

IN THE COURT OF APPEAL, FIJI  
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO. ABU 0053 of 2017  
(High Court Action No. HBC 272 of 2016)

BETWEEN : FIJI RUGBY UNION  
*Appellant*

AND : CARDS FEEJEE LIMITED  
*1<sup>st</sup> Respondent*

AND : CULDEN CHARLES KAMEA  
*2<sup>nd</sup> Respondent*

AND : FIJI ASSOCIATION OF SPORTS & NATIONAL OLYMPIC  
COMMITTEE  
*3<sup>rd</sup> Respondent*

Coram : Basnayake JA  
Lecamwasam, JA  
Almeida Guneratne JA

Counsel : Mr. N. Lajendra for the Appellant  
Mr. G. O'Driscoll for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents  
Mr. R. Singh for the 3<sup>rd</sup> Respondent

Date of Hearing : 16 November 2018

Date of Judgment : 30 November 2018

JUDGMENT

Basnayake, JA

[1] I agree with the reasons and conclusion of Guneratne, JA.

**Lecamwasam, JA**

[2] I agree with the reasons and the conclusion of Guneratne, JA.

**Almeida Guneratne JA**

Introduction

[3] This is an appeal from the Judgment dated 21<sup>st</sup> April, 2017 of the High Court at Suva. By its judgment the High Court struck out the Appellant's originating summons. By that summons the appellant had sought, inter alia the following orders:-

1. *THAT the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants be restrained from conducting Fundraising / promotional activities using Fiji Rugby Union's players, their images/pictures and/or words that associate with the Fiji 7s Team;*
2. *THAT the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants jointly and/or severally payout Fiji Rugby Union all the monies collected in the fundraising/promotional activities through the sale of wrist bands using Fiji Rugby Union's players, their images/pictures and/or words that associate with the Fiji 7s Team;  
(vide: page 10 of the Copy Record)*

[4] The background facts feeding the Appellant's claim reflected in the said summons are succinctly stated by the learned High Court Judge at paragraphs [2] to [4] of his Judgment (vide:- p.7 of the Record) which I shall not repeat at this point but the relevant parts of which I shall refer to later in my determination of this Appeal.



The Judgment of the High Court and the Reasoning behind it

[5] I think it is appropriate to reproduce the premises on which the learned Judge based his reasoning and reached his conclusion as follows:-

“8. *In the statement of claim of the plaintiff it does not say the basis on which they make the claim against the defendant. However, from the submission of the learned counsel or the plaintiff it appears that the plaintiff has come to court on the basis that it owns the Fiji Rugby 7s team and therefore, the defendants cannot use the players, for fundraising projects without its permission.*

9. *A team whether its rugby or any other game, is a group of people. Members of such a team are independent from each other. They cannot be owned by anyone. There can, of course, be contractual obligations between them and any controlling body such as the plaintiff in this matter. This position has been accepted by the plaintiff in its letter dated 26<sup>th</sup> May, 2016 where it is stated as follows in paragraph 4;*

*We urgently request that you remove the photo of our contracted player and likewise stop any fundraising that is not directed to Vodafone Fiji 7s Team as this is misleading to the members of the public. [Emphasis added].*

10. *If a player who has a contractual obligation to the plaintiff acts in contravention of the terms and conditions of the contract the plaintiff is entitled to sue him and not the defendants.*

11. *As submitted by the learned counsel for the 3<sup>rd</sup> defendant it is averred in the affidavit in support of the originating summons that*

*fundraising activities were done without plaintiff's authority. I do not see any basis to this allegation. The plaintiff has failed to explain to the court why the defendants should seek its authority for fundraising activities to assist the improvement of the quality of the game. There is no contractual relationship between any of the defendant and the plaintiff.*

12. *As submitted by the learned counsel for the 3<sup>rd</sup> defendant the plaintiff does not dispute that the 3<sup>rd</sup> defendant paid money to Mr. Ben Ryan, the coach. As I have already said there had been no understanding between the 3<sup>rd</sup> defendant and the plaintiff to pay money to the plaintiff.*

13. *For the reasons set out above the court is of the view that no cause of action has accrued to the plaintiff to sue the defendant and therefore the action of the plaintiff must necessarily fail”.*

[6] It is against that judgment the present appeal has been preferred. The grounds of appeal are at page 2 of the Court Record:

1. *THAT the Learned Primary Judge erred in law and fact in not holding that Fiji Rugby Union as the controlling / governing body for the sport of rugby union in Fiji has rights over the Fiji National 7s Team.*
2. *THAT the Learned Primary Judge erred in law and fact in not holding that anyone intending to use the brand name of Fiji 7s Team or words that associate with it for fundraising activities require approval/authority from Fiji Rugby Union.*



3. *THAT the Learned Primary Judge erred in law and fact in not holding that in the absence of any approval from Fiji Rugby Union as the controlling/governing body of the Fiji 7s Team, it was wrong of the Respondents to separate the Fiji 7s Team from Team Fiji to market and promote the fundraising activity of sale of wrist bands.*
  
4. *THAT the Learned Primary Judge erred in law and fact in not holding the Respondents responsible for its unauthorised actions and ordering it to pay out to Fiji Rugby Union either jointly or severally all the monies collected in the fundraising activity through the sale of wrist bands using the brand name Fiji 7s Team or words that associate with it.*

#### The Determination

- [7] Before I deal with the substantive merits of the appeal, I felt obliged to comment on a point urged on behalf of the 3<sup>rd</sup> Respondent that, the Appellant's action was liable to have been dismissed on the basis that, given the nature of the claim, the same ought to have been instituted by "writ and not by way of originating summons".
- [8] In as much as that point had not been urged before the High Court, I shall refrain from saying anything on that aspect. I shall now proceed to deal with the substantive merits of the appeal.

#### Re: Merits of the Appeal

- [9] The sole basis on which the Judgment of the High Court rests is that no cause of action had accrued to the Appellant (plaintiff) to sue the Respondents (Defendants).

## What is a Cause of Action?

[10] Deriving guidance from past precedents the learned Judge relied on the following propositions as defining or constituting a cause of action.

- (i) "... a set of facts that gives rise to an enforceable claim ...comprising every fact which if traversed the plaintiff must prove in order to obtain judgment."
- (ii) "... is simply a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person."
- (iii) "... any facts or series of facts which are complete in themselves to found a claim (for relief)."

(Vide: Dean v Shah [2012] FJHC 1344; Read v. Brown 22 QBD 128; Letang v. Cooper [1965 1 QB 232 at 242 -243 and Dominion Insurance v Pacific Building Solutions [2015] FJHC 633).

[11] While deriving guidance from the aforesaid precedents and reading between their lines, I venture to construe as to what constitutes a cause of action as follows.

[12] A cause of action is that which a plaintiff must disclose in his claim against a defendant based on a right existing in him whether it be in contract, trust or a duty or obligation on the part of the defendant owed to him referable to a statute, common law or equity. In all those instances a plaintiff must disclose in his claim a necessary nexus or privity between him and the defendant. In other words a plaintiff is required to disclose a defendant's liability to be sued in an action.

[13] The only situation that probably falls outside the definitional framework as to what constitutes a cause of action as articulated above is where a nexus (distinct from any privity) arises in an action based in tort on account of a breach of a



general duty of care imposed on a defendant that could be regarded as having developed into a specific duty owed to a particular plaintiff in the facts and circumstances of a given case. But that has no application here.

[14] Consequently, for the Appellant (plaintiff) to have reached the defendants based on any other cause as articulated in paragraph [12] above there had to be privity between the Appellant (plaintiff) and the Respondents (defendants). In its absence there was no enforceable claim which the Appellant could have sustained against the Respondents.

[15] Remaining in the aforesaid mind set I felt that I needed to address some further issues urged by learned Counsel for the Appellant.

The Reliance on the Digicel Case (vide: at p3 of the Appellant's written submissions dated 17<sup>th</sup> August, 2018)

[16] That case had commenced in the High Court and having proceeded to appeal to this court had culminated in proceedings in the Supreme Court. Having perused the passage the litigation in that case had gone through, I could not find any relevance in that to the instant case in as much as that litigation was one concerned with sponsorship rights in regards to the Rugby 7's team between parties *inter se* in that case.

Submissions made with reference to the Constitution of the Appellant (Vide: pp 103 – 133 of the RHC) and the Amended Constitution (pp 136-174)

[17] Adverting to the objects stated in that constitution the learned Counsel was heard to submit that the Fiji 7's team is part of the National Rugby Team of Fiji and therefore was owned by it and consequently the Respondents could not have used them for fundraising purposes of any sort without its approval.

[18] In that regard, I hark back to what I have said earlier in regard to the aspect of nexus and/or privity between the Appellant and the Respondents.

[19] I re-iterate what I have penned earlier thereon. There was no nexus / privity between the Appellant and any of the Respondents. If at all, the Appellant's grievance ought to have been with the Rugby 7s' players (I add, being part of and inseparable from the National Team. But how could that collateral nexus/ privity have visited the Respondents to have been sued?) I could not see a factual or legal basis in that regard.

The Correspondence between the Appellant and the 3<sup>rd</sup> Respondent

[20] The learned Counsel referred to the correspondence which is contained at pages 177 to 178 of the Copy Record. However having gone through the said correspondence I was at a loss to understand why reliance had been placed on the said correspondence and for what purpose in as much as I could not see how the said correspondence could have helped the Appellant's case. I reproduce below the said correspondence in full.

[on FANANOC Letterhead]

*"May 31, 2016*

*Ref 108/16/A45*

*Mr. John O'connor  
Chief Executive Officer  
Fiji Rugby Union  
SUVA*

*RE – SUPPORT TEAM FIJI TO RIO 2016 OLYMPIC GAMES*

*Thank you for the meeting with myself and Sitiveni Tawakevou from FASANOC and Janet Kamea from Teivovo Rugby at Olympic House yesterday, to discuss our "Support Team Fiji to Rio 2016 Olympic Games" fundraising campaign.*

*From the outset, we agreed that we are all obviously passionate about and fully committed to, giving our Team Fiji constituent national teams, the best*



*possible support for the Rio 2016 Olympic Games and that in itself is something that should unite us all, moving forward.*

*FASANOC officially appointed Teivovo Rugby as a "Silver Sponsor" specifically to help us fundraise for the Rio Olympic Games, based on their Teivovo Rugby Wristbands fundraising project, which I understand the Fiji Rugby Union Board declined late last year.*

*In summary, Teivovo Rugby has taken the initiative to design and import a range of Teivovo Rugby Wristbands which they have distributed for sale throughout Fiji for \$2.00, from which a donation of \$1.00 will be made to FASANOC to help offset preparation and participation costs for all our national teams to the Rio 2016 Olympic Games.*

*Our Agreement with Teivovo Rugby allocates 50% of the funds raised to Team Fiji and 50% specifically to the Fiji Mens 7s Team.*

*Teivovo Rugby is responsible for all costs and management of the project including procurement, distribution, sales and marketing – at no cost to FASANOC.*

*You will appreciate that as a National Olympic Committee, FASANOC has full and exclusive commercial rights to all participating players and officials of all national teams and individuals who will be representing Fiji at the Rio Olympic Games and this includes the Fiji 7s Team.*

*While it is obvious that the Fiji 7s Team players and officials will be the main drawcard for this fundraising campaign – they will also be the main financial beneficiary.*

*All going well, we expect this fundraising project to raise in excess of \$250,000 for our preparations to the Rio 2016 Olympic Games, directly relieving the Fiji Rugby Union and FASANOC of this burden.*

*In a small country such as Fiji, this is a significant amount of financial assistance, facilitated by a small company such as Teivovo Rugby, from our wider population – everyone can make a \$2.00 contribution and they have started already.*

*It is simple and low cost process for the fans of Fiji to show their support and it will also be seen by them as a positive engagement with the Fiji Rugby Union and Team Fiji.*

*Finally, as Culden Kamea mentioned at the meeting yesterday; he has struck a deal with MH Supermarkets to be the main retailer of the Teivovo Rugby Wristbands through their 23 stores around Fiji. As such, he estimates that MH will probably account for 80% of the total sales of the Teivovo Rugby Wristbands in Fiji.*



*Mr Daniel Whippy is an Executive Director and Chief Financial Officer of Carpenters Fiji Limited, which owns MH. He is also a Board Member of the Fiji Rugby Union and so is in the unique position to:*

- *Provide monthly reports of sales of the Wristbands through MH;*
- *Confirm payments to Teivovo Rugby for the supply of the Wristbands, from which \$1 per Wristband sold, will be paid to FASANOC.*

*We will ensure that with Mr. Whippy's oversight that the process will be transparent and that Fiji Rugby Union will be provided with reconciliation of sales.*

*FASANOC seeks the cooperation of the Fiji Rugby Union, both as an affiliate and as a member of Team Fiji to the Rio 2016 Olympic Games, in agreeing to Teivovo Rugby continuing this Fundraising project for the benefit of Team Fiji and the Rugby 7s Team. We have noted your concerns on the wording of the advertisement and undertake to remove the prominence given to the Rugby 7s team in the wording and replace this with a list of the Team Fiji sports. The request to use Osea Kolinisau in the project had in fact been approved through the usual Team Fiji coordination ie via the Section Manager and we would be grateful if you would agree to continuing his image being used please. Teivovo Rugby will also be using athletes from other Team Fiji sports in this project.*

*We firmly believe that this project will benefit the Rugby 7s Team as much as it will benefit Team Fiji, not only in funding but also in capturing the passion and spirit of the nation in backing our effort to place our athletes on the Olympic stage and have them excel.*

*We look forward to your early response to allow us to keep the momentum of this campaign moving forward.*

*Your sincerely*

*(signed)*

*Lorraine Mar*  
*Secretary General – CEO*

*cc – Mr Culden Kamea, Teivovo Rugby”*



- [21] Reading that communication in its entirety I could not find any legal basis that could have grounded a cause of action for the Appellant to have sued the 3<sup>rd</sup> Respondent, leave alone the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
- [22] I could not find any basis on the reliance placed by the Appellant on the document at page 184 of the Copy Record either.
- [23] Learned Counsel for the Appellant also urged before us the fact that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had offered 50% of the funds that were expected to be generated on the initiatives taken by them as if to say that, it was an acknowledgement on their part to concede the Appellant's claim over them.
- [24] In my view, it was not so. That was a gesture on the part of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the interests of the sport of Rugby in the country; the sport the country had reached international standards.
- [25] Even that gesture had been rejected by the Appellant as the Record of proceedings in this case reveals.

#### Final Assessment of the case in Appeal

- [26] I hark back again to what I have penned before as to what constitutes a cause of action. Perhaps the Appellant could be said to have entertained a lament and/or grievance but in its originating summons, a cause of action against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents was not disclosed. In that regard I agree with Mr. O'Driscoll's submission based on the reliance he placed on paragraphs [18] to [21] of the affidavit of the 2<sup>nd</sup> Respondent filed in the High Court (page 60 of the Copy Record).
- [27] Perhaps the Appellant may have had a ground to complain against the 3<sup>rd</sup> Respondent.

[28] In that regard, I have no hesitation in saying that, a cause of action is something more and extra than an alleged ground. (Vide: p.56, Salwan and Narang, Academics Legal Dictionary, 11<sup>th</sup> ed. 1996)

Conclusion

[29] On the basis of the aforesaid reasons, I conclude that I saw no reason to interfere with the learned High Court Judge's judgment. Accordingly, I proceed to make the final orders as follows:-

**The Orders of Court:**

1. *The Appeal is dismissed.*
2. *The Appellant shall pay \$2,500.00 as costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents jointly and \$2,500.00 to the 3<sup>rd</sup> Respondent.*
3. *The said costs shall be in addition to the costs ordered by the High Court in its judgment in Order 2 therein.*
4. *The said sums are to be paid by the Appellant within 28 days of this judgment.*



.....  
**Hon. Justice E. Basnayake**  
**JUSTICE OF APPEAL**



.....  
**Hon. Justice S. Lecamwasam**  
**JUSTICE OF APPEAL**



.....  
**Hon. Justice Almeida Guneratne**  
**JUSTICE OF APPEAL**