KHUSH NOOR NISHA v ATTORNEY-GENERAL OF FIJI (HBC0177 of 2007L)

HIGH COURT — CIVIL JURISDICTION

TUILEVUKA M

11 March 2010, 25 April 2012

Practice and procedure — applications — application to strike out — claim for damages — loss of entitlement to compensation — delay in filing claim — time limit — extension of time limit — excusable delay winding up — High Court Rules O 18 rr 18(1)(a), (b), (c), (d) — Workmen's Compensation Act s 13, 13(a), 13(b).

The plaintiff's husband died during and in the course of employment. The plaintiff alleged that the Department of Labour failed to file a claim within 12 months and hence, caused her to lose her entitlement to compensation under the Workmen's Compensation Act. She sought special damages, general damages and interest from the department. The Office of the Attorney-General sought an order to strike out the plaintiff's claim. An affidavit by the senior labour officer stated that the delay was excusable and that, under s 13(b) of the Workmen's Compensation Act, the time limit could be extended to six years. Subsequently, the Department of Labour filed a claim for compensation. The Magistrate's Court ordered the employer to pay compensation to the dependents of the deceased. Meanwhile, a petition was filed to wind up the employer's company. The plaintiff alleged that if the labour officers had taken timely action, the employer would be in better position to pay the compensation.

Held –

The question of whether or not the delay in filing the claim was excusable under s 13(b) of the Workmen's Compensation Act is for the Department of Labour to prove at trial. The Department needs to be cross-examined on its processes, rather than the issues being dealt with summarily by way of affidavit evidence. The onus is on the plaintiff to establish that, had a claim been filed on time, the employer would have settled any claim filed. This also cannot be dealt with adequately by way of affidavit evidence.

Application to strike out dismissed.

Cases referred to

Flour Mills of Fiji Ltd v Labour Officer [1992] FJSC 4; [1992] FJHC 12; Hba0010j.91s (13 February 1992); *Kitchen v C Koch & Co Ltd* [1931] AC 753; *Len Lindon v The Commonwealth of Australia* (No 2) S 96/005, considered.

Sahu Khan for the Plaintiff/Respondent.

Prasad for the Defendant/Applicant.

[1] Tuilevuka M. Abdul Haroon was 35 years of age when he died on 23 June 2005. On the day in question, he was operating a Skidder for and on behalf of his employer, United Landowners Co Ltd ('ULCL')on a slope at Nabou Pine Forest. Haroon was using the Skidder to load some logs onto a cargo truck. ULCL was - at all material times - engaged in the business of logging. Both the Skidder and the cargo truck were being used on the particular occasion in question towards ULCL's business.

[2] At some point - the Skidder brakes failed. This caused the Skidder to roll downslope. Haroon ended up being crushed under the weight of the Skidder. He died immediately on the spot.

[3] In compliance with its duties as employer under the Workmen's Compensation Act, ULCL reported the accident by completing and sending the relevant LD Form/C/1 to the Department of Labour on 04 July 2005. LD Form/C/1 sets out some basic information about Haroon and also an outline of the accident which caused Haroon's demise.

[4] Upon receiving ULCL's report, the Department of Labour immediately set out to investigate the accident. The Department completed the LD Form/C/2 which is its Notice of Claim by or on Behalf of a Workman. This - it sent to ULCL on 25 August 2005. Then it wrote letters to the Police on 25 October 2010, 25 May 2006 and on 21 August 2006[1] to request a copy of their investigation report. A letter was also sent to the Land Transport Authority to request a copy of their Investigation Report[2].

[5] I gather from the affidavit of Sosiceni Manulevu, Acting Senior Labour Officer that -at the time the Office of the Attorney-General filed this striking out application in 2007, the Department was still awaiting these reports from the Police and from the LTA. This, according to Mr Manulevu, was the reason why the Department was not able to file a claim within twelve months of the date of the accident.

[6] That delay is the cause of Nisha's (Haroon's surviving spouse) grievance. Her statement of claim (filed in June 2007) alleges that the Department's failure to file a claim within the stipulated twelve-months (under s 13 of the Workmen's Compensation Act) has caused her to loose her entitlement to compensation under the Workmen's Compensation Act.

[7] The maximum entitlement which the dependents of a deceased workman who is killed as result of an accident which occurred during and in the course of employment is $24,000. Nisha claims this sum from the Department in special damages. Nisha also seeks general damages and interest at 13.5% from June 2005 until payment.

SECTION 13 – WORKMEN'S COMPENSATION ACT

[8] Section 13 of the Act reads as follows (so far as relevant):

> '13. Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given by or on behalf of the workman as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within twelve months from the occurrence of the accident causing the injury …:
>
> Provided that –
>
> (b) the failure to make a claim for compensation within the period above specified shall not be a bar to the maintenance of such proceedings if it is proved that –
>
> (i) the failure was occasioned by mistake or other good cause; or
>
> (ii) the employer failed to comply with the provisions of subsection (1) or (2) of s 14,
>
> so, however, that no proceedings for the recovery of compensation shall be maintainable unless the claim for compensation is made within a period of six years from the date of accident (amended by 27 of 1975, s.9).'

1. Copies of these letters are exhibited in the Affidavit of Sosiceni Manulevu.
2. Copy of letters dated 25 October 2005, 26 May 2006 and 21 August 2006 by the Ministry of Labour to the District Supervisor of LTA is exhibited to the Affidavit of Sosiceni Manulevu.

[9] It is common ground between the parties that s 13(a) sets the time limit for filing a claim at twelve months. However – the time limit for filing a claim is extended to six years under s 13(b) if – by mistake or other good cause – compliance with the twelve month time limit is not possible.

[10] The following cases were referred to by the Office of the Attorney-General to illustrate some instances where the time limit was extended to six years - *Flour Mills of Fiji Ltd v Labour Officer* [1992] FJSC 4;; [1992] FJHC 12; Hba0010j.91s (13 February 1992) and *Kitchen v Koch* [1931] A.C. 753.

[11] In *Flour Mills of Fiji*, the workman sustained a knee injury in November 1984 in the course of employment. The Labour Department filed a claim for compensation for and on his behalf on 09 December 1987.

[12] The Court began with the general statement that - because the claim for compensation' was not made within twelve months from the occurrence of the accident, it was prima facie not maintainable. But the Court then went on to say that despite being out of time *vis a vis* s 13(a) of the Act, the claim could still be saved under one or other of the excuses enumerated in proviso (b) to s 13 if the facts so justify.

[13] The issue that the court had to consider was the percentage of incapacity suffered by the injured workman and also – flowing from that – the amount of compensation that he was entitled to. The answer to both questions hinged on the medical report that was being awaited. Fatiaki J held that because the delay was caused by the late Medical Report from the doctor which amounted to a good cause. Therefore - the claim for compensation could be saved under s 13(b).

[14] In *Kitchen v C Koch*, the House of Lords held on the facts that the failure to make the claim within the prescribed period was due to the delay of the certifying surgeon. And so far as the workman was concerned, that failure was occasioned by reasonable cause, within proviso (b) to subsection 1 of s 14. The House then held that the workman was entitled to compensation.

[15] In this case, the Office of the Attorney-General submits that the accident report was vital to their pre-claim investigations to establish whether or not the skidder had mechanical problems as claimed by ULCL.

[16] The question I ask is – could a claim have been filed anyway within twelve months of the accident while the Department awaited these reports?

APPLICATION TO STRIKE OUT

[17] The Office of the Attorney-General seeks an Order to strike out Nisha's claim. Its application is filed pursuant to O 18 r 18 (1) (a), (b), (c) and (d) of the High Court Rules 1988 on the ground(s) that the claim discloses no reasonable cause of action, is scandalous, frivolous or vexatious and is otherwise an abuse of the process of the Court.

[18] The affidavit of Sosiceni Manulevu[3] sworn on 30 August 2007 is filed in support of the application. He sets out evidence to show that the Department was still investigating the case and was awaiting the police and LTA reports when Nisha filed her claim against the Department.

[19] The Department's delay – according to Mr Manulevu -is being caused by a third party and is therefore excusable under s 13 (b) of the Act. And because the delay is excusable as such, the period within which the Act allows a claim to be filed is extended to 6 years.

3. Acting Senior Labour Officer – Nadi.

NADI MAGISTRATE'S COURT RULING

[20] Some ten months after the Department filed its application to strike out, it actually filed a claim for compensation under the Workmen's Compensation Act at the Nadi Magistrates Court on 24 June 2008 i.e. exactly three years after the accident on 23 June 2005 (see paragraph one above) (as per supplementary affidavit of Mr Ropate Green filed on 22 December 2009).

[21] On 13 October 2008, judgment on the above claim was entered by Resident Magistrate M. N. Sahu Khan after the Department formally proved the claim against ULCL. In his ruling, Magistrate Sahu Khan ordered inter alia that ULCL pay the sum of $24,000 in compensation to Haroon's dependents plus $500 costs. The Office of the Attorney-General has since sealed the Order and served it on ULCL on 16 October 2009. I note from a copy of Magistrate Sahu Khan's Ruling which is exhibited in Mr Green's affidavit that he did actually consider the evidence of the Police investigations into the accident.

WINDING-UP PROCEEDINGS

[22] On 03 November 2009, a petition of All Engineering (Fiji) Limited to wind up ULCL was advertised in the Fiji Sun. That petition was presented by Faiz Khan Lawyers (HBE 40 of 2009). Upon seeing this advertisement, the A-G's Office immediately filed a Notice of Intention to Appear in Support of the Petition in that winding up proceedings. A copy of the said Notice is exhibited in Mr Green's affidavit.

[23] An order to wind up ULCL was handed down in February 2010 by this Court and sealed in the same month.

NISHA'S OPPOSITION

[24] In her first affidavit, Nisha simply states in response to Manulevu's affidavit that she had placed her complete trust in the Department to ensure that investigations are carried out in full and that a claim is filed on time.

[25] In her second affidavit filed on 11 March 2010 in response to Green's affidavit, Nisha opines as follows in paragraphs 3 to 5:

> 3. …if the labour officers had taken appropriate action in time then the employer would have been in a better position to pay compensation that I was entitled to under the **Workmen's Compensation Act**.
>
> 4. …the labour officers were negligent in not taking the appropriate action against the Directors of the Company if the employer Company was carrying on business at a loss.
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> (and in response to the allegation that there was a Winding Up matter before the Court, Nisha states as follows):
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> 5. …I have no knowledge of the same and in any event, any cause of action in this Action is against the acts and omissions and negligence of the labour officers and I repeat the contents of the Statement of Claim herein and to the best of my knowledge information.

ISSUE

[26] The main issues raised in this application are:

> (i) whether the facts deposed in the affidavit of Sosiceni Manulevu are sufficient to establish an excusable delay such as to extend the limitation period in this case from twelve months to six years under s 13 (b) of the Act?
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> (ii) in any event, whether the fact that a claim under the Workmen's Compensation Act has since been filed at the Nadi Magistrates Court - and a ruling obtained thereon in favour of the dependents – means that any cause of action that Nisha might have had is now abated?

(iii) whether there is a sustainable cause of action in the argument that - 'had the labour officers taken appropriate action in time, then the employer would have been in a better position to pay compensation'?

WHETHER THE FACTS DEPOSED IN MANULEVU'S AFFIDAVIT ARE SUFFICIENT TO ESTABLISH AN EXCUSABLE DELAY?

[27] The question whether or not the Labour Officer's delay was excusable under s 13 (b) seems at first to be redundant and a compromise on the finality of the Nadi Magistrates Court ruling. But this is an issue that is best postponed for trial in my view so that the evidence could be tested under cross examination. I say this because – *firstly* - this issue was not raised at the Nadi Magistrates Court and *secondly* – it is still an open issue as to whether a claim could have been filed anyway under the Act within twelve months of the accident - in the particular circumstances of this case. In saying this, I am mindful that the basic facts were never in dispute right from the start between ULCL and the Department. These basis facts are as follows: that Haroon died as a result of an accident whilst driving a Skidder belonging to his employer – ULCL – and whilst loading logs belonging to his employer onto a truck, which truck either belonged to his employer or was being hired by his employer in connection with its business. Against that background – the onus would have been heavy on ULCL to convince the Court not to award any compensation.

"Had the Labour Officers taken appropriate action in time, the employer would have been in a better position to pay compensation" –

IS THERE A SUSTAINABLE CAUSE OF ACTION ON THIS ARGUMENT?

[28] This really is a novel issue that was not at all pleaded by the plaintiff. It only became an issue when the Affidavit of Mr Green highlighted that ULCL has in fact been wound up.

[29] But whether or not ULCL would have been in a better position to pay the claim – and/or would have actually settled any such claim had one been filed within twelve months of the accident – these questions will necessarily re-open the issue of whether or not the Labour Officers did fail to take appropriate action in time. Also –any Court dealing with these questions may end up having to embark on an inquiry as to ULCL's solvency status (or possible solvency status) within a year of the accident or shortly thereafter.

COMMENTS

[30] From where I sit, on the pleadings and on the material in all the affidavits filed, prima facie, Nisha's late husband Haroon, died during and in the course of employment. That was always clear right from the outset. As such, the onus was always heavily on ULCL to prove otherwise. There was a delay in filing the claim. Whether or not that delay is excusable under s 13(b) of the Act is for the Department to prove at trial. The Department needs to be cross-examined on its processes. I am uncomfortable with dealing with these issues summarily by way of affidavit evidence.

[31] The onus is on Nisha to establish that had a claim been filed on time – assuming the Department fails to discharge the above burden – that ULCL would have settled any claim filed. This also cannot be dealt adequately by way of affidavit evidence – and must necessarily hinge on the outcome of the above.

[32] I have an inkling that Nisha will have great difficulty succeeding in her claim – assuming that the Department fails in discharging its burden of proving that its delay was excusable under s 13 (b).But as His Lordship Mr Justice Kirby in *Len Lindon v The Commonwealth of Australia* (No 2) S 96/005 said -

> 1. it is a serious matter to deprive a person of access to the courts of law for it is there that the rule of law is upheld, including against Government and other powerful interests. This is why relief, whether under O 26 r 18 or in the inherent jurisdiction of the Court, is rarely and sparingly provided.
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> 2. to secure such relief, the party seeking it must show that it is clear, on the face of the opponent's documents, that the opponent lacks a reasonable cause of action ….or is advancing a claim that is clearly frivolous or vexatious…
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> 3. *an opinion of the Court that a case appears weak and such that it is unlikely to succeed is not, alone, sufficient to warrant summary termination……Even a weak case is entitled to the time of a court. Experience teaches that the concentration of attention, elaborated evidence and argument and extended time for reflection will sometimes turn an apparently unpromising cause into a successful judgment*.(my emphasis)
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> 4. summary relief of the kind provided for by O 26 r 18, for absence of a reasonable cause of action, is not a substitute for proceeding by way of demurrer……. If there is a serious legal question to be determined, it should ordinarily be determined at a trial for the proof of facts may sometimes assist the judicial mind to understand and apply the law that is invoked and to do so in circumstances more conducive to deciding a real case involving actual litigants rather than one determined on imagined or assumed facts.
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> 5. if, notwithstanding the defects of pleadings, it appears that a party may have a reasonable cause of action which it has failed to put in proper form, a court will ordinarily allow that party to reframe its pleading ……A question has arisen as to whether O 26 r 18 applies to part only of a pleading
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> 6. The guiding principle is, as stated in O 26 r 18(2), doing what is just. If it is clear that proceedings within the concept of the pleading under scrutiny are doomed to fail, the Court should dismiss the action to protect the defendant from being further troubled, to save the plaintiff from further costs and disappointment and to relieve the Court of the burden of further wasted time which could be devoted to the determination of claims which have legal merit.

Tuilevuka M.

ORDERS

(i) I dismiss the application to strike out. Costs in the cause. The plaintiff is at liberty to amend her claim and file and serve an amended statement of claim within 21 days of this Ruling.

(ii) 14 days thereafter to the defendant to file and serve an amended defence.

(iii) 7 days thereafter for reply.

Application dismissed.