IN THE HIGH COURT OF FIJI
AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. 154 of 2014

BETWEEN : MADEN SEN of Sigatoka, Past President, Sigatoka Club, Retired

PLAINTIFF

AND : SIGATOKA CLUB a duly registered club under the Clubs Act, the office situated at Lot 3 & 4 Queens Road, Sigatoka, Fiji.

FIRST DEFENDANT

AND : NIRAJ KASI PRASAD of Valley Road, Sigatoka, Trustee, Sigatoka Club, Businessman

SECOND DEFENDANT

AND : VIJAY SINGH of Sigatoka, Trustee, Sigatoka Club, Businessman

THIRD DEFENDANT

AND : BALA KRISHNA NAIDU of Sigatoka, Trustee, Sigatoka Club, Businessman.

FOURTH DEFENDANT

The Plaintiff in Person
Mr. Vakacakau for the Defendants

Date of Hearing - 22nd January 2015
Date of Ruling - 23rd February 2015

EXTEMPORE RULING

(A) INTRODUCTION

(1) This matter comes before the court by way of an "Interlocutory Summons" filed on behalf of the Defendants dated 13th October 2014, under Order 18, Rule 18 (1) of the High Court Rules seeking the following Order;

That the Plaintiff's Writ of Summons and Statement of Claim be struck out and dismissed with costs to the Defendants
UPON THE GROUNDS THAT:

1. *the Plaintiff's Statement of Claim discloses no reasonable cause of action against the Defendants;*

2. *the Plaintiff's Statement of Claim is scandalous, frivolous or vexatious; or*

3. *the Plaintiff is prejudicial and embarrassing; and*

4. *the Plaintiff's statement of Claim is an abuse of process of Court.*

(2) The application is opposed by the Plaintiff

(3) The Plaintiff "Madan Sen" has sworn an affidavit which was filed on the 27th November 2014, and which opposes the application.

(4) The Defendants did not file an affidavit in reply.

(5) The Plaintiff and the Defendants were heard on the summons.

(B) FACTUAL BACKGROUND

(1) By Writ of Summons dated 12th September 2014, the Plaintiff initiated action against the Defendants.

(2) The Plaintiff in his Statement of Claim pleads inter alia that;

1. *I am a financial member of the Sigatoka Club since the year 1967.*
2. *I have been a Committee member of the Board of the Committee for several years elected by the members at the Annual General Meeting.*
3. *I have been the Vice President of the Sigatoka Club for many years too.*
4. *I have also been the President of the Sigatoka Club.*
5. *There have been several illegal takeovers of the club by disgruntled members in the past 15 years.*
6. *There have been several thefts at the club and large amount of monies stolen without any arrests made by the police.*
7. *The club is a private member's club only however the committee is forced to operate illegally by allowing non-members the general public access to the facilities of the club.*
8. *The present trustees of the Sigatoka club have leased the club to another hotel without the consent of majority of the financial members of the club.*
9. *The members are denied peaceful enjoyment and upon making complaints are forced to leave the club premises.*
10. *My service as the President of the club was unlawfully and unconstitutionally terminated.*

(3) The Defendants filed Acknowledgement of Service of Writ of Summons on the 24th September 2014, but no Statement of Defence was filed.

(4) On the 13th October 2014, the Defendants filed "Interlocutory Summons" under Order 18, Rule 18 (1) (a) of the High Court Rules on the ground that the Plaintiff's claim discloses no reasonable cause of action.

(C) THE LAW

(1) Provisions relating to striking out are contained in Order 18, rule 18 of the High Court Rules. Order 18, rule 18 of the High Court Rule reads;

18. - (1) The Court may at any stage of the proceedings order to be struck out or amended 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; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court;

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

(2) *No evidence shall be admissible on an application under paragraph (1) (a).*

Footnote 18/19/3 of the 1988 Supreme Court Practice reads;

"*It is only plain and obvious cases that recourse should be had to the summary process under this rule, per Lindley MR. in Hubbuck v Wilkinson(1899) 1 Q.B. 86, p91 Mayor, etc., of the City of London v Homer (1914) 111 L.T. 512, CA). See also Kemsley v Foot and Qrs (1952) 2KB. 34; (1951) 1 ALL ER. 331, CA. affirmed (195), AC. 345, H.L .The summary procedure under this rule can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable " (Att - Gen of Duchy of Lancaster v L. & N.W. Ry Co (1892) 3 Ch 274, CA). The summary remedy under this rule is only to be applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process or the case unarguable (see per Danckwerts*

and Salmon L.JJ in Nagle v Feliden (1966) 2. Q.B 633, pp 648, 651, applied in Drummond Jackson v British Medical Association (1970)1 WLR 688 (1970) 1 ALL ER 1094, (CA) .

Footnote 18/19/4 of the 1988 Supreme Court Practice reads;

"*On an application to strike out the statement of claim and to dismiss the action, it is not permissible to try the action on affidavits when the facts and issues are in dispute (Wenlock v Moloney) [1965] 1. WLR 1238; [1965] 2 ALL ER 87, CA).*

It has been said that the Court will not permit a plaintiff to be "driven from the judgment seat" except where the cause of action is obviously bad and almost incontestably bad (per Fletcher Moulton L.J. in Dyson v Att. – Gen [1911] 1 KB 410 p. 419)."

(3) In the case of ***Electricity Corporation Ltd v Geotherm Energy Ltd [1992] 2 NZLR 641***, it was held;

"The jurisdiction to strike out a pleading for failure to disclose a cause of action is to be sparingly exercised and only in a clear case where the Court is satisfied that it has ***all the requisite material to reach a definite and certain conclusion;*** *the Plaintiff's case must be so clearly untenable that it could not possibly success and the Court would approach the application, assuming that all the allegations in the statement of claim were factually correct"*

(4) In the case of National MBF Finance (Fiji) Ltd v Buli [2000] FJCA 28; ABU0057U.98S (6 JULY 2000), it was held;

"The law with regard to striking out pleadings is not in dispute. Apart from truly exceptional cases the approach to such applications is to assume that the factual basis on which the allegations contained in the pleadings are raised will be proved. If a legal issue can be raised on the facts as pleaded then the courts will not strike out a pleading and will certainly not do so on a contention that the facts cannot be proved unless the situation is so strong that judicial notice can be taken of the falsity of a factual contention.

It follows that an application of this kind must be determined on the pleadings as they appear before the Court"

(5) In Tawake v Barton Ltd [2010] FJHC 14; HBC 231 of 2008 (28 January 2010), Master Tuilevuka (as he was then) summarised the law in this area as follows;

"The jurisdiction to strike out proceedings under Order 18 Rule 18 is guardedly exercised in exceptional cases only where, on the pleaded facts, the plaintiff could not succeed as a matter of law. It is not exercised where legal questions of importance are raised and where the cause of action must be so clearly untenable that they cannot possibly succeed (see Attorney General -v- Shiu Prasad Halka 18 FLR 210 at 215, as per Justice Gould VP; see also New Zealand Court of Appeal decision in Attorney -v- Prince Gardner [1998] 1 NZLR 262 at 267."

(6) His Lordship Mr Justice Kirby in Len Lindon -v- The Commonwealth of Australia (No. 2) S. 96/005 summarised the applicable principles as follows:-

a) *It is a serious matter to deprive a person of access to the courts of law for it is there that the rule of law is upheld, including against Government and other powerful interests. This is why relief, whether under O 26 r 18 or in the inherent jurisdiction of the court, is rarely and sparingly provided.*

b) *To secure such relief, the party seeking it must show that it is clear, on the face of the opponent's documents, that the opponent lacks a reasonable cause of action ... or is advancing a claim that is clearly frivolous or vexatious...*

c) *An opinion of the Court that a case appears weak and such that is unlikely to succeed is not, alone, sufficient to warrant summary termination... even a weak case is entitled to the time of a court. Experience teaches that the concentration of attention, elaborated evidence and arguments and extended time for reflection will sometimes turn an apparently unpromising cause into a successful judgment.*

d) *Summary relief of the kind provided for by O.26 r 18, for absence of a reasonable cause of action, is not a substitute for proceeding by way of*

demurrer.... If there is a serious legal question to be determined, it should ordinarily be determined at a trial for the proof of facts may sometimes assist the judicial mind to understand and apply the law that is invoked and to do in circumstances more conducive to deciding a real case involving actual litigants rather than one determined on imagined or assumed facts.

e) If, notwithstanding the defects of pleadings, it appears that a party may have a reasonable cause of action which it has failed to put in proper form, a Court will ordinarily allow that party to reframe its pleading.

f) The guiding principle is, as stated in O 26 r 18(2), doing what is just. If it is clear that proceedings within the concept of the pleading under scrutiny are doomed to fail, the Court should dismiss the action to protect the defendant from being further troubled, to save the plaintiff from further costs and disappointment and to relieve the Court of the burden of further wasted time which could be devoted to the determination of claims which have legal merit.

(7) In Paulo Malo Radrodro vs Sione Hatu Tiakia & others, HBS 204 of 2005, the Court stated that:

"The principles applicable to applications of this type have been considered by the Court on many occasions. Those principles include:

a) A reasonable cause of action means a cause of action with some chance of success when only the allegations and pleadings are considered – Lord Pearson in Drummond Jackson v British Medical Association [1970] WLR 688.

b) Frivolous and vexation is said to mean cases which are obviously frivolous or vexations or obviously unsustainable – Lindley Li in Attorney General of Duchy of Lancaster v L.N.W Ry [1892] 3 Ch 274 at 277.

c) It is only in plain and obvious cases that recourse would be had to the summary process under this rule – Lindley MR in Hubbuck v Wilkinson [1899] Q.B 86.

d) The purpose of the Courts jurisdiction to strike out pleading is twofold. Firstly is to protect its own processes and scarce resources from being abused by hopeless cases. Second and equally importantly, it is to

ensure that it is a matter of justice; defendants are permitted to defend the claim fairly and not subjected to the expense inconvenience in defending an unclear or hopeless case.

e) *"The first object of pleadings is to define and clarify with position the issues and questions which are in dispute between the parties and for determination by the Court. Fair and proper notice of the case an opponent is required to meet must be properly stated in the pleadings so that the opposing parties can bring evidence on the issues disclosed – ESSO Petroleum Company Limited v Southport Corporation [1956] A.C at 238" – James M Ah Koy v Native Land Trust Board & Others – Civil Action No. HBC 0546 of 2004.*

f) *A dismissal of proceedings "often be required by the very essence of justice to be done"..... – Lord Blackburn in Metropolitan – Pooley [1885] 10 OPP Case 210 at 221- so as to prevent parties being harassed and put to expense by frivolous, vexations or hopeless allegation – Lorton LJ in Riches v Director of Public Prosecutions (1973) 1 WLR 1019 at 1027"*

(8) In Halsbury's Laws of England Vol 37 page 322 the term "abuse of process" is described as follows:

"*An abuse of 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 endorsement does not offend any of the other specified grounds for striking out, the facts may show it constitutes an abuse of the process of the court, and on this ground the court may be justified in striking out the whole pleading or endorsement 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 an 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.*"

(9) The term "abuse of process" is summarized in *Walton v Gardiner (1993) 177 CLR 378* as follows:

"*Abuse of process includes instituting or maintaining proceedings that will clearly fail proceedings unjustifiably oppressive or vexatious in relation to the defendant, and generally any process that gives rise to unfairness*"

(10) In Stephenson –v- Garret [1898] 1 Q.B. 677 it was held:

"It is an abuse of process of law for a suitor to litigate again over an identical question which has already been decided against him even though the matter is not strictly res judicata.

Domer –v- Gulg Oil (Great Britain) (1975) 119 S.J 392

"Where proceedings which were viable when instituted have by reason of subsequent events become inescapably doomed to failure, they may be dismissed as being an abuse of the process of the court"

Steamship Mutual Association Ltd –v- Trollope and Colls (city) Ltd (1986) 33 Build L.R 77, C.A

"*The issue of a writ making a claim which is groundless and unfounded in the sense that the plaintiff does not know of any facts to support it is an abuse of process of the Court and will be struck out*"

(D) ANALYSIS

(1) Mr Vakacakau for the Defendants stressed that the Statement of Claim be struck out as it discloses no reasonable cause of action.

(2) In reply, the Plaintiff contended that a reasonable cause of action is pleaded against the Defendants.

(3) The crux of Mr Vakacakau's argument is Order 18, rule 18 (1) (a) of the High Court Rules which reads as follows;

(a) "It discloses no reasonable cause of action or defence, as the case may be; or

(4) The following notes to Order 18, r.19 of the Supreme Court Practice (U.K) 1979 Vol-01 Or 18/19/11 defines the term 'a reasonable cause of action" as follows;

"..... A reasonable cause of action means a cause with some chance of success when only the allegations in the pleadings are considered (per Lord Pearson in Drummon Jackson v British Medical Association [1970] 1 WLR, 688; [1970] 1 All E.R. 1094 C.A.). So long as the statement of claim or the particulars (Davey v Bentinck [1893] 1 Q.B. 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 (Moore v Lawson (1915) 31 T.L.R. 418, C.A.; Wenlock v Moloney [1965] 1 W.L.R 1238 [1965] 2 All E.R 871, C.A.)..."

(5) An application of this type does not require evidence in support. It requires the court to make its determination based upon a perusal of the pleading itself.

(6) When one looks at the Statement of Claim of the Plaintiff, it is apparent that the Statement of Claim does not disclose a cause of action against the Defendants. It is a brief narration of facts. Nevertheless, a number of allegations have been made against the Defendants in paragraphs 7,8 and 9.

The Plaintiff in paragraph seven (07) of the Statement of Claim pleads;

THAT the club is a private member's club only however the committee is forced to operate illegally by allowing non-members the general public access to the facilities of the club.

The Plaintiff in paragraph eight (8) of the Statement of Claim pleads;

THAT the present trustees of the Sigatoka club have leased the club to another hotel without the consent of majority of the financial members of the club.

The Plaintiff in paragraph nine (9) of the statement of Claim pleads;

THAT the members are denied peaceful enjoyment and upon making complaints are forced to leave the club premises.

(7) The above paragraphs do contain certain allegations of fact that raises issues deserving to be aired out properly at the trial of this case. Therefore, the Plaintiff is entitled to bring this action. It is not an abuse of process of the court.

(8) Unfortunately, due to poor and negligent drafting, the Statement of Claim is a narration of facts and no cause of action is disclosed. The appropriate remedy is to allow the Plaintiff a chance to amend the Statement of Claim so as to accentuate the issue for this case. I agree with Mr. Vakacakau that the particulars are insufficient to enable the Defendants to properly plead to the Statement of Claim. Moreover, the Statement of Claim fails to disclose what the cause of action is. The claim is very poorly pleaded and not in proper form. Nevertheless, this would not be a reason for striking it out in its entirety. I am not inclined to strike out the Statement of Claim as the strike out is action of last resort. I remind myself of Kirby J's words (supra) that , *"if , notwithstanding the defects of pleadings, it appears that a party may have a reasonable cause of action which it has failed to put in proper form, a court will ordinarily allow that party to reframe its pleading."*

(9) At this juncture, I bear in mind the "caution approach" that the Court is required to exercise, when considering an application of this type.

(10) I remind myself of the Principles stated clearly in the following decisions;

Megarry V.C in Gleeson v J. Wippell & Co. [1977] (1) W.L.R. 510 at 518 said;

"First, there is the well-settled requirement that the jurisdiction to strike out an endorsement or pleading, whether under the rules or under the inherent jurisdiction, should be exercised with great caution, only in plain and obvious cases that are clear beyond doubt. Second, Zeiss No. 3 of

[1970] Ch.506 established that, as had previously been assumed, the jurisdiction under the rules is discretionary; even if the matter is or may be res judicata, it may be better not to strike out the pleadings but to leave the matter to be resolved at the trial".

Lindley M.R. in Hubbuck & Sons, Ltd v Wilkinson, Heywood & Clark Limited [1899 1 Q.B. 86] at page 91 said:

"...summary 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" in rule 4 shows that the summary procedure there introduced is only intended to be had recourse to in plain and obvious cases".

In Attorney General v Shiu Prasad Halka [1972] 18 FLR 210 Marsack J.A. said;

"...I think it is definitely established that the jurisdiction to strike out proceedings under Order 18 rule 18 should be very sparingly exercised where legal questions of importance and difficulty are raised".

Master Tuilevuka (as he then was) in *Sugar Festival Committee 2010 v Fiji Times Ltd (2012) FJHC 1404; HBC 78. 2010 (1 November 2012) held;*

"Courts rarely will strike out a proceeding on this ground. It is only in exceptional cases where, on the pleaded facts, the plaintiff could not succeed as a matter of law or where the cause of action is so clearly untenable that it cannot possibly succeed- will the courts act to strike out a claim. If the facts as pleaded do raise legal questions of importance, or a tribal issue of fact on which the rights of the parties depend- the courts will not strike out the claim."

(E) CONCLUSION

It is my considered view that an amendment to the Statement of Claim is necessary to clarify the cause of action and the remedies requested.

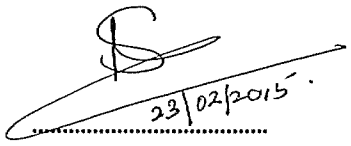
I therefore dismiss the Summons to strike out the Statement of Claim, but order the Plaintiff to file an amended Statement of Claim specifying the cause of action and the remedies sought.

(F) FINAL ORDERS

(1) The Summons to strike out the Statement of Claim is dismissed.

(2) The Plaintiff is directed to file and serve a summons to amend the Statement of Claim within 14 days from the date hereof.

(3) The Plaintiff is ordered to pay a cost of $500.00 to the Defendants, which is to be paid within 14 days from the date hereof.



Jude Nanayakkara
Acting Master of the High Court

At Lautoka

23/02/2015