IN THE HIGH COURT OF NEW ZEALAND 413
WELLINGTON REGISTRY

CP277/93

IN THE MATTER of the Judicature Act 1908

145

BETWEEN FOE ESEKIELU of Auckland, Process Worker

First Plaintiff

A N D FA'AITU MOKENI ESEKIELU of Auckland, Process Worker

Second Plaintiff

A N D FIAMASI MOKENI ESEKIELU of Auckland, Process Worker

Third Plaintiff

A N D ESAU MOKENI ESEKIELU of Auckland, Process Worker

Fourth Plaintiff

AND FUIMAONO TUIASAU of Wellington, Solicitor

Defendant

Hearing: 11 November 1993

Counsel: R.J. Hooker for Plaintiffs
C. Ruthe for Defendant

Judgment: 22nd February 1994

JUDGMENT OF MASTER J C A THOMSON

In this case four plaintiffs, who are Samoans, seek summary judgment against the defendant. He is a solicitor. The plaintiffs allege that on various dates they entered New Zealand and were granted temporary permits, which subsequently expired.

In the Statement of Claim it is pleaded that on 26th of January 1988 the second, third and fourth plaintiffs entered into a contract with the defendant which provided (inter alia):

1) That the defendant would advise the plaintiffs of the appropriate procedure for lodging with the Minister of Immigration an application for permanent residence.

2) That the defendant would lodge with the Minister of Immigration applications for residence permits on behalf of the plaintiffs in accordance with the provisions of the Immigration Act 1987, Immigration Regulations 1987, and the policy and requirements of the Immigration Service.

3) That the defendant would at all material times keep the plaintiffs fully informed and advised of any requirements of the Immigration Service as to the processing of their applications for permanent residence.

It is alleged that in accordance with the advice of the defendant, the plaintiffs provided to the defendant application forms, passports and fees.

Paragraph 5 of the Statement of Claim alleges that on or about the 26th of January 1988 the defendant lodged with the Immigration

Service application forms for the second, third and fourth plaintiffs together with their passports and a filing fee of $220.

Paragraph 6 alleges that on or about the 30th of January 1988 the defendant was instructed by the first plaintiff to obtain for him a permit pursuant to s42 of the Immigration Act 1987.

The plaintiffs allege that on the 8th of February 1988 the Immigration Service (Wellington Office) returned to the defendant the applications lodged in respect of the second, third and fourth plaintiffs on the ground that the defendant had failed to tender in support of the applications lodged the fees as required by the Immigration Regulations 1987. It appears that the filing fee of $220 lodged would only have covered one of the applications.

As to the first plaintiff, it is alleged that the defendant failed or omitted to lodge with the Immigration Service an application for the first plaintiff to be granted a permit pursuant to s42 of the Immigration Act 1987.

It is alleged that in March 1988 the Minister of Immigration determined that all persons who had lodged applications for permanent residence prior to the 31st of March 1988 or had obtained a permit under s42 of the Immigration Amendment Act 1987 would be granted a residence permit pursuant to the conditions of the Immigration Act 1987. It is alleged that by virtue of the failure and/or omission of the defendant to (1) Lodge the appropriate fees with the Immigration Service in January 1988, and (2) Lodge the application for a s42 permit, the first, second, third and fourth plaintiffs have not been granted a residence permit and were required to return to Western

Samoa. Their exit took place after the Minister determined that despite representations made on their behalf that they would not be granted a residence permit. The decision of the Minister was challenged by a review application lodged in the Auckland High Court. The plaintiffs also sought interim orders under s8 of the Judicature Amendment Act 1972 to restrain any Immigration Officer or Police Constable from exercising a removal warrant which had been issued by the Levin District Court in respect of each plaintiff. The latter application was heard by Hammond J. who gave a decision on the 4th of March 1993 refusing the interim orders sought. It was following that decision that the plaintiffs returned to Western Samoa. They say as a result of the failure of the defendant to lodge the appropriate applications and pay the appropriate fees, they were deprived of the opportunity of earning income in New Zealand and enjoying the benefits of residing in New Zealand. They claim a refund of legal expenses and they also seek damages for future loss of earnings during their lifetime, being the difference in the money they will earn in Western Samoa and the money which each plaintiff would have earned in New Zealand. They also seek general damages of $50,000 against the defendant. In the application for summary judgment, the plaintiffs seek judgment for the same sums, or in the alternative judgment for $34,916.62 for legal costs and a declaration of liability for the damages claims.

If the plaintiffs are entitled to summary judgment, then it could only be for the alternative relief sought. Clearly the question of damages will have to be subject to trial and proved in the usual way. The question therefore is have the plaintiffs established their right to a declaration of liability against the defendant on their summary judgment application and for judgment for legal costs.

I will deal first with the claim of the first plaintiff. He has made two substantive affidavits on behalf of the three other plaintiffs as well as for himself. The first plaintiff deposes in his first affidavit that he had applied himself for a residence permit in 1986, and had been declined. He says on or about 28th of January 1988 he had received a request from the Immigration Service that he complete a permit under the transition provisions of the Immigration Act 1987. He says he gave this letter to the defendant and requested that the defendant obtain for the first plaintiff a permit under s42 in accordance with the Immigration Service's letter. For confirmation he relies on the fact that the original of the letter from the Immigration Department to him was found on the defendant's file. The defendant however says that the first plaintiff was not present when he had a meeting in January 1988 with the three other plaintiffs. The defendant maintains that he did not receive any instructions from him. With the agreement of both counsel, the file in respect of the judicial review proceedings was made available to me. I am also referred by counsel for the defendant to page 11 of the decision of Hammond J. (Exhibit "I" to the first plaintiff's first affidavit) in respect of the application of the first plaintiff under s42. At page 11 the learned Judge says:

> "As to the s42 application, I am faced with the difficult allegation that the first plaintiff claims he filed a s42 permit application with the Wellington office. I am satisfied that the Immigration Service made a diligent search and no record whatsoever of the first plaintiff lodging a s42 application for a visitor's permit can be located on the Immigration Service's file. That is complicated by the fact that the first plaintiff has stated that he believes he completed a s42 application and gave it to a Mrs Saili, who he thinks handed the form to the Immigration Service. This woman apparently handled a lot of immigration cases (including those of his family) but is now dead. The Immigration Service also took the point that at the relevant time there were communications from the Palmerston North office of the service (which was well aware of the implications of the failure to file a s42 application).

> The service got in touch with the first plaintiff and asked him to contact that office urgently. I accept that the first plaintiff did not take appropriate steps at that time.
> The basic contention of the first plaintiff (through his counsel) on this head is that he did in fact attempt to comply, and that it is really the Immigration Service which is at fault here. The Crown on the other hand says that essentially the first plaintiff was the author of his own misfortune.
> Common sense suggests that occasionally things do go missing in Government files. But the probabilities here are that the application was never filed at all. The very fact that the Immigration Service asked for a response as a matter of urgency indicates that it knew there was a problem for the first plaintiff and yet he did not respond to its request."

The first plaintiff now puts forward a different version of events and seeks to place the whole blame for the failure to file a s42 application squarely on the defendant. There is confusion, and the Court is faced with a direct denial by the defendant that he ever received instructions to act on behalf of the first plaintiff. It is clear that there is a factual dispute on that issue which can only be resolved by viva voce evidence.

I find that such conflict is more than sufficient to dispose of any question of a summary judgment application being entered for the first plaintiff. As to the three other plaintiffs, it is noted that the affidavits on which they rely have been sworn by the first plaintiff on their behalf. I observe that the youngest of them, Esau, was born on the 21st of October 1968, so is 25 years of age. There is no real explanation as to why the second, third and fourth plaintiffs have not filed affidavits on their own behalf.

Objection has been taken by the defendant to the affidavits filed by the first plaintiff so far as they relate to those plaintiffs on the ground

of hearsay. I think there is force in that submission, especially regarding the issue of whether or not such plaintiffs had employment in 1988, when it is alleged that the Minister of Immigration declared a period of amnesty and during which time it is claimed residence permits could have been applied for and successfully obtained.

The case for the second, third and fourth plaintiffs is that the defendant was instructed to apply for residence permits, and they relied on him to complete the applications correctly and lodge them with the proper fee. An application was completed on their behalf and lodged. Initially a fee of $200 was paid, and later a further $20 was paid. However the Immigration Service subsequently returned the applications to the defendant stating that insufficient fees had been proferred.

The defendant contends that he lodged the application for those plaintiffs with only one fee in the hope that the application might be considered as a family application. On that basis he was of the view that only one fee would be required to be paid. The defendant says he raised with the plaintiffs the need to supply him with evidence to show that they had had employment at the relevant time. As it appeared that they could not produce satisfactory evidence about this, it was his view that the lodging of the application was unlikely to succeed unless the Department might be prepared to consider their case on the grounds that it was a family application and accordingly it would not be necessary for each individual to meet all of the requirements for residency in force at that time. The defendant acknowledges that the application forms were returned to him, but says that when he raised the question of why they had been returned, he did not receive an answer from the Department.

As contended by the plaintiffs, I think it highly likely that the defendant was contacted by the Department by telephone and told that the fees were insufficient. Certainly the defendant did not advise the plaintiffs that their application (for whatever reason) had been returned. Nothing further was done in respect of their applications.

The plaintiffs claim as I understand it, that if the applications had been properly filed and the correct fees paid at that particular time, entitlement to residency would as it turned out have been automatic. However, an affidavit has been filed by Donald Bond on behalf of the defendant. He was a director of Immigration Services for the Department of Labour between 1981 and 1987. He refers to Mr Foe Esekielu's affidavit (the first plaintiff) dated 21st of June 1993 and in particular paragraph 8 thereof which states:

> "That in March 1988 the Minister of Immigration determined that all those people who had applied for residence permits prior to the 31 March 1988 or who had obtained permits pursuant to s42 were to be granted residence in New Zealand...
> Attached hereto and marked with the letter 'H' is a copy of the relevant instructions which were issued and used by the Immigration Service."

Mr Bond says that there was never a general amnesty and further that a person who applied pursuant to s42 and obtained a temporary permit under that section had to subsequently apply for permanent residence. Persons who wished to have a temporary permit under s42 had to:

a) Establish that they had no criminal convictions in any country.

b) That they had been in employment, and provide a letter from their solicitor saying that they had a job in New Zealand.

c) Complete a proper housing declaration form establishing that they had adequate housing for their needs.

He deposes that any person acting on behalf of an applicant who could not obtain a letter from an employer saying that they had employment would be advised that a s42 application would have virtually no chance of success.

In response to the affidavit of Mr Bond, the plaintiffs filed an affidavit sworn by a Mr McBride, an Auckland solicitor, who is an expert in the area of immigration law. He deposes as to his understanding of the policy applicable in 1988 and in particular where an applicant for permanent residency was sponsored by a brother or sister. Up until November 1988 he says that an applicant had to demonstrate he had a worthwhile skill in which he had two years experience. He also had to have a New Zealand job offer. He deposes, however, that evidence of a job offer could be lodged subsequent to the lodging of the application form for residence. Mr McBride however does confirm that in order to be successful, "a worthwhile skill residence application" had at some stage to be supported by an offer of permanent employment in the area of that worthwhile skill. He says that it was his preference to lodge such evidence at the time of making the application, but if it was not so lodged, it was his practice to have it lodged as soon as possible thereafter.

Mr McBride deposes that in May 1988 the relaxed procedures which had been previously been applied to overstayers were extended to cover applications for permanent residency. The basis of the relaxed procedures was that it was not necessary to demonstrate any worthwhile skill, or job offer, within that area of skill, and all that was necessary

was for the applicant to demonstrate that he had a job, any job, in New Zealand. He says that if the applications had been correctly lodged in January or February 1988 the plaintiffs would have subsequently been eligible under the "relaxed procedures" regime.

Accepting that that is so, I think it was and is encumbent on all the plaintiffs to establish beyond argument that they all had jobs at the relevant time.

The defendant in his first affidavit raised the question of the plaintiffs not having jobs. To meet that claim, the first plaintiff filed an affidavit in reply setting out the jobs which he deposes the plaintiffs had. The first plaintiff says that at the relevant time he had employment on farms and factories in the Levin and Otaki areas. The second plaintiff was employed in a sewing factory; the third and fourth plaintiffs worked on farms and in factories. The only other evidence for the plaintiffs on this issue is in the affidavit filed by a brother, one Archie Esekielu. He simply says "the plaintiffs were all in employment as has been detailed in my brother Foe Esekielu's affidavit sworn on the 29th of October 1993".

As against that evidence, the defendant has filed a second affidavit which is dated the 11th of November 1993. In it he refers to the Immigration file and a letter from the plaintiff's father. The father is noted as saying:

> "My wife's job finishes in November. This means that we will have nothing to live on. My older children have tried hard to look for work, but have not been successful."

The defendant deposes that at no time during 1988 was he advised that any of the plaintiffs were working. He deposes that he had written to the Department of Social Welfare on behalf of the plaintiff's father seeking an unemployment benefit. He further deposes that it his understanding that during the period 1988, none of the plaintiffs were in employment.

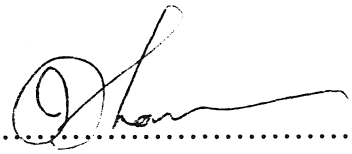
It seems to me therefore that even if the Court was to accept that the position in 1988 was as deposed to by Mr McBride, that the crucial issue for the Court would be whether or not these plaintiffs were employed at the critical date.

On the factual material before the Court at the moment, there is clearly a dispute of fact on the employment question. It seems to me that if the plaintiffs wished to persuade the Court to adopt a robust view on the question of liability, it was encumbent upon them to all swear affidavits as to their job situation in 1988 supported by corroborative evidence from the persons who employed them with the usual annexures of the Inland Revenue Department certificates. I say that particularly because the affidavit of the first plaintiff as to his dealings with the defendant must be considered as suspect. Accordingly one must take a critical view of his affidavit in respect of the job situation in 1988 as deposed to by him on behalf of the other plaintiffs and himself.

Further, it appeared from submissions made on behalf of the defendant that an order for discovery has been served on the plaintiffs, but as yet they have not adduced any documentation which would support the claims of employment at the critical period; nor have they answered interrogatories which have been issued against them and which were directed to the issue of employment.

I also think there is substance in the defendant's contention that the Statement of Claim is defective in that it pleads that the defendant should have filed their applications with the Minister of Immigration. It is submitted that the Regulations make it clear that the application for residency by a temporary permit holder had to be made to an Immigration Officer of the Department of Labour and not to the Minister.

I conclude that even if the plaintiffs' contention is correct that residency would have followed automatically (and the Court has serious reservations as to that contention) if the applications had been correctly filed and the correct fees paid that there are serious disputes on the facts which can only be resolved by a substantive hearing. The application for summary judgment is refused. Costs are reserved. I will accept a memorandum as to timetabling orders.



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Master J C A Thomson

Solicitors:
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Ruthe Denee & Cullen, Wellington for Defendant