CITATION Mpampas v. **CRA et al**, 2011 ONSC 1897
COURT FILE NO.: 03-CV-248107CM 1
MOTION HEARD: 2011-02-10

SUPERIOR COURT OF JUSTICE - ONTARIO

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RE: Mpampas

AND:

CRA et al

BEFORE: Master Joan M. Haberman

COUNSEL: John Mpampas, on his own behalf

Linen, W., for CRA

Martyr, C., for Gritti

HEARD: February 10, 2011

REASONS FOR DECISION

[1] This endorsement flows from the 4th attendance with respect to Mr. Mpampas' motion to amend his fresh as amended statement of claim, which took place on February 10, 2011.

[2] The hearing of this motion began on September 22 and continued on November 25 and December 10, 2010. The day before the December attendance, Mpampas filed a supplementary motion record with a new form of proposed pleading. He re-filed it again before this last attendance and was told that, as the motion has already begun in the context of his first proposal, and as I had already partially disposed of the motion with respect to the first proposed form of pleading, we could not start the process over and deal with yet another form of proposed pleading in mid-motion. He was told that if he wanted to further amend his pleading, that would have to be dealt with in a new motion at another time, if the issues it raised were not already disposed of here. In view of my findings at this time, there is no basis to consider the new proposed draft.

[3] We did not complete the hearing of this motion in December 2010 so it was again put over to complete in February. This final attendance was scheduled for the purpose of dealing with two issues only:

1) Whether Mr. Mpampas could amend his claim to add paragraph 40(h) thereto vis a vis the defendant, Gritti; and
2) The CRA's claim for costs arising from another portion of the same motion.

[4] Item 1 involves Mpampas' attempt to add the following to the pleading:

> *Gritti and other CRA staff, SFL and Kline libelled Mpampas and maliciously circulated information about Mpampas that they knew to be false and damaging to his reputation generally as a businessman, and specifically, highly damaging to his economic interest at that date, contrary to the Libel and Slander Act.*

[5] Though not disclosed in the draft proposed pleading, the apparent trigger for this assertion is a letter, dated March 25, 1998, authored by D.F.M. Gritti, Insolvency Collections Team, Revenue Collections Division, Toronto-Centre Tax Services of Revenue Canada and sent to Richard Kline of Schwartz, Levitsky, Feldman (SLF). This letter is one of several described by Mpampas in his factum as the basis for his desire to add a claim for libel against Gritti at this late date in the life of this action. It is, however, the only document which Mpampas referred to in his oral submissions. As Mpampas appears to have withdrawn his allegations regarding the remaining documents, I have limited my deliberations to this letter.

[6] The Gritti letters begins with Gritti explaining that he is sending it "in my personal capacity as inspector of World Class Bakers Corporation, in Bankruptcy, and not as an officer of National Revenue."

[7] He continues as follows:

> *I draw your attention to the following events since the deeming of the bankruptcy of World Class Bakers Corporation:*
>
> 1. *Shortly before our meeting at the premises of World Class Bakers Corporation on April 23, 1997,* ***you informed me*** *that in your verification of accounts receivables with certain clients,*
>
>   - *some of the clients reported having paid Mpampas personally instead of forwarding payment to the estate without your authorization and*
>
>   - *that you were unable to match these payments with your records of receivables paid.*
>
> 2. ***On your questioning of Mpampas****, he had first denied taking these funds and then later advised you that he needed cash to meet certain petty cash expenses. He supplied you with receipts and vouchers.*
>
> 3. ***You informed me*** *sometime in early May 1997 that equipment and possibly stock has been removed from the premises by Mpampas without your*

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authority. ***You had identified the missing equipment*** *using your video tapes of the premises.*

You requested authorization from me as inspector to report this incident to the Office of the Superintendent of Bankruptcy for their referral to the Commercial Crimes Unit of the local detachment of the Royal Canadian Mounted Police for investigation.

We agreed that Mpampas should be advised that the theft was being referred for criminal investigation. The equipment was "mysteriously" returned shortly after.

4. *On April 28, 1997,* ***we met with individuals from a rival bakery*** *introduced by Mpampas as prospective purchasers. They expressed interest in the client list and recipes but dropped out immediately after.*

   You subsequently learned that Mpampas entered into a contract with these people in which for a share of the resulting profits, *he would supply the client list and certain vital trade secrets – all to the detriment of the creditors of World Class Bakers.*

5. *Mpampas was discovered to have a criminal record, which may be material,* ***and that he acknowledged to you that he owed money to unnamed underworld figures.***

   It is now apparent to me that Mpampas' actions resulted in the demise of the business and wastage of the value of the ongoing business to the severe detriment of all the creditors.

   Accordingly, in my capacity as an inspector and in the interests of all creditors of World Class Bakers Corporation, I am requesting you to immediately refer this matter to the Official Receiver together with a request that the Office of the Superintendant of Bankruptcy approach the Commercial Crimes Unit of the local detachment of the RCMP to conduct a thorough investigation of Mpampas and others as it related to the bankruptcy of World Class Bakers Corporation,

[8] The letter was copied to Frank Quance, Official Receiver and to R.D. Jenkins, Manager, Revenue Collections, Toronto-Centre TSO.

[9] Mpampas' evidence about this letter is as follows (paragraph 14 of his affidavit);

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> *...Exhibit G is a letter and correspondence from Mr. Gritti to two different Federal officials at two different Federal agencies relating to issues of libel and slander as against me. I had never seen this document until December 2009, but it was always in the possession of Mr. Gritti and the CRA, and* ***the action would have been framed differently from the outset had Gritti disclosed this material to me earlier instead of so late in the action.*** *The discovery of December 2009 helped for me to understand how this document was distributed.*

[10] We had already dealt with this subparagraph briefly on November 25, 2010, insofar as it applied to the CRA. I note that Kline passed away several years ago and the motion to continue the action as against SLF was dismissed (along with the appeal from that order). On that basis, Mpampas agreed to delete all references to them. The reference to "other CRA staff" is also improper as it is imprecise. On that basis, at the November 25 attendance, I ordered that it could not stand.

[11] Gritti opposes the addition of this allegation, as it applies to him at this late date, relying on the expired limitation period. He asserts that libel is a new cause of action, has not been pleaded with particularity and that its addition at this stage of the action would cause him actual prejudice in view of Kline's death.

[12] In view of what I find to be an expired limitation period and no basis to invoke the discoverability principle, I have disposed of the motion on that basis, alone. Kline's death need not factor into my deliberations in view of the limitations issue.

[13] In terms of particulars, the proposed claim, as worded, is clearly devoid of the necessary particularity. This is what Mpampas had hoped to remedy with his new draft, which emerged after the motion had already begun and had been partially dealt with. As my ruling is based on the expired limitation period, the issue of particularity is now moot, as it cannot save this proposed paragraph.

[14] In response to Mpampas' position that he only learned about the letter in December 2009, Gritti asserts that the letter was not hidden but rather, was disclosed both in his and in the CRA's affidavit of documents served in 2006 and 2007 respectively. Mpampas' failure and that of his former counsel to either obtain copies of or to inspect the actual documents disclosed in schedule "A" of the two defence affidavits of documents amounts to a failure to use reasonable diligence. As a result, Gritti asserts, Mpampas is now barred from relying on a lack of knowledge that he could have easily remedied. In essence, the document in issue was always there to be seen but Mpampas chose not to review it.

[15] I have carefully considered the materials filed, the state of the law regarding discoverability and the submissions of Mr. Mpampas and Gritti's counsel with respect to the proposed amendment to paragraph 40(h) of the claim. I conclude that the motion should be dismissed in that regard in view of the expired limitation period. As a result of Mpampas having failed to satisfy me that he used reasonable diligence to obtain the

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information he now relies on when he was first made aware of its existence, I find that what he proposes to plead is no longer tenable at law.

[16] With respect to item 2, on consent, Mr. Mpampas will pay costs, fixed at $1,500, to the CRA in the cause.

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Background – history of the action

[17] In view of some of the allegations Mpampas now makes, and the position he is taking, a thorough review of the history of this action is required.

[18] Mpampas operated the World Class Bakery and claims to have been both a secured and unsecured creditor of that business.

[19] In 1996, Liebl's Food Products Inc. obtained judgment against the Bakery in the amount of $300,000 which Mpampas claims the Bakery could not pay at that time.

[20] As a result, at some point, Mpampas and the Bakery retained the former defendant SLF and Richard Kline thereof as trustees, for the purpose of obtaining advice and assistance in managing both his personal and the Bakery's financial affairs. This culminated in the Bakery's notice of intention to make a proposal under the *Bankruptcy and Insolvency Act*, (the Act) filed in December 1996.

[21] Mpampas' allegations against the defendants are as follows:

- at some point prior to the proposal being filed, SLF became the CRA's agent for the purpose of collecting the Bakery's income, excise and other taxes, as well as payroll source deductions from the Bakery and from others indebted to it;

- this agency agreement, which was unknown to him, was implemented by "unlawful means" and caused damage to the Bakery (which I note is not a party to this proceeding) and to Mpampas;

- this arrangement amounted to a breach of SLF's engagement with the Bakery and with Mpampas;

- SLF failed to comply with the provisions of the Act and neglected to follow through by filing a proposal on behalf of the Bakery;

- as a result, on March 6, 1997, the Bakery was deemed to have made an assignment in bankruptcy by certificate issued by the official receiver;

- SLF and Kline purported to act in the interests of the Bakery and of Mpampas during the course of the bankruptcy, acting as trustee, but at the same time, also acting as the CRA's collection agency;

- in the period that followed, the CRA issued Requirements to Pay to third parties indebted to the Bakery or to the plaintiff, directing that payment be made or property returned to the Receiver General of Canada or to SLF on CRA's behalf under threat;

- these acts allegedly deprived Mpampas of monies to which he claims he was entitled as a secured creditor;

- this also resulted in loss of customers and profits by the Bakery. This was exacerbated by the closing of the business rather than selling it as a going concern;

- the Bakery's assets were sold for an unknown sum and the proceeds of sale were allegedly expropriated by SFL and the others for their own personal benefit and the benefit of CRA;

- in April 1997, Gritti intentionally pushed Mpampas and Gritti, along with Kline, forcibly confined him in an office;

- from November 1996 to June 1997, Gritti and Kline acted in a manner that caused Mpampas to fear that he would be "physically interfered with";

- All of the above was carried out without authority.

[22] When the action began, Mpampas was not represented by counsel, notwithstanding the fact that, as he advised at the time, he suffered from some form of cognitive defect.

[23] I began to case manage this action in March 2004. At that time, matters were stalled as Mpampas was either incapable or not interested in taking the necessary steps to get the matter off the ground. While I indicated that there was some flexibility in view of his alleged health issues, I also made it clear that medical evidence would be required if he continued to miss deadlines and planned to attribute his default to his medical condition.

[24] I received nothing useful or informative from Mpampas' physician until October 2004. As a result of a medical report received from Dr. Mamalak, it was agreed that the action would be stayed briefly at that time while Mpmapas tried to catch up. He was ordered to serve the particulars to his pleadings that had been sought months earlier and to prepare

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his materials for a motion to continue against the trustees, having neglected to obtain leave before commencing suit against them, as required.

[25] Mpampas had already breached a previous timetable order (March 22, 2004) regarding completion of these steps. As a result, at this time, October 2004, Mpampas was given an extension to March 2005 to complete these steps, failing which any of the defendants could move to dismiss for delay.

[26] At that time, I was optimistic that Mpampas would meet the deadline as he advised that Larry Frolick, a retired lawyer, was assisting him, so he was no longer stumbling in the dark.

[27] My optimism was misplaced as, once again, Mpampas failed to comply and Gritti initiated a motion to dismiss for delay in June 2005. Shortly thereafter, Mpampas moved to set aside the stay order and, on September 12, 2005, Mr. Binavince went on record for Mpampas, where he remained for the next three years.

[28] On September 15, 2005, I lifted the stay order and encouraged Mpampas to proceed with his motion to amend as his pleading had become overly complicated by two sets of particulars. Leave to amend was granted on March 2, 2006 and the pleading was amended a few days later.

[29] According to Gritti's evidence, he served his affidavit of documents by cover letter of September 19, 2006. At that time, he disclosed the letter which now forms the basis of Gritti's allegations of libel.

[30] In their cover letter accompanying Gritt's affidavit of documents, his counsel states:

> *If you would like copies of the Schedule "A" documents, kindly advise in writing.*

[31] The letter is addressed to counsel for the co-defendants, as well as to Mr. Binavince, counsel for Mpampas.

[32] Although this was his fourth attendance before me on this motion, on this last attendance, Mpampas advised, for the first time, that Mr. Binavince never received Gritti's affidavit of documents. It is not clear how or when Mpampas became aware of that or why he would have chosen not to mention it in his evidence or to refer to it earlier, though he had been told repeatedly that he would have to show that he used reasonable diligence in order to combat the limitations issue. Mpampas, himself, filed case law regarding this very issue.

[33] Though this assertion could be an important one for Mpampas, it simply emerged in court during the course of the last attendance of four, while Mpampas was well into his submissions. In addition to the lack of evidence regarding this issue, it is also a surprising assertion, in view of the order I made following a telephone case conference

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that took place of January 15, 2007. At that time, I set a deadline for service of the CRA's affidavit of documents. Had Gritti's also been outstanding, I undoubtedly would have included him in that order.

[34] All in all, I am of the view, based on the lack of evidence on point as well as my timetable order, that this comment, casually tossed off during the course of the hearing, is not one that should factor in my current deliberations.

[35] The CRA served their affidavit of documents on March 29, 2007. Their reference to the Gritti letter that appears to have led to the proposed amendment is at item 334, which reads as follows:

> *March 25, 1998 Letter from DG to Frank Quance, at Superintendant of Bankruptcy, to attach copy of letter to Rick Kline* ***asking for investigation by RCMP.***

[36] Despite the fact that the letter in question was disclosed by both defendants in their respective affidavits of documents, Mpampas maintains, in his supporting affidavit, that the defendants maintained "a thick veil of secrecy" regarding these materials. He asserts that he never saw the letter until December 2009. He provides no evidence at all regarding why he did not seek copies of the schedule "A" documents or of this document in particular, notwithstanding how the CRA described it. His evidence is also silent as to why his lawyer, up until October 2008, or he himself thereafter did not, at the very least, attend to inspect the schedule "A" documents, or this letter.

[37] In August 2007, the trustees' Rule 21 motion was granted and the action was dismissed against them. An appeal from that decision was also unsuccessful (August 12, 2008). Thus SLF and Kline (who has since passed away) are no longer defendants against whom relief can be sought.

[38] The action was dismissed by the registrar for delay in January 2008. A motion to set aside the administrative dismissal was brought in June 2008 and was successful. A deadline by which the action had to be set down for trial of the end of December 2008 was ordered.

[39] I then extended the deadline to the end of March 2009 by order of July 16, 2008.

[40] On October 23, 2008, Mr. Binavince obtained an order removing himself as counsel of record. Since that time, Mpampas has remained without counsel, but he advises that his retired lawyer friend is assisting him once again and that he actually retained counsel to draft the proposed new pleading on his behalf.

[41] Thereafter, there has been extension after extension of the deadline by which the action must be set down for trial. Mpampas has been largely responsible for the action having been delayed in recent years. The following are some examples:

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- Though he is well aware that I am case managing the action, he has, twice, moved before other masters for a variety of relief and they have adjourned his motions back to me;

- Mpampas has brought inappropriate and unnecessary motions before me – a master cannot hear a contempt motion, nor can a party be found in contempt when the allegation of non-compliance is in respect of an order that was not obtained at the behest or for their benefit;

- Insufficient time was scheduled for a large refusals motion and the chart mandated by the rules was not used so the motion had to be adjourned;

- Disclosure was sought from SLF by motion as if they were still a party to the action, though it had already been dismissed against them;

- Relief is regularly sought without an evidentiary foundation, though Mpampas has been told repeatedly that the court can only act on the basis of sworn evidence in affidavit form. He has been told how to draft an affidavit, how to swear his oath, how and when to serve and file his evidence and he has been directed to the assistance office for self-represented litigants in this building;

- Mpampas brought the same motion for disclosure from SLF under Rule 301.0 that the CRA had already successfully brought and they shared what they received through that exercise. Mpampas' suspicions that there must be more were not supported by evidence.

[42] Mpampas has also changed his position from time to time. By way of example, during a telephone case conference of January 7, 2010, held after Mpampas had seen the Gritti letter that now forms the basis of his desire to pursue a claim for libel, he advised he would not seek to amend his claim. By June of that year, however, Mpampas had a different approach and advised that he wished to amend after all.

[43] All of these motions have consumed considerable court time and put the defendants to great expense. When costs are sought from Mpampas, he pleads poverty but the evidence tendered to make out that position has been slow in coming and was deficient when ultimately tendered.

[44] When the parties were before me on November 25, 2010, despite having substantially succeeded in resisting the proposed amendments to the claim, the CRA indicated they were prepared to accept only $1500 for costs, payable in the cause. Mpampas, at that

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time, stood by his position that he was unable to pay anything. As I note in my endorsement of that day:

> *I have my own questions about some of the information in the affidavit that I want answered before I am prepared to accept it as support for the plaintiff's alleged impecuniosity. The issue is therefore deferred to next day. Mr. Mpampas should be prepared to swear an oath and respond to questions about this affidavit next day if he wishes to rely on it in response to defence requests for costs.*

[45] We were unable to deal with this issue at the December attendance but it was raised before me again at the last hearing. At that time, this part of the motion was on a regular motions list and did not get reached until after the morning break. We began this matter, then adjourned for lunch. It was only after the lunch break that Mpampas announced that he had only just then decided to accept CRA's position regarding costs, an offer that had been made more than two months and two attendances earlier.

[46] To further complicate matters, though the first return date for this motion was in September 2010 and the first actual hearing date took place in November 2010, at which time an order was made dealing with and disposing of the issues considered at that time, Mpampas filed a supplementary motion record on December 9, 2010, one day before the December hearing date. At that time, he tendered a new form of proposed pleading, thoroughly revising paragraph 40(h) of his initial proposed draft.

[47] Although I made an order on November 25, 2010 that impacted on the allegations in paragraph 40(h), Mpampas came back with a thoroughly revised paragraph 40(h), containing multiple subparagraphs, no doubt in response to Gritti's position, which had been clearly set out in his written material served long ago.

[48] Rule 26.01 has been interpreted broadly, such that a party will be permitted to amend a pleading (subject to the amendment being legally tenable and not causing prejudice that cannot be compensated for in costs) at any time in a proceeding. This flexibility, however, does not apply in mid motion, when the moving party claims to be impecunious and is not prepared to compensate responding parties for their costs incurred in having to shift gears.

[49] Motions are costly exercises and all parties are entitled to a level of certainty that the motion they have prepared for is the motion that will be argued. At some point, a proposed draft pleading for consideration at a motion must be fixed. Mpampas has adopted a moving target approach throughout this motion, responding, with considerable delay, to work done and issues raised by the defendants throughout. At this stage, in view of his plea of impecuniosity, only minimal costs are being sought. Which do not come close to compensating the defendants, even on a partial indemnity basis.

[50] While Mpampas may be representing himself at this stage, he had had the benefit of counsel who was formally on the record for a period of three years. Early on and again

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more recently, he has also had access, informally, to legal assistance. He has been quite candid about that fact. In the circumstances, Mpampas cannot be treated as a man who is stumbling through a labyrinth of process and procedures he does not understand and cannot hope to navigate.

[51] To the contrary, Mpampas has been strategic in his approach, continually adjusting his position to attempt to meet deficiencies in his materials as they are indentified.

[52] The new proposed pleading addresses the issue of lack of specificity raised last day. Had I found that the pleading should be amended to add a claim for libel against Gritti notwithstanding the expiry of the limitation period, I would have dismissed the motion with regards to paragraphs 40(h) with leave to amend. What I would have expected to have seen as a result is something that more closely resembles the revised draft. In view of my decision regarding the limitation period, however, a detailed consideration of the recently proposed form is not necessary.

[53] Also on December 9, 2010, Mpampas filed a document entitled "Submissions of the moving party". In it, he attempted to re-argue matters I had already heard in full and disposed of following the November hearing vis a vis the CRA.

[54] Mpampas was advised that the motion has already been disposed of regarding these issues and if he wished to have me reconsider my earlier decision, he would have to move before me to vary my earlier order, based on evidence. As my endorsement states:

> *...should Mr. Mpampas wish to proceed with this, he will have to move before me to seek a variation of my previous order. He will first have to schedule a mutually convenient motion date and serve and file his materials.*

[55] I also made it clear that the issue we would be dealing with, when assessing the impact of the expired limitation period, was not simply when Mpampas discovered the letter he relied on, but **when he ought to have done so.** I wrote:

> *Mr. Mpampas is reminded that the test is not simply when he discovered various facts but* ***when he could have done so with the exercise of reasonable diligence****.*

[56] Mpampas has not booked, served or filed a motion to vary my previous order. The motion to amend the claim was therefore heard to completion at the recent 4th attendance.

[57] Further, despite the clear words of my endorsement, he tendered no evidence to show any effort on his part to find out the full extent of his possible claims against Gritti until very recently.

THE LAW
Rule 26.01

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[58] Rule 26.01 speaks in mandatory terms. On a straight reading of the Rule, the court must grant leave to amend at any stage of a proceeding on terms that are just, unless prejudice would result that cannot be compensated for by costs or an adjournment.

[59] A cost order tends to be the term most frequently used by the court when the action has moved through multiple steps before a party comes to terms with what it is they want to say in their pleading. Leave is generally granted, but costs are often awarded to those parties who have been or will be put to added expense by reason of the amendment. In this case, Mpampas' self-described inability to pay costs would make costs a problematic term if leave to amend had been granted.

[60] The other term referred to by the Rule itself that is used from time to time to offset prejudice is an adjournment. Any adjournment in this case, however, in no one's interest. The action was commenced in 2003. It stems from events that took place in the late 1990's. The deadline by which the action must be set down for trial has been extended repeatedly and there has already been one motion to dismiss for delay. At this point, the action must go forward.

[61] Although the Rule is appears to be absolute in its application, it has been considerably modified by case law.

[62] The basic qualification to the mandatory nature of the Rule is tenability at law – if the facts as pleaded, even if accepted as true, could not lead to a successful outcome for the plaintiff as a result of the applicable law, leave should not be granted. As a result, the court must carefully scrutinize proposed amendments to ensure they are legally tenable (see *Plante v. Estate of Rene Laurient Plante et al.* 2003 CarswellOnt 2961).

[63] Whether or not the claim is factually tenable is not in issue on a motion of this kind because the facts as pleaded are deemed true for the limited purpose of the motion. Thus, even if it is clear that a plaintiff could not possibly succeed because the evidence does not support the case he is trying to make, that should not form part of the analysis I am required to undertake at this stage. I have therefore refrained from commenting on the merits of the libel claim at this stage, though both parties presented submissions going to the merits, as it is not an appropriate consideration on a motion of this kind.

The Limitations Act, 2002

[64] One aspect of a claim being tenable in law involves the action having been started within the applicable limitation period. In this case, both Mpampas and Gritti maintain that it is the two year limitation period prescribed by the *Limitations Act, 2002* that applies.

[65] There was some confusion on this point, as, in paragraph 40(h) of the proposed amended pleading, Mpampas claims that Gritti libelled him pursuant to the *Libel & Slander Act.* Further submissions in writing were sought on this point.

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[66] Though my order made it clear that all I wanted the parties to address was this discrete issue and nothing more, Mpampas again went through his position on the motion generally.

[67] Despite the proposed pleading, both parties maintain that it is the two-year limitation period under the *Limitations Act, 2002* that applies here, rather than s. 6 of the *Libel and Slander Act*, as there has been no broadcast or publication as understood under that Act.

[68] S. 4 reads of the *Limitations Act, 2002* reads as follows:

> ***Unless this Act provides otherwise,*** *a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.*

[69] The comments and alleged libel that Mpampas complains of occurred in 1998, thus, on a straight reading of s. 4, the time within which to commence an action for libel appears to have expired.

[70] Case law, however, has created an exception to the strict application of that provision such that the commencement of the limitation may be extended in certain circumstances. This exception is generally referred to as the discoverability rule.

[71] This rule is explained in the Court of Appeal's decision in *Coutanche et al. v. Napoleon Delicatessen et al.*, 2004 CanLII 10091:

> *...the discoverability rule is not concerned with the expiry of the limitation, but with its commencement, a point made by the court in* Zapfe *at paragraphs 46 and 47.*

[72] The Court of Appeal then quotes from their earlier decision in *Zapfe v. Barnes* (2003) 66 O.R. (3d) 397 as follows:

> *As appears from the decisions of the Supreme Court of Canada in Central Trust Co. and Peixeiro,* ***the discoverability principle rests by definition on the requirement of diligence by the plaintiff****. Judicial respect for that requirement is inherent to proper regard for the diligence policy rationale, which underlies limitation statues. That requirement dictates the test to be applied in determining the start of a limitation period under the discoverability principle: when can it be said that the plaintiff knew,* ***or by reasonable diligence could have discovered,*** *the material facts on which to base a cause of action against the proposed defendant?*

[73] In *Aguonie v. Galion Solid Waste Material Inc.* (1998) 38 O.R. (3rd) 161, the Court of Appeal stated that discoverability applies to all aspects of a claim, including the identity of a tortfeasor. In that case, the court explained how the principle operates when knowledge as to the identity of a party is the issue:

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> *The discovery of a tortfeasor involves more than the identity of who may be liable.* ***It involves the discovery of his or her acts, or omissions, which constitute liability,***

[74] Later on, the court added:

> *The starting point for the application of the discoverability rule...is the time when the appellants' cause of action arose. This will define the starting point of the limitation period.* ***It is a question of fact when the cause of action arose and when the limitation period commenced****. The application of the discoverability rule is premised on the finding of these facts: when the appellant learned they had a cause of action;* ***or when, through the exercise of reasonable diligence, he ought to have learned they had a cause of action against the respondents.***

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Application of the law to the facts and Conclusion

[75] It is clear that Mpampas was made aware of the existence of the letter which forms the basis of his intended claim for libel as far back as September 2006, at which time he was asked, through his counsel, if he wanted a copy of all Schedule "A" documents, which would have included this document. It appears copies were not requested. There is also no evidence to suggest that Mpampas or his counsel sought to inspect any of the schedule "A" documents, as they were entitled to do under Rule 30.04(1).

[76] Though Mpampas now states (but has filed no evidence to support this) that his former lawyer never received Gritti's affidavit of documents, he was then served, in March 2007, with the CRA's version, which also disclosed the letter in issue.

[77] Even if one were to give Mpampas the benefit of the doubt, if he or his counsel never received Gritti's affidavit of documents (which I am not prepared to accept is the case), his counsel, still on record until October 2008, clearly did receive that of the CRA, which not only disclosed the letter, but described it in terms that ought to have raised Mpampas' curiosity, as it specifically referred to the letter as a document within which DG (Gritti) asked Rick Kline to seek for an investigation by the RCMP.

[78] Mpampas now states that even if he had seen this entry, which he does not deny, there were already many documents dealing with the issue of a possible RCMP investigation, so this did not unduly trouble him.

[79] I have difficulty accepting this submission, which, in effect is all that it was – there is no evidence before the court on this point. If Mpampas is truly concerned about being libelled by Gritti, one would have thought that evidence of Gritti telling others that his conduct merited a police investigation would have been the very thing that ought to have attracted his attention. Surely, he ought to have been curious about what it was Gritti was telling others about why such drastic action was called for.

[80] Mpampas, in my view, failed to exercise reasonable diligence when, following receipt of Gritti's affidavit of documents, he failed to ask for copies or to request an opportunity to review those listed under schedule "A". This omission was compounded in March 2007, when the very same document was again referred to in the CRA's affidavit of documents and described in terms that ought to have piqued his interest. Again, he took no steps to either obtain a copy of the document or to ask to inspect it, as he was entitled.

[81] It is important to bear in mind that Mpampas was represented by counsel during this critical period – and up until October 2008 – more than two years after the initial disclosure. Mpampas is bound by the acts and omissions of his former counsel, who, as his legal representative, was his agent for the purpose of moving his action forward. I have no idea what transpired as between Mpampas and his former counsel and what instructions Mpampas may have given Mr. Binavince regarding these documents. That remains between the two of them.

[82] Mpampas cannot now come before this court and claim the defendants hid this document when the letter was clearly disclosed as far back as 2006. He is now unable to rely on the discoverability rule as, in the face of these incontrovertible facts, he failed to exercise a reasonable level of diligence to obtain the letter.

[83] This is not a case where Mpampas has raised a credible triable issue that is best left to the trial judge. The evidence is clear and uncontroverted – two affidavits of documents were served and each disclosed this document. In the normal course, parties either ask for copies of all the schedule "A" documents or of those they do not have. Where the volume of documents is copious and funds are limited, a party can always avail himself of the right to inspect provided by the Rules. Mpampas had counsel for two years after the first affidavit of documents was served and for well over a year after the second was served. He took over the file from counsel more than a year before obtaining these materials, yet he provides no evidence as to why he did nothing earlier.

[84] As the doctrine of "special circumstances" no longer applies as a means of avoiding the impact of an expired limitation period, I have no choice but to dismiss this motion with respect to paragraph 40(h) of the proposed pleading.

[85] Mpampas is reminded that he faces a current deadline of the end of June 2011 to set the action down for trial.

Master Joan M. Haberman

Date: March 31, 2011

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