

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 22 of 2012

BETWEEN : **ESALA VULA** t/a **VEILOMANI TRANSPORT** of Gusuisavu Village,
Naitasiri, Fiji, Self Employed.

PLAINTIFF

AND : **MERCHANT BANK OF FIJI LIMITED** t/a **MERCHANT FINANCE** a
limited liability company having its registered office at Level 1 Ra Marama
House, Gordon Street, Suva, Fiji.

DEFENDANT

BEFORE : **Acting Master Thushara Rajasinghe**

COUNSEL : **Mr. Maisamoa K.** for the Plaintiff
Mr. Nandan S. for the Defendant

Date of Hearing : **5th November, 2013**

Date of Ruling : **12th February, 2014**

RULING

A. INTRODUCTION

1. This Summons was filed by the Defendant in pursuant of Order 18 rule 18 of the High Court Rules (hereinafter referred as H.C.R) seeking following orders inter alia;

- i. That Plaintiff's Statement of Claim be struck out on the grounds that it discloses no reasonable cause of action and/ or is vexatious and frivolous and/or is an abuse of court process,

- ii. Cost of this application be paid by the Plaintiff; and
- iii. Any other order that the Court deems just and appropriate.

2. Upon being served with this Summons, the plaintiff filed his affidavit in opposition in respect of the grounds contended by the Defendant pursuant to O 18 r 18 (1) (b) and (d) of H.C.R. Subsequently this matter was set down for hearing on the 5th of November 2013 where learned counsel for the Defendant and the Plaintiff made their respective arguments and oral submissions. During the hearing, the learned counsel for the Defendant withdrew the second ground of his Summons which is that this Statement of Claim is vexatious and frivolous pursuant to O18 r 18 (1) (b). Both counsel were then invited to file their respective written submissions at the conclusion of the hearing, which they filed accordingly.
3. Upon careful perusal and consideration of the Summons, respective affidavits and written submissions of the parties and their respective oral arguments and submissions, I now proceed to pronounce my ruling as follows.

B. BACKGROUND,

Pleadings,

4. The Plaintiff instituted this action by way of writ of summons together with his Statement of Claim seeking following orders inter alia,
 - i. Judgment in the sum of \$1,000,000.00,
 - ii. Specific Damages in the sum of \$7,000.00 as mentioned at paragraph 28,
 - iii. General Damages,
 - iv. Exemplary Damages,
 - v. Solicitors Costs on an indemnity basis,
 - vi. Court costs,

- vii. Interest; and
- viii. Such further and/or other relief that this Honourable court may deem just, expedient and necessary,

5. The Plaintiff's claim is founded on four separate loan contracts that he had entered in with the Defendant to purchase four new trucks. Those four loan contracts were subsequently amalgamated into one contract on the 17th of November 2003. However, all those four trucks together with another truck owned by the Plaintiff which was given by him as a security for this loan contract were repossessed by the Defendant on the 22nd of January 2004. Plaintiff claims that he initially thought that the action of the Defendant was right. However, sometimes on or about 2009, he discovered some irregularities and discrepancies in those payments and contracts such as payment in advance, discrepancies in the amount of money borrowed and prices of the vehicles. The Plaintiff then instituted this action based on those discovered irregularities and discrepancies.
6. The Defendant filed their Statement of Defence and Counter Claim which was then followed by the Plaintiff's reply to the Statement of Defence and Defence to the Counter Claim. Subsequently the Plaintiff filed summons for directions. At that stage of this proceedings, the Defendant filed this Summons for strike out.

Defendant's Submissions,

7. The submissions of the Defendant consist with two main grounds. The first ground is that the statement of claim discloses no reasonable cause of action. The second ground is that the abuse of the process of the court.
8. In respect of the first ground of submissions, the learned counsel for the Defendant submitted that the Statement of Claim has not properly disclosed the particulars of the facts and it mixed with facts and evidence. Moreover, the learned counsel argued that the damages claimed in the Statement of Claim were not properly particularized. The learned counsel admitted that the Statement of Claim requires to be amended.

9. The second ground of the Defendant's submission is mainly founded on section 4(1) of the Limitation Act. The learned counsel urged in his submissions that the purported cause of action took place sometimes in 2003 or 2004 and it has now being time barred pursuant to section 4(1) of the Limitation Act. He further argued that the Plaintiff knew about the Limitation act, nonetheless, chose to institute this action which amount to abuse of the process of this court.

Plaintiff's Submissions.

10. The learned counsel for the Plaintiff contended that the Plaintiff's claim is founded on fraud committed by the Defendant, wherefore, section 15 of the Limitation Act allows him to institute this action.
11. The learned counsel for the Defendant submitted in his reply submissions that the facts pleaded in the Statement of Claim do not disclose any allegation of fraud, thus this statement of claim failed to comply with the requirement stipulated in O 18 r 11 of the High Court Rules.

C. THE LAW ON STRIKING OUT.

12. Having briefly outlined the background of this proceedings, I now turn to discuss the applicable laws on the issue of striking out of pleadings under Order 18 rule 18 of the High Court rules.
13. Order 18 rule 18 (1) (a) and (d) states that

“the court at any stage of the proceedings order to be struck out or amend any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –

- a. *It discloses no reasonable cause of action or defence as the case may be,*
- b.
- c.
- d. *It is otherwise an abuse of the process of the court,*

And may order the action be stayed or dismissed or judgment to be entered accordingly, as the case may be.

14. **Justice Byrne** held in *Timber Resource Management Limited v The Minister for Information, The Minister for Agriculture, Fisheries and Forests, The Attorney General of Fiji and others* (HBC 0212 of 2000) that

“Time and again the court have stated that the jurisdiction to strike out proceedings under Order 18 rule 18 should be very sparingly exercised and only in exceptional cases where legal questions of importance and difficulty are raised – per Marsack J.A. in Attorney General v Shiu Prasad Halka (1972) 18 FLR 210 at page 215

In Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd (1899) 1 Q.B.86 at page 96 Lindley M.R. said “the ...Procedure is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient even if proved to entitle the plaintiff to what he asks. The use of the expression “reasonable cause of action” shows the summary procedure.... Is only intended to be had recourse to in plain and obvious cases”.

15. The discretion of striking out of pleadings should be exercised sparingly and only in exceptional cases. The court is required to consider the right of the litigant to access proper and complete judicial process while keeping in mind the fact that the Defendant should not be unnecessarily involved in an action which is plainly and obviously has no cause of action or abuse of the process of the court.

D. REASONABLE CAUSE OF ACTION AND ABUSE OF COURT PROCESS

16. What constitutes a reasonable cause of action was discussed in **Prasad v Home Finance Company Ltd** (2003) FJHC322; HBC0116D.2002s (23 January 2003), where Justice Jitoko held that;

“what constitutes a reasonable cause of action or defence does not mean that the Court should delve into whether the claim or defence is likely to succeed. As Lord Pearson stated in Drummond Jackson v. British Medical Association [1970] 1 WLR 688, [1970] 1 ALL ER 1094 CA at P.1101: No exact paraphrase can be given, but I think a reasonable cause of action means a cause of action with some chance of success, when (as required by r.19 (2)) only the allegations in the pleading are considered.....

The Courts view and many decisions on this matter is clear: As long as the statement of claim or the particulars (Davey v. Bentinck: (1893) 1 QB 185) disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak, and not likely to succeed is no ground for striking it out. (Supreme Court Practice 1985 Vol. 1 p.306).....

It is therefore very clear that in both the exercise of its powers under O.18 r.18 and under its inherent jurisdiction, a Court may only strike out a Statement of Claim and dismiss the action if in the words of Lord Blackburn, in Metropolitan Bank v. Pooley (1885) 10 App. (As 210 at p.221, if and when required by the very essence of justice to be done”.

17. In view of the **Prasad v Home Finance Company Ltd**, (Supra) the strength or the likelihood of the success of the pleading is not a determining factor. The test of reasonable cause of action is to consider whether the statement of claim discloses some cause of action or raise some question fit to be decided by a judge.
18. In respect of the abuse of the process of the court, Justice Pathik while referring Halsbury’s Laws of England observed in **Taniela Bolea v Fiji Daily Post Company Limited** (HBC 0058 of 2003) that

“In considering this application I have borne in the following passage from “Halsbury’s Laws of England 4th Ed vol.37 para.434 on “abuse of process” which I consider pertinent;”

“an abuse of the process of the court arises where its process is used, not in good faith and for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or, more simply, where the process is misused. In such a case, even if the pleading or indorsement does not offend any of the other specified grounds for striking out, the facts may show that it constitutes an abuse of process of the court, and on this ground the court may be justified in striking out the whole pleadings or indorsement or any offending part of it. Even where a party strictly complies with the literal terms of the rules of court, yet if he acts with an ulterior motive to the prejudice of the opposite party, he may be guilty of abuse of process, and where subsequent events render what was originally a maintainable action one which becomes inevitably doomed to failure, the action may be dismissed as an abuse of the process of the court”.

19. The scope of the abuse of the process of the court is wider and goes beyond the parameters of the pleadings. Unlike other grounds stipulated in O 18 r 18 (1) of H.C.R., the court is allowed to venture out from the pleadings even though they are in full conformity with the rules and consider whether the process of the court is used in good faith and for proper purpose.

E. ANALYSIS,

20. Bearing in mind the factual background of this application and the laws pertaining to the issue of striking out, I now turn to analyse the arguments and submissions presented by the parties with the relevant legal principles and provisions. I first deal with the issue of abuse of the process of the court in this ruling.

21. Upon careful consideration, it is obvious that the cause of action pleaded in the Statement of Claim is founded on breach of contract and statute barred pursuant to section 4 (1) of the Limitation Act. The Plaintiff also admitted that his cause of action is time barred in paragraph 33 of the Statement of Claim. The Plaintiff contended that section 4(1) of the Limitation Act is not applicable in this instance action since the cause of action is based on fraud, which allows the Plaintiff to institute this action pursuant to section 15 of the Limitation act.

22. Section 15 of the Limitation Act states that;

“Where, in the case of any action for which a period of limitation is prescribed by this Act, either –

(a) The action is based upon the fraud of the Defendant or his agent or of any person through whom he claims or his agent,; or

(b) The right of action is concealed by the fraud of any such person; or

(c) The action is for relief from the consequence of a mistake,

The period of limitation shall not begin to run until the Plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it.

23. Lord Watson referring section 26 of the Statute of Limitation which is essentially similar to section 15 of the Limitation Act, held in **Daw Hager Lawrance v Lord Norreys** (1890) 15 App Case 210) that

“in order to constitute a fraud which will have that effect, these statutory requirements must be fulfilled. In the first place, it must be a fraud which had deprived the plaintiff of his land; and in the second place it must be a concealed fraud, in this sense that it was not only unknown to the plaintiff, and to those through whom he derives right, but could not, with reasonable diligence, have been discovered by him or them before the commencement of the twelve years immediately preceding the institution of this suit”

24. According to section 15 of the Limitation Act and Lord Watson's observation in Lord Norreys (supra) I find the section 15 of the Act constitutes following main elements, they are as follows that;

- i. The action is based upon the fraud of the Defendant,
- ii. The fraud was concealed or unknown to the Plaintiff,
- iii. The Plaintiff discovered the fraud,
- iv. The Plaintiff exercised reasonable diligence to discover the fraud,

25. The Plaintiff is required to provide necessary particulars of his claim of fraud in his Statement of Claim. Order 18 rule 11(1) (a) of H.C.R. states that;

“Subject to paragraph 2, every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words-

(a) Particulars of any misrepresentation, fraud, breach of trust, willful default, or undue influence on which the party pleading relies;

26. Bramwell L.J. in **Philipps v Philipps** (1897) 4 Q.B.D.127) observed the object of this rule, where his lordship outlined that

“the object of the rules is threefold. It is that the Plaintiff may state what his case is for the information of the Defendant, and that the Plaintiff may be tied down to it and not spring a new case on the Defendant; secondly, that the Defendant may be at liberty to say, that the statement is not sufficient in point of law, and to raise the point of demurrer; and thirdly, that the Defendant, instead of being driven to deny everything by an ambiguous and uncertain statement involving conclusions of issue, as well as actual facts, and so going down to try an expensive issue, may be at liberty to single out any one statement, and to answer it”.

27. In view of O 18 r 11 (a) of H.C.R, it is a mandatory requirement to provide necessary particulars of any claim of fraud in the Statement of Claim. At this point, it should be mindful to differentiate Order 18 rule 7 from Order 18 rule 11, where rule 7 is only dealing with any pleadings subsequent to a statement of claim. However the scope of rule 11 covers every pleading which undoubtedly includes Statement of Claim.

28. I now turn to discuss what constitute the necessary particulars of fraud in pleading in pursuant of section 15 of the Limitation Act and Order 18 rule 11 of the High Court Rules.

29. Jessei MR held in *In re Rica Gold Washing Company* (1879) 11 Ch.D 36) that

“I have always understood it to be a rule in equity that where you allege fraud you must state the facts which constitute the fraud. You are not entitled on a petition any more than in an action to say to the other side “you have defrauded me; you have obtained my money by fraud”. You must state the facts which you say amount to a fraud, so that the other party may know what he has to meet”.

30. A more explanatory and comprehensive description of necessary particulars of fraud in pleading was outlined in **Dow Hager Lawrance v Lord Norreys** (supra) where Lord Watson held that

“In my opinion, a Plaintiff who desires to avail himself of the provisions of section 26 is not released from the ordinary rule of pleading applicable to cases of fraud, which was thus expressed by Earl Selborne in Wallingford v Mutual Society (5 app. Cas. 697) “General allegation, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice”. It is not a sufficient compliance with the rule to state facts and circumstances which merely imply that the defendant, or someone from whose action he is responsible, did commit a fraud of some kind. There must be a probable, if not necessary, connection between the fraud averred and the injurious consequences which the plaintiff attributes to it, and if

that connection is not sufficiently apparent from the particulars stated, it cannot be supplied by general averments”.

31. In view of Lord Watson’s comprehensive observation in Lord Norreys (Supra), the Plaintiff is required to comply with the requirements stipulated in Order 18 rule 11 in order to seek assistance of section 15 of the Limitation Act. A mere statement of facts and particulars of fraud are not sufficient to meet the threshold of necessary particulars of fraud in pleading. The Plaintiff should give the particulars of the overt act of fraud. The particulars of concealment or that the fraud was unknown to him until he discovered it with reasonable diligence need to be pleaded. The pleaded facts must provide a probable connection between the alleged fraud and the injurious consequence which the Plaintiff is claimed.
32. Bearing in mind the above discussed laws and legal principles on the issue of necessary particulars of fraud in pleading, I now turn to statement of claim of the Plaintiff in order to examine the pleaded averment in it with these applicable legal principles. I mainly focus my attention on the paragraphs 22 to 31 of the Statement of claim in this regard,
33. The Plaintiff has not pleaded any act of fraud, instead he pleaded irregularities and discrepancies. The particulars pleaded in the Statement of claim merely stated that due to those alleged irregularities and discrepancies the Plaintiff suffered loss and damages as pleaded. Moreover, the pleading has no particulars of concealment or that the Plaintiff was unaware of this alleged fraud and he exercised reasonable diligence to discover the fraud. A mere statement of his discovery of these alleged irregularities and discrepancies does not suffice to constitute the requirement stipulated in O 18 r11 and section 15 of the Limitation Act.

F. CONCLUSION.

34. Having considered the reasons set out above, I am satisfied that the statement of claim does not contain the necessary particulars of fraud as mandatorily required by O 18 r 11 of the HCR. Accordingly, the Plaintiff is not allowed to institute this proceedings

pursuant to sections 4 and 15 of the Limitation Act. In view of these findings, I hold that the Plaintiff has abused the process of this court by instituting this action.

35. In Conclusion, I make following orders that;

- i. The Statement of Claim of the Plaintiff is struck out in pursuant of Order 18 rule 18 (1) (d) of the High Court Rules and Writ of Summons of the Plaintiff dated 27th of January 2013 is dismissed accordingly.
- ii. The Defendant is granted a cost of \$ 1500 assessed summarily

Dated at Suva this 12th day of February, 2014.

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R.D.R Thushara Rajasinghe
Acting Master of High Court, Suva