



IN THE SUPREME COURT OF NAURU
AT YAREN

CIVIL SUIT NO 1/2016

BETWEEN

Joseph Adam

PLAINTIFF

AND

Nauru Rehabilitation Corporation

FIRST DEFENDANT

AND

Derio Namaduk of Ewa District, Leading Hand

SECOND DEFENDANT

Before: Khan J
Date of Hearing: 15 April 2018
Date of Ruling: 3 May 2018

Case may be cited as: *Adam v Nauru Rehabilitation Corporation and others*

CATCHWORDS:

Where the plaintiff filed an action without leave of the Cabinet against the first defendant which is an instrumentality of the Republic under the Republic Proceedings Act 1973 (the Act)- Where the defendants admitted liability and trial proceeded to assess damages-Where defendants filed this application to strike out the action under order 15 rule 19 of the Civil Procedure Rules 1972- Whether the first defendant waived its right by its conduct to raise the defence that leave of the Cabinet was not obtained in accordance with section 3 of the Act- This application filed without leave to amend the defence to raise a new ground- Whether the application is defective.

Held: The first defendant waived its right to raise non-compliance of section 3 of the Act in its defence and by its subsequent conduct of admitting liability, is now estopped from raising it. The application is defective as leave of the court was not obtained to raise this new ground.

APPEARANCES:

Counsel for the Plaintiff: V Clodumar
Counsel for the First and Second Defendant: D Aingimea and Ms A Lekenua

RULING

INTRODUCTION

1. This is an application on behalf of the first and second defendants to strike out this action on the ground of an abuse of process. This application is made pursuant to Order 15 rule 19(1)(d) of the Civil Procedure Rules 1972 (the Rules). The summons to strike out reads as follows:

Let all parties attend before the Supreme Court at Yaren on the 9th day of April 2018 at 10am in the morning for the hearing of an application on behalf of the first and second defendants by their counsels for an order:

- a) That this action be struck out on the grounds of an abuse of process with particulars as follows:
 - i) That Cabinet leave has not been granted pursuant to section 3 of the Republic Proceedings Act 1972;
 - ii) An application for compensation under the Workers' Compensation Act 1956 has not been made in accordance with section 7(1)(b).
2. Order 15 rule 19(1)(d) provides as follows:

19(1) The Court in which any suit is pending may at any stage of the proceedings order to be struck out or amended any pleadings or the endorsement of any writ of summons in the suit, for anything in the pleading or in the endorsement on the ground that:

- a) it discloses no reasonable course of action or defence, as the case may be;
 - b) it is scandalous, frivolous or vexatious;
 - c) it may prejudice, embarrass or delay the fair trial of the suit; or
 - d) it is otherwise an abuse of process of the Court and the Court may order the suit to be stayed or dismissed or judgement be entered accordingly as the case may be.
3. The sole basis for making this application is that it is an abuse of process of court in that leave of the Cabinet was not obtained pursuant to section 3 of the Republic Proceedings Act 1972 (the Act).

REPUBLIC PROCEEDINGS ACT 1972

4. Section 3 of the Republic Proceedings Act 1972 (the Act) provides as follows:
 - 1) Claim against the Republic

- a) In this section:
- ‘Republic’ means the Republic or any government department or instrumentality of the Republic or the President, the Cabinet, any Minister or any public officer in his official capacity; and
- ‘Proceedings’ includes a counterclaim in proceedings against the Republic
- 2) No proceedings may be taken against the Republic to enforce a claim against the Republic unless:
- a) Before the commencement of the proceedings Cabinet has given leave for them to be taken; or
- b) The claim is of a kind mentioned in subsection (3).
- 3) A person make take civil proceedings, without leave of the Cabinet, to enforce any of the following claims:
- a) A claim for the enforcement of a contract validly entered into by, or on behalf of, the Republic;
- b) A claim for judicial review of an administrative action;
- c) A claim to enforce the payment of debt charges which are a charge to the Treasury Fund;
- d) A claim in respect of which it is provided in an Act the provisions of this section does not apply.
- 4) The Cabinet may prescribe by regulations the manner in which applications may be made to the Cabinet for leave to take proceedings against the Republic.

REPUBLIC REGULATION 1973 (the Regulations)

- a) Regulation 3 provides:

Application for leave to commence proceedings

3. Application to the Cabinet for leave under section 3 of the Act to take civil proceedings against the Republic shall be made in writing in the form set out in Appendix A to these Regulations signed by the person in whose name it is intended the proceedings should be taken or, where the person is a body corporate, by an officer thereof and shall be sent or delivered to the Secretary to the Cabinet.

BACKGROUND

5. a) The plaintiff was born on 22 February 1968.

- a) The plaintiff has been employed by the first defendant, a body corporate established under the Nauru Rehabilitation Corporation Act 1997.
- b) The plaintiff's employment commenced with the first defendant, on or about 8 July 2013 when he was offered employment by a letter from the first defendant. In the letter (Exhibit P1) it was stated that his appointment was for a probationary period of 3 months after which he could become a permanent employee.
- c) The plaintiff continued to be in the employment of the first defendant until 20 April 2015 when he suffered personal injury to the middle finger of his right hand. At the material time the plaintiff was working with the second defendant and the plaintiff alleges that he suffered the injuries due to the negligence of the second defendant.
- d) Because of the injuries the plaintiff was unable to return to work and informed the first defendant of his inability to return to work.
- e) On 2 June 2016 the first defendant terminated the plaintiff's employment advising him amongst other things that he was still a casual employee, and was still subject to probation and his employment was being terminated because he has been absent from work in excess of 3 days.

THIS CLAIM

- 6. a) The plaintiff filed this claim on 12 January 2016;
- b) The first defendant entered an appearance on 24 February 2016 and filed a general defence and on 15 March 2016 the denying all the allegations made against it.
- c) On 30 June 2016 the plaintiff moved the Court to enter default judgement against the second defendant and the second defendant filed his appearance on 5 July 2016 in person.
- d) On 16 June 2016 the first defendant filed a full Statement of Defence to the claim denying liability, and in the alternative pleaded contributory negligence on the part of the plaintiff.
- e) On or about 25 April 2017 Ms Lekenua admitted liability on behalf of the first and second defendants and the parties thereafter entered into a negotiation to reach a settlement and offers and counter offers were made thereafter. The parties were unable to reach a compromise and this matter was set down for trial on 8 June 2017.
- f) On 8 June 2017 Ms Lekenua of counsel for the first and second defendant admitted liability and informed the Court that the only issue for determination was quantum and the trial proceeded on that basis. The plaintiff gave evidence

and was cross examined by Ms Lekenua. During the course of giving evidence the plaintiff sought an adjournment to go through further medical procedures to correct the injury to the right middle finger.

- g) Subsequently, the plaintiff had further medical procedures and a portion of the right middle finger was amputated. The plaintiff's counsel, Mr Clodumar, obtained further medical reports and was ready to proceed with the trial and this matter was set down for trial on 9 April 2018 when this application was filed to strike out the action.

MATTERS NOT IN DISPUTE

7. It is not in dispute that:

- a) That the first defendant is an 'instrumentality of the Republic' as defined in section 2 of the Act.
- b) That this is a claim against the Republic.
- c) That the consent of the Cabinet was not obtained prior to the filing of the Claim.

SUBMISSIONS

8. Both parties filed written submissions and also made oral submissions.

CONSIDERATION

9. The crux of the first defendant's submission is that the writ was filed without the leave of the Cabinet which is in breach of the statutory requirements of the Act and Order 50 rule 2 of the Rules where it is provided:

No writ of summons to commence civil proceedings against the Republic which by virtue of section 3 of the Republic Proceedings Act 1972 cannot be taken without leave of the Cabinet shall be issued unless prior to its issue the plaintiff has presented at the Registry of the Court in which the proceedings are to be commenced a certificate under the hand of the Secretary of the Cabinet that the Cabinet has given leave for the proceedings to be commenced and such Certificate has been filed.

- 10. The first defendant submits that this action against it should be struck out as leave of the Cabinet was not obtained before it was filed. If the first defendant were to succeed in its application then the plaintiff's cause of action against the second defendant would still survive as the plaintiff alleges negligence against him in his personal capacity which caused his injuries.
- 11. The plaintiff submits that both the defendants have admitted liability and the trial has proceeded on that basis to assess the damages. The plaintiff relies on Order 15 rule

10 of the Rules¹ and submits that the first defendant is raising a new ground, which is inconsistent with its previous pleadings and consequently this application in itself is an abuse of process of Court in that the defendants have themselves failed to comply with the Rules.

12. The plaintiff submits that the first defendant having admitted liability has waived its right vested in it by virtue of section 3 of the Act and having waived its right it is now estopped from raising it again in this strike-out application. The plaintiff relies on *The Commonwealth of Australia v Verwayen*² (Verwayen) where it is provided in the head note as follows:

“Estoppel – Waiver – Action against Commonwealth by serviceman injured in collision between the Australian Naval vessels engaged in combat exercises – Defence – Failure to plead expiration of limitation period or absence of duty of care – statements by the Commonwealth that it would not rely on either defence – Subsequent amendment to defence to plead both grounds – where the Commonwealth estopped from relying on defences – Whether defences waived – Limitation of Actions Act 1958 (VICT), s5(6)’.

The High Court held by Dean Dawson, Toohey and Gaudron JJ., Mason CJ, Brennan and McHugh JJ. dissenting that the Commonwealth not free to dispute the liability to the plaintiff, by Deane and Dawson JJ because it was estopped from doing so, the equity raised by the Commonwealth’s conduct have been such as could only be accounted for by holding its duty assumed state of affairs, by Toohey and Goudron JJ. because it had waived its right to rely on either defence.

13. The plaintiff submits that the first defendant having waived its rights under s3 of the Act, the first defendant is also estopped by the provision of s4 of the Act which provides:

Liability of the Republic in tort

- 1) Subject to the provisions of this Act, the Republic shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject:
 - a) In respect of tort committed by servants or agents;
 - b) In respect of any breach of those duties which a person owes to his servants or agent at common law by reason of being their employer; and
 - c) In respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of the property:

¹ O15R10 provides: 10 (1) A party shall not in any pleadings make an allegation of fact, or raise any new ground or claim, inconsistent with the previous pleading of his.

(2) The last preceding paragraph shall not be taken as prejudicing the right of a party to amend, or apply for leave to amend, his previous proceedings so as to plead the allegations or claims in the alternative

²[1990] 170 CLR [394]

Provided that no proceedings shall lie against the Republic by virtue of paragraph (a) of this subsection in respect at any act or omission of a servant or agent of the Republic unless the act or omission apart from the provisions of this Act have given rise to a cause of action in tort against that servant or agent or his state.

14. Order 15 rule 8 provides:

8(1) A party **must** (emphasis added) in any pleading subsequent to a statement of claim plead specifically any matter for example, performance, relief, **any relevant statute of limitation** (again emphasis added), fraud or any fact showing inability.

In this matter the statute of limitation was the Act and the defendant was required to plead that the claim was filed in non-compliance of the Act and further under Order 15 rule 10 a party is not allowed to raise a new ground which is inconsistent with his previous pleadings.

15. The first defendant failed to raise the issue of non-compliance of s.3 of the Act in its defence. In filing this application, the first is now 'departing' from his pleading and raising a new ground and under Order 15 Rule 10(2) it was required to obtain leave of the court to do so as the Commonwealth did in Verwayen's case. This application is non-compliance of the rules and is therefore defective.

STATUTE OF LIMITATIONS 2017

16. The other issue which is of concern to me is that by delaying this application and by not raising the issue of not obtaining the consent of the Cabinet prior to filing this claim, the plaintiff's position has been prejudiced in that this claim became a statute barred on 20 April 2018³.

17. For the reasons given above the application is dismissed.

18. The plaintiff is entitled to the costs of this application.

Dated this 2 day of May 2018



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Mohammed Shafiullah Khan
Judge

³ Section 4 of the Limitation Act 2017