SUPREME COURT OF QUEENSLAND

CITATION:	*Mbuzi v SV Partners & Anor* [2012] QSC 84
PARTIES:	**JOSIYAS MBUZI** **(applicant)** **v** **SV PARTNERS ABN 63 103 951 819** **(first respondent)** **WESTPAC BANKING CORPORATION** **ABN 33 007 457 141** **(second respondent)**
FILE NO:	BS2216 of 2012
DIVISION:	Trial Division
PROCEEDING:	Originating application
DELIVERED ON:	5 April 2012
DELIVERED AT:	Brisbane
HEARING DATE:	16 March 2012
JUDGE:	Mullins J
ORDER:	**Originating application is dismissed**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – ORIGINATING PROCESS – where the applicant started proceeding by originating application – where the applicant claims compensatory damages for negligence, undue harassment and defamation and aggravated and vindicatory damages – where the applicant sought an order under r 14 of the *Uniform Civil Procedure Rules* 1999 (Qld) that the proceeding continue as if started by claim – where claims for damages could proceed only if properly pleaded and particularised – where purpose of return date of application was to address the applicant's choice of originating process – where the amounts claimed for damages did not require the claim to be started in the Supreme Court – whether the choice of incorrect originating process was an abuse of the court's processes *Bankruptcy Act* 1966 (Cth), s 125, s 139L *Bankruptcy Regulations* 1996 (Cth), reg 6.12C *Uniform Civil Procedure Rules* 1999 (Qld), r 14, r 16, r 155
COUNSEL:	The applicant appeared in person

SG Muller *(Sol)* for the first respondent
E Goodwin for the second respondent

SOLICITORS: Rodgers Barnes & Green for the first respondent
Minter Ellison for the second respondent

[1] This proceeding was commenced by originating application filed on 9 March 2012 in which Mr Mbuzi claims the following relief:

"1. To declare as unlawful and unauthorised, the actions of the respondents to block the applicant from accessing Family Assistance payments made by Centrelink into his bank account kept with Westpac Bank.

2. An injunction restraining the respondents by themselves, or any of their members, or otherwise however, from any further or future blocking of Family Assistance payments made to the applicant by Centrelink.

3. An order under rule 14 of the Uniform Civil Procedure Rules of 1999.

4. Compensatory damages of $100,000.00 against the respondents for negligence. The law, in relation to negligence, places a duty for persons to conform to certain standards of conduct recognised by law in their duties.

5. Compensatory damages of $100,000.00 against the respondents for undue harassment. The actions of the respondents to block the applicant from accessing his personally-entitled funds were without justification and they did so in blatant disregard of the law of the land. This is a case of big business institutions trampling upon an individual's rights with their own beliefs of impunity.

6. Compensatory damages of $100,000.00 against the second respondent for defamation in relation to imputations made to the Queensland Police Service. The statements made to the police by the second respondent were to the applicant's detriment (Brown, The Law of Defamation in Canada, Paragraph 4.2 (2) and with tendency to lower the applicant in the estimation of right-thinking members of society (Lord Atkin in Sim v. Strech (1936) 52 TLR 669).

7. Compensatory damages of $20,000.00 against the second respondent for affront to personal dignity; embarrassment; humiliation; hurt; worry; upset; anger; annoyance; injured feelings; and distress suffered by the applicant and his family.

8. Aggravated damages of $10,000.00 against both respondents. This is on account that they persisted in their actions even when presented with factual legal grounds pointing to the illegality of their actions.

9. Vindicatory damages of $5,000.00 against the second respondent. This is on account that the second respondent made an official and public detrimental report against the applicant.

10. Interest of 9 per cent pursuant to s.47 of the Supreme Court Act of 1995 for such period as the Court deems it fit.
11. Costs."

Background to the proceeding

[2] On 5 September 2011 Mr Sweeney and Mr Cronan of SV Partners were appointed as joint and several trustees of the bankrupt estate of Mr Mbuzi. Mr Mbuzi appealed to the Federal Court of Australia against the making of the sequestration order. At the time this application was heard, the appeal had been heard, but the decision was reserved. Mr Mbuzi's appeal was allowed and, by judgment given on 28 March 2012, the sequestration order made against the estate of Mr Mbuzi was set aside: *Mbuzi v Favell (No 2)* [2012] FCA 311. The fact that Mr Mbuzi's appeal was successful does not affect the issues that were raised in the hearing before me.

[3] On 16 September 2011 the trustees sent a letter to the second respondent advising of their appointment as the trustees of Mr Mbuzi's bankrupt estate and enclosing a copy of the certificate of their appointment. The trustees referred the second respondent to s 125 of the *Bankruptcy Act* 1966 (Cth) (the Act), and requested the second respondent to place a stop on all withdrawals from any accounts operated by Mr Mbuzi.

[4] The second respondent identified two bank accounts in Mr Mbuzi's name which are referred to in the second respondent's submissions as the first account and the second account. In accordance with the request made by the trustees, the second respondent placed a hold on these two accounts on or around 16 September 2011 which prevented withdrawals (other than direct debits).

[5] At 8:56pm on 6 October 2011 Mr Mbuzi sent by facsimile to the trustees copies of his bank statements for the first account for the period 12 August to 23 September 2011 which showed the credits to that account were primarily family allowance payments. On or about 10 October 2011 Mr Mbuzi lodged his statement of affairs with the Official Receiver.

[6] Mr Mbuzi was relying on the exclusion from the definition of income under s 139L of the Act of a payment of family tax benefit paid under the family assistance law: reg 6.12C *Bankruptcy Regulations* 1996 (Cth).

[7] On 10 October 2011 the trustees sent a letter by facsimile to the second respondent requesting the second respondent to remove the stop placed on the first account and allow Mr Mbuzi full access to it. The hold on the first account was lifted by the second respondent on 11 October 2011.

[8] The factual basis relied on by Mr Mbuzi to support his application is set out in paragraphs 2 to 6 of his affidavit filed on 9 March 2012:

"2. That from October 2011 the respondents blocked me from accessing funds paid into my Savings Account kept with the second respondent.
3. That I had no prior warning regarding the respondents actions and that both of them told me 'to seek legal advice'.
4. That although I spoke and wrote numerously to the respondents, with specific Australian legislation pointing to the unlawfulness of their actions, the respondents persisted

in their actions of blocking me from accessing funds which the paying Federal Government's body, Centrelink, said were my personal entitlements.

5. That an officer of the first respondent said words to the effect that 'we can do anything, and we do not care who has paid you those funds'.
6. That one of the officers of the second respondent ordered me to be removed from their premises by a security guard, although I had been asked to be there by another of their officers."

[9] After the hold on withdrawals from the first account was lifted, there was nothing raised in the material to support any reasonable apprehension by Mr Mbuzi that there would be any future action taken by the respondents to block Mr Mbuzi's access to the family allowance payments.

Was it appropriate for this proceeding to be commenced by originating application?

[10] This proceeding was commenced by originating application filed on 9 March 2012 which was five months after the events that gave rise to the complaints made by the Mr Mbuzi in the proceeding. It is not uncommon when a party seeks interim relief from the court to commence the proceeding by originating application and then after the interim relief has been obtained for the court to make an order under r 14 of the *Uniform Civil Procedure Rules* 1999 (*UCPR*) that the proceeding continue as if started by claim and for orders to be made for the filing and service of pleadings.

[11] Mr Mbuzi did not in the originating application seek any urgent or interim relief. As there was absolutely no urgency or need for interim relief in the matter being brought before the court by Mr Mbuzi and no utility in making the declaration or granting the injunction sought in paragraphs 1 and 2 of the application, in the course of hearing the application on 16 March 2012, I struck out paragraphs 1 and 2. In view of the fact that the remainder of the relief sought should have been the subject of a properly pleaded claim which exposed the factual matters which Mr Mbuzi alleges give rise to the several causes of action referred to in paragraphs 4 to 7 of the application, I asked Mr Mbuzi to show cause why the application should not be dismissed as an abuse of process.

[12] This application came on for hearing while my judgment was reserved in the application brought by the Crown Solicitor against Mr Mbuzi to have him declared under the *Vexatious Proceedings Act* 2005 a person who has frequently instituted or conducted vexatious proceedings in Australia. The respondents sought to rely on the existence of that application to have this proceeding stayed, pending the determination of the Crown Solicitor's application to have Mr Mbuzi declared a vexatious litigant.

[13] I prefer the course foreshadowed to the parties during the hearing of dealing with the application on the basis of its form. Using the procedure of the originating application gave Mr Mbuzi the opportunity on the return date of the application (which was chosen by him) to bring the representatives of the respondents before the court and to complain about their activities. It is relevant that the only orders that Mr Mbuzi could seek on the return date of the originating application were

those that facilitated the further prosecution of the proceeding, as if it were commenced by claim. The claims for damages that are made in the application could only ever be pursued on pleadings.

[14] The events that are the subject of Mr Mbuzi's complaints took place over a period of less than one month. Even on the amount of damages that he claims in paragraphs 4 to 9 of the originating application, the District Court would have jurisdiction. It is not apparent that all the heads of damages that are claimed in the application are based on causes of action that are known to law. By way of example, in paragraph 5 damages are claimed for "undue harassment". That does not indicate the underlying cause of action on which Mr Mbuzi bases the claim for damages for undue harassment.

[15] In relation to the claim for damages for negligence, reference is made in paragraph 4 of the application in general terms to "a duty for persons to conform to certain standards of conduct recognised by law in their duties." That is inadequate for pursuing claims for damages for negligence. There are two sets of respondents named in this proceeding and Mr Mbuzi must identify the nature of the relationship with each of them that gives rise to the duty that is alleged to have been owed by the respective respondent to him (which also must be specifically described) and the manner in which it is alleged to have been breached, in order to support a claim for damages for negligence.

[16] The respondents are entitled to know the basis on which each amount claimed for damages has been worked out or estimated and how that claim for damages relates to the relevant cause of action: r 155 *UCPR*.

[17] Where a person in Mr Mbuzi's position wishes to pursue claims for damages, the discipline of having to set out the claims in a properly pleaded and particularised pleading assists in evaluating whether, in fact, they are claims that are worthwhile pursuing and justify the risk, the cost and the inconvenience of litigation.

What is the consequence of using the incorrect originating process?

[18] It is not a foregone conclusion that a party who commences a proceeding by way of originating application, when it should have been brought by way of claim, will obtain an order from the court pursuant to r 14 of the *UCPR*. It is a matter for the exercise of the discretion of the court. The court has jurisdiction under r 16 of the *UCPR* to set aside or stay an originating process. The court has inherent jurisdiction to control its own processes.

[19] During the hearing I noted that Mr Mbuzi was able to file the application by paying a reduced fee, because it appears he qualified for a reduction of fees on the basis of financial hardship. One of the reasons that the court often facilitates the conversion of a proceeding commenced by originating application to one that is deemed to have been commenced by a claim, where pleadings are appropriate, is to ensure the filing fee that has been paid by an applicant is not wasted. That justification for the favourable exercise of the discretion under r 14 does not have the same force for Mr Mbuzi who paid the much reduced filing fee.

[20] It is relevant that the respondents were put to the cost and expense of preparing affidavits and retaining lawyers for an appearance on the return date of the originating application before Mr Mbuzi's claim had been properly formulated and

where there was no real purpose in progressing the claim by bringing it before the court only one week after the application was filed, apart from addressing Mr Mbuzi's choice of the incorrect originating process. In the circumstances, I consider that Mr Mbuzi's election to proceed against the respondents prematurely by way of originating application in this Court before his claims have been properly formulated, rather than by claim and statement of claim in either the District Court or the Magistrates Court, is an abuse of this Court's processes.

[21] I therefore decline to exercise the discretion conferred by r 14 of the *UCPR* favourably to Mr Mbuzi which means that the application must be dismissed.

[22] As the application has been brought to an end without a determination on the merits by virtue of the form in which Mr Mbuzi chose to pursue his claims, I am inclined to order that Mr Mbuzi pay the first and second respondents' costs of the application to be assessed. Before making any order for costs, however, I will give the parties an opportunity to make submissions.