

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

SUIT NO. 9 OF 1999

BETWEEN

MC LEANE ST. JUSTE

Plaintiff

And

**1. THE HONOURBLE ATTORNEY GENERAL
2. VINCENT SAMUEL**

Defendants

Appearances

Mr Colin Foster for Plaintiff
Miss Viki Ann Ellis for First Defendant
Mr Mark Maragh for the Second Defendant

2000 March 1;
April 19.

JUDGMENT

[1] d'Auvergne J. By summons filed on the 4th August 1999 the Plaintiff filed **Summons for Revivor of Action** supported by an affidavit deponed to by the wife of the Plaintiff which states the following:

I MC LEAN ST JUSTE acting herein and represented by SHEVON ST. JUSTE wife of the said MC LEANE ST. JUSTE both make oath and say as follows to wit:-

- (1) That the suit herein was duly issued and filed on the 7th day of January, 1998.
- (2) The First-named Defendant was duly served on the 7th of January, 1998.
- (3) The Second-named Defendant filed an Appearance on the 1st day September, 1998.
- (4) The Plaintiff herein both humbly request an Order that the Suit herein be Revived in pursuant of Order 34 r.7 of Rules of the Supreme Court, 1970.

[2] On the 16th day of November 1999 the Second named Defendant filed the following affidavit:

I VINCENT SAMUEL of Morne Fortune, Castries make OATH and say as follows:

- (1) That I am the Second-Named Defendant herein.
- (2) In so far as the statements of fact made in this Affidavit are within my personal knowledge they are true and in so far as they are not within my personal knowledge they are true according to my information and belief.
- (3) That by Writ of Summons No. 747 of 1995 filed the 24th day of October, 1995 the Plaintiff instituted proceedings for alleged negligence on my part in respect of damage allegedly sustained by him in a motor vehicular accident which took place on the 17th day of January, 1995.
- (2) That by Writ of Summons No. 9 of 1998 filed the 7th day of January, 1998 wherein the Plaintiff brought substantially the same cause of action against

the same parties as in Suit No. 747 of 1995, the Plaintiff claimed the following relief:

- (1) Special Damages in the sum of \$91,578.30
 - (2) General Damages
 - (3) Costs and such other damages as the Court deems fit.
- (3) That by Notice of Discontinuance dated the 12th day of January, 1998 and filed on the 14th day of January, 1998 the Plaintiff discontinued Suit No 747 of 1995.
- (4) That on the 1st day of September, 1998 the Defendants entered an Appearance to suit No. 9 of 1998.
- (5) That on the 29th day of September, 1999 I was served with a Summons for Revivor of Action pursuant to Order 34 R. 7 of the Rules of the Supreme Court, 1970, which was filed on the 4th day of August, 1999.
- (6) That I am informed by my solicitor and verily believe that the Plaintiff is not entitled to have this action revived because of the following:
- (i) The Plaintiff failed to file this action within the time prescribed, that is within six (6) months of the alleged cause of action and this action is therefore statute barred by virtue of Article 2124 of the Civil Code of Saint Lucia and Section 25 of the Crown Proceedings Ordinance Chapter 13 of the Laws of Saint Lucia.
 - (ii) No Notice was given of the Plaintiff's intention to institute legal proceedings against either of the Defendants as prescribed by Article 28 of the Code of Civil Procedure, Chapter 243 of the Laws

of Saint Lucia. This Notice is a condition precedent to the bringing of this action, the omission whereof cannot now be corrected especially having regard to the fact that the Plaintiff's cause of action is now statute barred as aforesaid.

(iii) This action, No 9 of 1998 was brought for the same matter as an action which was already pending between the same parties in the High Court of Justice instituted No. 747 of 1995 and the same is an abuse of the process of the court.

(7) Having regard to the fact that this action is statute-barred I am informed by my solicitor and verily believe that it is incapable of being revived.

(8) In the Premises, I respectfully ask that the Writ of Summons and Statement of Claim dated the 4th day of January, 1998 be set aside and the action dismissed and that the Plaintiff do pay to the Defendants the costs of this action and of this application.

[3] **Arguments**

At the hearing in Chambers Learned Counsel for the Plaintiff argued that the action was not statute barred for it was filed within three years. The accident from which personal injuries for negligence was being claimed occurred on the 17th day of January 1995 and the action was filed on the 7th day of January 1998. He further argued that the six month period of limitation claimed can only succeed on behalf of the Crown and not on behalf of an individual.

- [4] He again argued that to date the Second Named Defendant had not filed a defence for his affidavit in reply is silent on that point.
- [5] He further argued that the Plaintiff's injuries were severe and quoted the case of **Thompson v Brown 1981 IWIR 747**
- [6] Learned Counsel for the Defendants re-iterated the chronology of events as stated in the affidavit of the Second Defendant noted earlier. She noted that from the 7th to the 12th of January 1998 there were two cases filed against the Defendants for substantially the same cause of action.
- [7] She contended that the Plaintiff failed to file this action within the prescribed six months and therefore the action was statute barred against both Defendants by virtue of **Article 2124 of the Civil Code of St. Lucia.**
- [8] She further contended that no notice was given of the Plaintiff's intention to institute legal proceedings against either of the Defendants as provided by **Article 28 of the Code of Civil Procedure Chapter 243 of the Laws of St Lucia.**
- [9] She concluded her arguments by stating that the action was statute barred and that the prerequisite for filing an action against the Crown or its public officers had not been followed. She quoted the following cases **James Alfred vs Honourable**

George Mallet No 150 of 1993 Page 8 where it was pointed out that notice of the suit was required.

Cumberbatch v Weber 1965 9 WIR Page 143

Slazam v Enmore Estates 1960 WIR Page 126

Suit 120 of 1989 club St Lucia vs Trevor Cozier etal

[10] She said that the action was nothing short of an abuse of the process of the Court and that the action should be dismissed with Costs to the Defendants.

[11] Learned Counsel for the Second Defendant endorsed the arguments of Counsel for the First Defendant and quoted **Order 34 Rule 7 (3)**.

[12] In his reply Learned Counsel for the Plaintiff conceded that the limitation period applies on behalf of the First named Defendant but not the Second named Defendant since he was not a Public Officer but acting under instructions of an employer. He further said that the position should have been pleaded in a defence and not in an Affidavit in Reply.

[13] **Conclusion**

I will start by saying I am unable to understand the last submission of Learned Counsel for the Plaintiff since the matter being considered is a Summons for Revivor of action which is supported by an affidavit and the proper method of responding is by an affidavit in reply.

[14] Since Learned Counsel for the Plaintiff has conceded that the limitation period applies on behalf of the First named Defendant I will proceed to consider the position of the Second named Defendant.

Article 28 of The Code of Civil Procedure Chapter 243 of the Laws of St Lucia provides:

“No public officer, or other person fulfilling any public duty or function, can be sued for damages by reason of any act done by him in the exercise of his functions nor can any judgment be rendered against him, unless notice of such suit has been given him at least one month before the issuing of the writ of summons. Such notice must be in writing, it must specify the grounds of the action, must be served upon him personally, or at his domicile, and must state the name and residence of the Plaintiff.”

[15] **Article 2124 of the Code of Civil Procedure** provides:

“Actions against public officers in respect of acts done by them in good faith and in respect of their public duties are prescribed by six months.”

[16] **Article 2122 of the Civil Code of St Lucia Chapter 242** provides:

The following actions are prescribed by three years.

- (1) For seduction, or lying-in expenses.
- (2) For damages resulting from delicts or quasi delicts whenever other provisions do not apply.

- (3) For wages or salaries of employees not reputed domestics and who are engaged or hired for a year or longer period;
- (4) for sums due to schoolmasters and teachers, for tuition and board and lodging furnished by them.

[17] The Interpretation section of the **Constitution of St Lucia 1978** defines public office as “any office of emoluments in the Public Service” and public officer as “a person holding or acting in any public office.”

[18] The writ in this action endorsed with statement of claim was filed on the 7th day of January 1998 there is no affidavit of service on file but an appearance entered by the Second named defendant filed on the 1st of September 1998. There are no defences filed and no further proceeding taken or document filed in the action until this application was filed on the 4th August 1999.

[19] **Order 12 Rule 4** states that “an appearance be entered 8 days after service of the Writ” and **Order 18 Rule 2** states unless the Court gives leave to the Contrary the defendant must serve a defence on the Plaintiff before the expiration of 14 days. **Order 18 Rule 3 (4)** states that a reply to any Defence must be served before the expiration of 14 days after the service on him of that defence and **Order 18 Rule 20** states that pleadings in an action are deemed to be closed 14 days after service of reply. **Order 25 Rule 1 (1) (b)** provides that a Plaintiff must within one month

after the pleadings in the action are deemed to be closed, take out a summons for directions returnable in not less than 14 days.

[20] **Order 34 Rule 3** reads as follows:

“When cause or matter ripe for hearing.

3. (1) Subject as hereinafter provided a cause or matter shall be ripe for hearing when –
 - (a) the defendant is in default of appearance or has failed to deliver a defence and the Plaintiff has complied with the provisions of Order 13 or Order 19 as the case may be;
 - (b) the pleadings have been closed by the delivery of a reply, or, if no reply has been delivered, after the time for delivery of a reply has expired;
 - © an order has been made under Order 14 or under Order 25 or under any other Order giving directions as to the trial of the cause or matter.”

[21] **Order 34 Rule 7** reads:

- (1) “A cause or matter shall be deemed deserted if no request for setting down is filed within six months after the expiration of the period fixed for filing of such request.
- (2) When an action has been deemed deserted, no further proceedings may be taken therein, unless and until an order for revivor has been made by the

Court on the application of any party or a consent to revivor and a request for setting down signed by all the parties thereto have been filed.

- (3) No order for or consent to revivor shall avail as an advantage to the Plaintiff in respect of the period of limitation applicable to the cause of action.”

[22] As I have said in paragraph 17 the second named Defendant did not file a defence neither did the Plaintiff enter Judgment in default, in accordance with **Orders 13 or 19**, therefore the matter was not ripe for hearing (Order 34 Rule 3(1)(a)).

Under **34 Rule 3(1)(b)** the pleadings could not be said to be closed when no defence has been filed.

Under **34 Rule 3 (1)(c)** no order was made under **Orders 14 and 25**.

Therefore if the matter was not ripe for hearing (Order 34 Rule 3) it could not be requested to be “set down for hearing”(Order 34 Rule 1) and therefore could not be deserted.

It appears however that Counsel for the Plaintiff considers the matter as deserted for he is seeking **Summons for Revivor of Action**.

[23] The cause of action in this matter arose on 17th January 1995 and therefore the period of limitation would be by **Article 2122 (2)** of the Civil Code three years, the 17th January 1998. The period of limitation has definitely elapsed.

Article 2129 of the Civil Code states.

“In all the cases mentioned in articles **2111, 2121, 2122, 2123** and **2124**, the debt is absolutely extinguished and no action can be maintained after the delay for prescription has expired except in the case of promissory notes and bills of exchange, where prescription is precluded by a writing signed by the person liable upon them.”

[24] The effect of the above article was explained in **Civil Appeal No 2 of 1975 St Lucia by Peterkin J. A** as he then was and reiterated by **Byron J** as he then was in Suit 120 of 1989 St Lucia.

Peterkin J. A said:

“In **Article 2129** quoted above, both the right and the remedy are extinguished, and therefore, there is no question of a party being called upon to choose whether he would plead the defence of limitation. As long as the evidence in a case disclosed that the period of limitation has expired, the judge has no discretion in the matter. In the instant case to have allowed an amendment would have meant that the substituted Plaintiff would have been instituting proceedings out of time.”

[25] **Order 34 Rule 7 (3)** quoted above stipulates that the making of an order for revivor, shall not avail as an advantage to the Plaintiff in respect of the period of limitation applicable to the Cause of Action.

[26] At the time the application for revivor was made the period of limitation had expired and moreover under the Civil Code a judge has no discretion. **Article**

2129 takes away any discretion the Court may have since both the right and the remedy are extinguished.

[27] “**He who alleges must prove**” A perusal of the affidavit of the Second named Defendant does not disclose that he is a public servant as defined by the **Constitution of St Lucia**. It is therefore clear that **Article 2124** of the Civil Code does not apply.

[28] In my judgment therefore, I have no discretion to make the order sought for the period of limitation has expired and no order for Revivor should be made, because to do so would be to confer an advantage on the Plaintiff Contrary to **Order 34 Rule 7 (3)**.

[29] My order is therefore as follows:

The application is dismissed.

The Plaintiff to pay Costs to the Defendants to be agreed or otherwise taxed.

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Suzie d’Auvergne
High Court Judge