

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO: CV2007-04365

BETWEEN

NIGEL APARBALL
ROHIT APARBALL
NEIL APARBALL
BATCHYA APARBALL

CLAIMANTS

And

THE ATTORNEY GENERAL
OF TRINIDAD AND TOBAGO

FIRST DEFENDANT

P.C. SAMAD

SECOND DEFENDANT

P.C. PIERRE

THIRD DEFENDANT

Before the Honourable Madame Justice C. Pemberton

Appearances:

For the Claimants: Dr. C. Seepersad

For the First Defendant: Ms A Panchu instructed by Mr. N. Smart

DECISION

[1] On January 18, 2011, the First Defendant, the Attorney General filed an application to strike out the Claimant's statement of case as having offended Section (1)(a) of the **LIMITATION OF CERTAIN ACTIONS ACT, Chap. 7:09 ("the Act")**. To counter this application, Dr. Seepersad, on behalf of the Claimants, filed an application seeking an

order that “the time for the filing of the **action** be extended to November 19, 2007”, that being the date of filing of this action.

[2] To my mind, that is an admission that the First Defendant was on good ground in filing the application. I therefore shall not engage on an examination of the arguments, save to say that the flawless examination of the law and authorities can be summarized as follows:

1. It is open to a Defendant to raise the issue of limitation after a Defence is filed.

There is no need for a specific plea in the pleadings.

See Gobin J. in **WENDELL BECKLES V. THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO**, CV2009-03303.

“There is a deliberate departure from this position (that is, the necessity to plead the Statute of Limitations) in our jurisdiction. I consider the difference in our current rule from our former rule under the **RULES OF THE SUPREME COURT** and the present English rule to result in a widened jurisdiction in the Court to allow a party to limitation even in the absence of a formal defence...

(emphasis mine)

I associate myself with the learned Judge’s dicta.

2. Section 3(1) of the Act speaks to the actions in tort, the class of action pursued by the Claimants. The limitation period is 4 years from the date of the accrual of the action. In this case, the allegedly tortious action took place on May 13, 2003. The action was filed after May 12th or 13th May 2007, the last date permitted for filing. Therefore the torts of assault, battery and false imprisonment are statute barred and cannot be prosecuted in this court.

[3] As stated above, Dr. Seepersad applied to the court for its exercise of its inherent jurisdiction to extend the time fixed by the Legislature to file this action and pursue these reliefs. There were no submissions filed in support. The learning of this Court is that the court may exercise its discretion only on the very stringent of conditions and upon the supply of the most cogent evidence. This was given effect in the Act through Section 9 of

the Act. In exercising this discretion, I am mindful of the dicta of Jamadar J. (as he then was) in **MITCHELL v. BICKRAJ**.¹

[4] Further, since this discretion and the conditions of its exercise are contained in the Act, there can be no argument that there is any discretion and/or jurisdiction inherent in the court to do as Dr. Seepersad has requested. In this regard des Vignes J. and I are at one.²

[5] **FALSE IMPRISONMENT**

The particular section that I must address is Section 9, which allows an escape for actions to which Sections 5 and 6 relate. The tort of false imprisonment, a common law action founded either in negligence or nuisance or breach of duty is not captured.

[6] The Claimants are therefore caught by the Limitation Provisions and so the claim for false imprisonment is struck out.

[7] **ASSUALT AND BATTERY**

Prejudice to Either Claimant or Defendant

This is a primary threshold requirement for the Claimants to cross, since it is the Claimants' burden to prove that the First Defendant will suffer no prejudice if the action is allowed to override the limitation period. As I said, I have had no submissions from the Claimants on any of these issues.

[8] Mr. Smart, instructing Attorney at Law for the First Defendant swore and gave in evidence:

8. The Claimants have not advanced any reason for their delay
in filing their Claims.

¹ HCA 617 of 2004. “ Courts ought not to extend statutory limitation periods without good cause, and section 9 (3) describes at least six considerations which a court must have regard to. These considerations are not weighted. This is a matter which Parliament has left to the courts. The overriding consideration is “all the circumstances of the case”, which gives the court a fair measure of latitude. However, as with all judicial discretions, this one must be exercised in a fair and reasonable manner, bearing in mind the relevant facts and applying the appropriate legal considerations. **Judicial discretion is not some amorphous power to be exercised whimsically**”.

² See **SINANAN RAMPERSAD v. RAMCHARAN RAMPERSAD**. CV2008-04919.

9. Due to passage of time, the defendants have not to date been able to find the station diary extracts and other relevant documents to support and corroborate their Defence. Further, I am informed by the Central Division Chief Clerk No 14490 Cpl George and verily believe that the Second named Defendant who ought to be a witness in this matter is not on active duty in the Police Station and cannot to date be located. Thus the defendant is severely prejudiced by the passage of time in the preparation of his defence.

Further there has been no mention at all of any compliance with pre-action protocol by the Claimants.

- [9] In the circumstances, I do not think that the Claimants have discharged this burden. The evidence supplied by the First Defendant and my observation that there is no evidence that the pre-action protocol has been observed lead me to find that the Claimants have not surmounted the first threshold of prejudice.
- [10] Even if I am wrong on that, I shall now go on to look at all of the circumstances of the case to determine whether I should allow the claim for assault and battery to survive.
- [11] (a) **Section 9(1)(3)**
This speaks to the length of and reasons for the delay on the part of the Claimants in instituting these proceedings.
- [12] Mr. Nigel Aparball swore an affidavit in which he explained the difficulties with legal representation, his impecuniosity, emigration of a key witness and the medical condition of the Fourth Claimant. I wish to make the observation that the affidavit is lacking in specifics with respect to the dates and time or stage in the proceedings at which those difficulties cropped up. I cite two instances – when were Dr. Seepersad's services engaged? When did the Claimants attend upon Mr. Victor Hosein? Did Dr. Seepersad

represent the Claimants in the lower courts? When were the attempts made to contact Mr. Clarke?

[13] I therefore have no cogent evidence to go on to assess this ground.

[14] (b) **Effect of the Delay**

The issue to be considered under this section is the extent to which having regard to the delay, the evidence likely to be adduced or advanced by the Claimants or First Defendant is likely to be less cogent than if the action had been brought within the time limited.

[15] In this case, the time factor bears a direct relationship to the cogency of the evidence to be adduced by both the Claimants and First Defendant. Nigel Aparball has admitted that his grandmother's health is fading and that she was unable to attend to give instructions to Dr Seepersad. That this negatively impacts the Claimants' cause is obvious. In addition, because of the lapse of time a crucial witness, a Mr. Clarke, emigrated and is beyond the seas. Several crucial pieces of documentary evidence to support their case are not available. On the strength of their evidence alone, and in assessing the requirement of cogency of evidence, I cannot accede to the Claimants' request to extend the limitation period mandated in the Act.

[16] (c) **Conduct of Defendants**

No issue was made of this by the Claimants.

[17] (d) **Duration of Disability**

None of the Claimants suffered from any legal disability to bring an action at the time when the cause of action first accrued.

[18] (e) **Promptitude**

From the above, there is no evidence to show that the Claimants acted with promptitude. Impecuniosity cannot be used to support this ground.

[19] (f) **Advice – Medical/Legal**

The evidence contained in Nigel Aparball's affidavit as I said before lacks any specificity in terms of time. If the court is being asked to exercise a discretion permitted by statute, the evidence to be relied upon must be detailed, clear and relevant.

[20] (g) **All the Circumstances of the Case**

I revert to Jamadar J's dicta quoted above. I agree that I have "a fair measure of latitude". However, there is nothing in the affidavit sworn in support of this application that gives me comfort to accede to this request. I must be careful, fair and reasonable in the exercise of my discretion. The Claimants have not satisfied me "in all the circumstances of this case", namely:

1. Delay in bringing the proceedings;
2. Explanation for delay lacking in specificity with respect to dates and times;
3. Age of the 4th Claimant and her ability to prosecute this matter;
4. Absence of key witness and documents to support the Claimants' case;
5. Absence of key witness and documents to enable the Defendants to properly defend this case.

that I should exercise my discretion to extend the limitation period provided for in the Act to the date of filing.

[21] I wish to further comment on two aspects of procedure in this case:

1. Lack of evidence of any Pre-action Protocol Letter being sent to the First Defendant.

This to my mind would have had a debilitating effect on the Claimants' case.

2. Delay in bringing the application to extend the limitation period.

This action suffered from lengthy lapses overall. The claim was filed on November 19, 2007. The First Defendant entered an Appearance on December 7, 2007. The First Defendant filed a Defence on June 18, 2008. It would appear that nothing was done regarding service of the second, third and fourth Defendants. A Case Management Conference was fixed when it was determined that the validity of the Claim Forms had expired and no steps were taken by the Claimants to renew same. The Court gave directions by Order of July 5, 2010. The First Defendant has complied with the

Directions. The Claimants have complied partially with the Directions – filing of 4 of the 5 witness statements.

[22] In the unagreed statement of issues filed on the 1st December 2010, Mr. Smart raised the limitation issue, an issue which he wrote about by letter of October 4, 2010. The application to extend the limitation period was not filed until January 20, 2011, some three months after being put on notice that the First Defendant was concerned about that issue. I do not believe that the application was made as promptly as it could have been. I say no more.

[23] In any event, I have decided not to allow Dr. Seepersad's application of January 20, 2011 and to allow the Attorney General's application of January 13, 2011 with the consequential orders as to costs.

IT IS HEREBY ORDERED AS FOLLOWS:

1. That the Claimants' Claim Form and Statement of Case filed on November 19, 2007 be and is hereby struck out in so far as it relates to claims for damages for assault and battery and false imprisonment, on the ground that it offends Section 3 of the **LIMITATION OF CERTAIN ACTIONS ACT Chap. 7:09**.
2. That the Claimants to pay First Defendant's costs to be assessed if not agreed.
3. That the Claimants' application filed on January 20, 2011 be and is hereby dismissed.
4. The action to continue on the relief for malicious prosecution.
5. Pre Trial Review adjourned to 10th May 2011 at 11:00 a.m. POS 04 at which all objections to evidence will be addressed and trial to continue at 1:30 p.m.

Parties are strongly urged to settle the remainder of this claim.

Dated this 15th day of April 2011.

/s/ CHARMAINE PEMBERTON
HIGH COURT JUDGE