4th and 5th defendants respectively.

3. The defendants, by their statement of defence dated 28 July 2006, denied the allegations of any improper and/or unlawful conduct by 1st-3rd defendants and stated that the plaintiff's claims were based on delusions. The defendants also pleaded that the action was time-barred under the Limitations Act.

4. As the case stood for trial on 16 October 2012, Mr R Green, learned counsel for the defendants, moved court for determination of the issue of *res judicata* as a preliminary issue under O 33 r 3 of the High Court Rules 1988 (High Court Rules) on the basis of the summons dated 12 October 2012 in view of the series of civil actions against the state with the same and/or similar causes of action by the plaintiff.

5. Court, having considered the summons, decided to determine the matter whether the plaintiff's action is barred on application of the principle of *res judicata* in its wider sense, as provided for by O 33 r 3 of the High Court Rules.

6. O 33 r 3 states:

> *Court may order any question or issue arising in a cause or matter, whether of fact or of law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.*

Rule 7 of the Order further provides that:

> *If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.*

7. The plea of *res judicata,* which is founded on the principles of estoppel, is capable of disposing of a cause before court fully or substantially, if it succeeds. Court, is therefore, bound to consider the matter in light of the foregoing provisions of the High Court Rules. (See ***Everett v Ribbands*** [1952] 1 All ER 823; ***Carl-Zeiss-Stiftung v Herbert Smith and Co. and another*** [1968] 2 All ER 1002. In this regard, the principles as expounded by Lord Roskill of the House of Lords in ***Ashmore v Corp. of Lloyd's*** [No. 1] [1992] 2 All ER 486 at 488, are instructive. They are:

> *The Court of Appeal appear[s] to have taken the view that the plaintiffs were entitled as of right to have their case tried to conclusion in such manner as they thought fit and if necessary after all the evidence on both sides had been adduced. With great respect, like my noble and learned friend, I emphatically disagree. In the Commercial Court and indeed in any trial court, it is the trial judge who has control of the proceedings. It is part of his duty to identify the crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judge's time as is necessary for the proper determination of the relevant issues. That was what Gatehouse J, in my view entirely correctly, sought to achieve by the order which he made, an order which as all your Lordships agree should be restored.*

8. The plaintiff, however, did not have adequate notice of the summons to meet the plea; hence, time was granted for parties to file written-submissions. Written-submissions on behalf of the defendants in support of the plea of *res judicata* were filed on 19 October 2012 with prompt notice to the plaintiff. The plaintiff replied by his written-submissions dated 29 October 2012. Proceedings were adjourned until 31 January 2013 to receive submissions in reply by parties on which date the hearing was fixed for 05 April 2013 at the request of the plaintiff as he had to prepare himself for his other cases.

9. At the hearing on 05 April 2013, the plaintiff made oral submissions and relied on written-submissions as well. Ms Lee, learned counsel for the defendants, relied only on the written-submissions.

10. It is clearly discernible from the submissions of the parties that this case is one in the series of litigations by and against the plaintiff after he became resident for several years in Nananu-i-Ra, an island off Rakiraki, prior to July 2005. Litigations were resulted initially from the constant complaints made by the plaintiff on alleged nefarious activities of the people in the locality followed by counter-complaints against the plaintiff over a

decade or so. Police, too, were embroiled in the imbroglio of complaints against them as the plaintiff berated the police, too, alleging that they [the police] were complacent over his complaints on alleged misdeeds of the people of the locality.

11. There is indeed no necessity to delve into all the cases in greater detail for the purposes of this ruling. Instead, it would suffice for me to consider whether the case bearing No HBC 223/2003L could bar the plaintiff from proceeding with the case in hand on application of the principles of *res judicata*. Both the plaintiff and the defendants, on the basis of their submissions, are in agreement that it is the Case No HBC 223/03, which was concluded on 16 January 2007, could, if at all, impact the case before me on application of the principles of *res judicata*.

12. The plaintiff, by his notice of motion dated 01 July 2003, instituted Action No HBC 223/2003 in this court against the Commissioner of Police and the Attorney-General apparently under Section 41 of the Constitution of the Republic of Fiji Islands of 1997 read with Section 36 of the Human Rights Commission Act 1999 for alleged violation of his constitutional rights. The civil proceedings on the notice of motion, which was subsequently amended to be Originating Summons seeking following reliefs, was filed by the plaintiff in the wake of the Human Rights Commission (the HRC)'s disinclination to institute proceedings by itself under Section 36 (1) of the HRC Act after an inquiry. The reliefs claimed were:

    (i) A Declaration that the 1st Defendant and his Senior Officers have engaged in unfair discrimination by denying the Plaintiff equal protection under the Section 38 of the 1997 Constitution;

    (ii) A Declaration that the 1st Defendant and his Senior Officers breached Paragraph 1-3 of the agreement reached in the conciliation meeting on 26.03.2002 between him, the Plaintiff and the Fiji Human Rights Commission;

    (iii) An Order restraining the 1st Defendant from continuing or repeating the said unfair discrimination against the Plaintiff;

    (iv) An Order that the 1st Defendant abides by the undertaking made by him and his Senior Officers at the Conciliation meeting dated 26.03.2002; and,

    (v) An Order for damages for distress, anguish and pain, loss of the pleasures of amenities of life, time and finances.

13. Mr Green, learned counsel for the defendants, contended that basic facts pleaded in both cases were in relation to alleged acts of police brutality and referred to paragraph 18

(c) of the affidavit dated 01 July 2003 of the plaintiff in support of the originating summons. Paragraph 18 (c) read that:

> *That the following incidents show the extent of police brutality and persecution directed against me...physical and mental torture by Rakiraki Police Officers on 08 May 2003, which [was] being investigated by the Fiji Human Rights Commission.*

14. Learned counsel, in the circumstances, contended that the cause of action in the present case also should have been pursued along with HBC 223/03 in the wider sense of *res judicata* on the basis of the authority in ***Henderson v Henderson*** [1843] 3 Hare 100 at 115; [1843-60] All ER 378 at 381. The rule, as laid down in *Henderson* (supra), reads thus:

> *In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case[s], not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.*

15. In ***Barrow v Bankside Agency Ltd and Another*** [1996] 1 WLR 257; [1996] 1 All ER 981 at 983, the Court of Appeal discussed the rule in *Henderson* (supra) and stated that:

> *...[T]he rule in Hendersen v Hendersen [1843]3 Hare 100 is very well known. It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves,*

that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed.

16. Lord Bingham in ***Johnson v Gore Wood & Company*** [2001] 1 All ER 481 at 498-499, considered the principle and held:

> *...But Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceedings involves what the court regards as unjust harassment of a party. <u>It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive</u>. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. ...*

(Underlined for emphasis. See also ***19 CJQ*** [***Civil Justice Quarterly***]; July 2000)

17. The plaintiff submits that HBC 223/2003L was initiated consequent upon a 'Conciliation Agreement' reached on 26 March 2002 in the course of the proceedings had before the HRC for constitutional redress. He further submits that the defendants could not be entitled to the plea of *res judicata* on the basis of the principles in *Henderson* (supra) as there were special circumstances so as to exclude its applicability to bar the proceedings in this case.

18. The plaintiff relied on paragraph 18 (c), referred to above, of his affidavit dated 01 July 2003 to show that the events that formed the basis for the cause of action in this case were under investigation up until 2006 by the HRC; and, hence his originating summons dated 01 July 2003 could not encompass the alleged incidents of 08 May 2003.

19. It is admitted that HBC 223/2003L was concluded by a final judgment on 16 January 2007 by Connors J. in pursuance of the originating summons by the plaintiff to give effect to the proceedings had before the HRC at the suit of the plaintiff. The process was, in my view, rightfully set in motion by an originating summons as the plaintiff had not intended to litigate on any evidentially disputable matters against the defendants. The plaintiff, instead, sought the enforcement of some consent order of the HRC; or, in the alternative, an award of damages in the form of constitutional redress.

20. In *Johnson v Gore Wood and Co* (supra), the House of Lords held that when considering whether a second claim is an abuse of process, a broad and merit-based judgment had to be made taking into account all the public and private interests involved and all facts. A second claim should be struck-out only if, in all the circumstances, it should rather than merely could, have been brought in the first claim.

21. The plaintiff admittedly could not have incorporated the alleged events of 08 May 2003 when he sought constitutional redress as the matters were under investigation by the HRC until early 2006. Moreover, the two cases were founded on two different bases namely, HBC 223/2003/L on originating summons for enforcement of some orders of the HRC where facts were not intended to be evidentially disputed; and, HBC 079/2006/L (this case) on writ of summons where the facts were kept open for the defendants to evidentially dispute.

22. In the circumstances, I hold that the defendants are not entitled to succeed in their plea of *res judicata* even in its wider sense on the application of the foregoing principles albeit the issue was validly raised in terms of O 33 rr 3 and 7and of the High Court Rules. I, accordingly, dismiss the summons but award no costs having regard to the legal validity in seeking a determination on the issue before the trial.

23. Orders, accordingly.

Priyantha Nāwāna
Judge
High Court
Lautoka
08 April 2013

HIGH COURT OF FIJI
LAUTOKA