IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. 64 of 2014

BETWEEN : **ABDUL RAHIMAN ALI** and **MOHAMMED IMTIAZ** And **MOHAMMED HARUN** of Nadi, Fiji, former Committee Members of Nadi Airport Islamic Society.

PLAINTIFFS

AND : **MOHAMMED JAMAL** of Martintar, Nadi, Fiji, Chairman of Trustees, Nadi Airport Islamic Society.

FIRST DEFENDANT

AND : **HAJI ROSHAN ALI and HAJI MOHAMMED AIYUB KHAN** of Martintar, Nadi, Fiji, Trustees of Nadi Airport Islamic Society.

SECOND DEFENDANTS

Mr. Siddiq Faizal Koya for the Plaintiffs
No appearance for the Defendants

Date of Hearing :- 12th March 2015
Date of Ruling :- 15th May 2015

EXTEMPORE RULING

(A) INTRODUCTION

(1) Before me is the Plaintiffs Summons pursuant to Order 15, rule 4 and Order 20, rule 5, seeking leave to amend their Writ of Summons and Statement of Claim and also to join "Nadi Airport Islamic Society" as the third Defendant in this action.

(2) The application is supported by the affidavit of second Plaintiff.

(3) Upon being served with summons the Defendants filed an affidavit in opposition opposing the application.

(4) The summons was set down for hearing on 12th March 2015. The Plaintiffs were heard on the Summons. The Defendants neither appeared nor filed submissions to oppose the Plaintiffs application.

(B) FACTUAL BACKGROUND

(1) The Plaintiffs have filed a writ against the Defendants seeking damages for publishing libel upon the Plaintiffs.

(2) The Plaintiffs are the former Committee Members of the "Nadi Airport Islamic Society" and the Defendants are the Chairman and Trustee of the said committee.

(3) The Plaintiffs have alleged that the Defendants have acted fraudulently and with malice in convening a separate meeting for the review of the conduct of the Plaintiffs as Committee Members and publishing a Notice highlighting defamatory comments.

(4) The Defendants are sued in their personal capacity. The Defendants have filed their Statement of Defence. The Plaintiffs have not filed the reply to Defence. The action has not proceeded beyond the stage of Pleadings.

(C) THE LAW

(1) This is the Plaintiffs application to amend their Statement of claim pursuant to Order 20 rule 5 of the High Court Rules 1988. The law relating to grant of leave to amend pleadings is set out under Order 20, rule 5 of the High Court Rules 1988.

Order 20 Rule 5 of the High Court Rules provides:

> *"5-(1) Subject to Order 15, Rule 6, 8 and 9 and the following provisions of this rule, the Court may at any stage of the proceedings allow the Plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct."*

(2) Under Order 20/8/6 of the Supreme Court Practice of 1999 under the heading **'General principles for grant of leave to amend'** at page 379 it is stated that:

> *"General principles for grant of leave to amend (rr5, 7 and 8)-It is a guiding principle of cardinal importance on the question of amendment that, generally*

speaking, all such amendments ought to be made ***"for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defects or errors in any proceedings."*** *(see per Jenkins L. J. in R. L. Baker Ltd v Medway Building & supplies Ltd [1958] 1 W.L.R. 1216; [1958] 3 All E.R. 540. P. 546)."*

(Emphasis added)

It is a well established principle that the object of the court is to decide rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace. It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right" (per Bowen L.J. in Cropper v. Smith (1883) 26 Ch. D. 700, pp. 710 – 711, with which observations A.L. Smith L.J., expressed "emphatic agreement" in Shoe Machinery Co. v. Cultam (1896) 1 Ch. 108. P. 112)."

(3) Under Order 20/8/6 of the Supreme Court Practice of 1999 under the heading '**General principles for grant of leave to amend**' at page 379 further stated as follows:

"In ***Tildesley v. Harper*** (1878) 10 Ch. D. 393, pp 396, 397, Bramwell L.J. said:

"My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by this blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise." "However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs" (per Brett M.R. Clarapede v. Commercial Union Association (1883) 32 WR 262, p263; Weldon v. Neal (1887) 19 QBD 394 p. 396. Australian Steam Navigation Co. v. Smith (1889) 14 App. Cas. 318 p 320; Hunt v. Rice & Sons (1837) 53 TLR 931, C.A and see the remarks of Lindley L.J. Indigo Co. v. Ogilvy (1891) 2 Ch. 39; and of Pollock B. Steward v. North Metropolitan Tramways Co. (1886) 16 QBD. 178, P. 180, and perEsher M.R. p.558, c.a.). An amendment ought to be allowed if thereby "the real substantial question can be raised between the parties," and multiplicity of legal proceedings avoided (Kurtz v. Spence (1888) 36 Ch, D. 774; The Alert (1895) 72 L.T. 124).

On the other hand it should be remembered that there is a clear difference between allowing amendments to clarify the **issues in dispute and those that provide a distinct defence or claim to be raised for the first time** (see, per Lord Griffiths in Kettma v Hansel Properties Ltd [1987] A.C. 189 at 220).

Leave to amend will be given to enable the defendant to raise a defence arising from a change in the law since the commencement of the proceedings affecting the rights of the parties or the relief or remedy claimed by the plaintiff, even though this might lead to additional delay and expense and a much longer trial, e.g. that the plaintiffs have acted in contravention of Art. 85 (alleging undue restriction of competition) and Article 86 (alleging abuse of dominant market position) of the treaty establishing the European Economic Community (the "Treaty of Rome") which became part of the law of the United Kingdom by the European Communities Act 1972, so as to become disentitled to their claim for an injunction (Application des Gaz SA v Falks Veritas Ltd [1974] Ch. 381; [1974]3 All E.R. 51 CA). In a copyright action, leave may be given to amend the statement of claim to include allegations of similar fact evidence of the defendant having copied the products of other persons (Perrin v Drennan [1991] F.S.R. 81).

Where a proposed amendment is founded upon material obtained on discovery from the defendant and the plaintiff also intends to use if for some purpose ulterior to the pursuit of the action (e.g. to provide such information to third parties so that they could bring an action), **the plaintiff should not be allowed to amend a statement of claim** endorsed on the writ and so it the public domain but instead the amendment should be made as a statement of claim separate from the writ and thus not available for public inspection (Mialano AssicuranionaSpA v Walbrook Insurance Co Ltd [1994] 1 W.L.R 977 see too Omar v Omar [1995] 1 W.L.R. 1428,) use of documents disclosed in relation to Mareva relief permitted to amend claim and at trial.

The Court is entitled to have regard to the merits of the case in an application to amend if the merits are readily apparent and are so apparent without prolonged investigation into the merits of the case (King's Quality Ltd v A.J. Paints Ltd [1997] 3 All E.R. 267)."

(4) Justice Wickramasinghe stated in ***Colonial National Bank v Naicker [2011] FJHC 250; HBC 294. 2003 (6 May 2011)*** by direct reference to the Supreme Court Practice 1988 (White Book) as set out under Order 20/5-8/6 as:

> *"It is a guiding principle of cardinal importance on the question of amendment that generally speaking, all such amendments ought to be made" for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defects or error in any proceedings." (see per Jenkins L.J. in R.L Baker Ltd v Medway Building & Supplies Ltd [1958] 1 W.L.P 1216, p 1231; [1958] 3 All E.R 540, p. 546)."*

Justice Pathik in ***Rokobau v Marine Pacific Ltd Hbc0503d.93s*** said:

> *"We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be in my opinion, improper and unjust. Under very peculiar circumstances the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so."*

(5) Lord Keith of Kinkel in **Ketteman and others v Hansel Properties Ltd** (1988) 1 All ER 38 observed that;

> *"whether or not a proposed amendment should be allowed is a matter within the discretion of the judge dealing with the application, but the discretion is one that falls to be exercised in accordance with well-settled principles. In his interlocutory judgment of 10 December 1982, allowing the proposed amendment, Judge Hayman set out and quoted at some length from the classical authorities on this topic. The rule is that amendment should be allowed if necessary to enable the true issues in controversy between the parties to be resolved, and if allowance would not result in injustice to the other party not capable of being compensated by an award of costs. In Clarapade & Co v Commercial Union (1883) 32 WR 262 a 263 Brett MR said:*

The rule of conduct of the court in such a case is that, however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by cost: but if the amendment will put them into such a position that they must be injured it ought not to be made".

(6) LORD KEITH OF KINKEL in KETTEMAN v HANSEL PROPERTIES (supra) states further that;

> *"The effect of these authorities can, I think, be summarised in the following four propositions. First, all such amendments should be made as a necessary to enable the real questions in controversy between the parties to be decided. Secondly, amendments should not be refused solely because they have been made necessary by the honest fault or mistake of the party applying for leave to make them: it is not the function of the court to punish parties for mistakes which they have made in the conduct of their cases by deciding otherwise than in accordance with their rights. Thirdly, however blameworthy (short of bad faith) may have been a party's failure to plead the subject matter of a proposed amendment earlier, and however late the application for leave to make such amendment may have been the application should, in general, be allowed, provided that allowing it will not prejudice the other party. Fourthly, there is no injustice to the other party if he can be compensated by appropriate orders as to costs."*

Speight J. in **Reddy Construction Company Ltd v Pacific Gas Company Limited** (1980) 26 FLR 121 held;

> *"The primary rule is that leave may be granted at anytime to amend on terms if it can be done without prejudice to the other side."*

(D) ANALYSIS

(1) The Summons which is before me asks for an order on behalf of the Plaintiffs that they be granted leave to amend the statement of claim. The Plaintiffs seek to make certain amendments to their pleadings in relation to the inclusion of a litigant and the change of capacity in which Defendants are to be sued. These changes include:

(a) *To sue the first Defendant in the capacity as the Chairman of "Nadi Airport Islamic Society".*

(b) *To sue the second Defendant in the capacity as the Trustee of the "Nadi Airport Islamic Society".*

(c) *To include "Nadi Airport Islamic Society" as the Third Defendant.*

(2) The Defendants opposed the Summons and filed an affidavit in opposing the summons. The Defendants position is that they will incur unnecessary costs because of the amendment.

(3) The Plaintiffs did not respond to this by way of an affidavit in reply. This is quite unsatisfactory.

(4) Be that as it may, I approach the facts of this case and the submissions made to court with the following principles uppermost in my mind.

- ❖ The basis of an amendment is to ensure that the real issue is tried and the court should deal with the whole matter in contest between the parties.
- ❖ Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy.
- ❖ There is a clear difference between allowing amendments to clarify the issues in dispute and those that provide a distinct defence or claim to be raised for the first time (**Ketteman v Hansel Properties Ltd**, (supra)

(5) In the instant case, the Plaintiffs have alleged that the Defendants have acted fraudulently and with malice in convening a separate meeting for the review of the conduct of the Plaintiffs as committee members and in publishing a notice highlighting defamatory comments.

The Defendants state that the Special General Meeting (SGM) was called at the request of the residents of the Nadi Airport area and according to the provisions of the Constitution of "Nadi Airport Islamic Society".

The Defendants further state that the "SGM" was convened on agenda raised and requested by the members of "Nadi Airport Islamic Society" upon a matter of public interest and as such does not tantamount to defame any person or persons.

Therefore, the issue should be whether the Defendants have acted fraudulently and with malice in convening a special meeting for the review of the conduct of the Plaintiffs as committee members and in publishing a notice highlighting the alleged comments?

(6) The Plaintiffs in the proposed Statement of Claim has made the same claim for damages for publishing a libel upon the Plaintiffs. The amendment sought does not raise any new matters. It does not raise a new claim for the first time. No new averments are sought to be included. The identical prayers have been included in the proposed Statement of Claim. The Plaintiffs seek to alter the capacity in which the Defendants are sued. The new capacity is one which the Defendants had at the date of the commencement of the proceedings or had since acquired.

What is the effect of this alteration? Certainly this will not change the action into one of substantially different character which would more conveniently be the subject of a fresh action. Moreover, the amendment does not alter the case the Defendants have to meet. Granting leave to amend would assist the Court in deciding the matters that are in controversy. There is nothing by which it could be said that this amendment will not lead to a decision of the real matter in controversy. On the contrary, it appears to me that the amendment will assist the court in being able to determine the controversy between the parties.

(7) The Plaintiffs may perhaps have been neglectful in not raising the matter initially in the existing Statement of Claim.

At this juncture, I echo the sentiments of Staughton LJ in ***"British Gas Plc v Green Elms Ltd"*** (1998) CA,

> *"It is a well-established principle that the object of the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace."*

"In ***Tildesley v. Harper*** (1878) 10 Ch. D. 393, pp. 396, 397, Bramwell L.J. said:

> *"My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by this blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise." "However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs" (per Brett M.R. Clarapede v. Commercial Union Association (1883) 32 WR 262, p263; Weldon v. Neal (1887) 19 QBD 394 p. 396. Australian Steam Navigation Co. v. Smith (1889) 14 App. Cas. 318 p 320; Hunt v. Rice & Sons (1837) 53 TLR 931, C.A and see the remarks of Lindley L.J. Indigo Co. v. Ogilvy (1891) 2 Ch. 39; and of Pollock B. Steward v. North Metropolitan Tramways Co. (1886) 16 QBD. 178, P. 180, and per Esher M.R. p.558, c.a.). An amendment ought to be allowed if thereby "the real substantial question can be raised between the parties," and multiplicity of legal proceedings avoided (Kurtz v. Spence (1888) 36 Ch, D. 774; The Alert (1895) 72 L.T. 124).*

(8) The next issue for consideration is whether amendment can be done without prejudice to the Defendants?

At this juncture, I reminded myself that;

- An amendment should be allowed if it could be done without prejudice to the other side.

- I have to balance the extent of prejudice with the extent of Plaintiffs need to make the amendments.

- It is a matter of pure judgment or discretion which is not susceptible to the giving of any other reasons.

It is noteworthy that, the Defendants did not suggest that there is any specific prejudice which would be suffered by the Defendants should the amendments be granted.

The new capacity is one which the Defendants had at the date of the commencement of the proceedings or had since acquired.

The Defendants will of course be entitled to file an Amended Defence and in that Defence put all the bases upon which they seek to rely in defending the Amended Statement of Claim. They will not, because the Statement of Claim is amended, be precluded from putting any relevant defence upon which they seek to rely.

In the circumstances, I have no hesitation in holding that no injustice will be caused to the Defendants.

(9) The next issue for consideration is Costs.

> *'As a general rule, where a plaintiff makes a late amendment, as here, which substantially alters the case the defendant has to meet and without which the action will fail,* ***the defendant is entitled to the costs of the action down to the date of the amendment*** *(per Stuart-Smith L.J. in Beoco Ltd v Alfa Laval Co Ltd [1995] Q.B. 137). (emphasis in mine)*

In the instant case the Defendants have not submitted any evidence of costs that they have incurred.

This action has not proceeded beyond the stage of pleadings. The action was instituted on 25th April 2014. The summons for amendment and joinder was filed on 05th December 2014. The period of around 08 months can be possibly described as "reasonable".

In these circumstances, I have no hesitation in holding that the Defendants are not entitled to costs.

(10) The next issue for consideration is whether there are sufficient grounds to grant the Plaintiffs application for joinder.

The Plaintiffs application is made pursuant to Order 15, rule 4 of the High Court Rules.

Order 15, rule 4 provides;

> *4. –(1) Subject to rule 5 (1), two or more persons may be joined together in one action as plaintiffs or as defendants with the leave of the Court or where –*
>
> *(a) of separate actions were brought by or against each of them, as the case may be, some common question of law or fact would arise in all the actions, and*
>
> *(b) all rights to relief claimed in the action (whether they are joint, several or alternative) are in respect of or arise out of the same transaction or series of transactions.*
>
> *(2) Where the plaintiff in any action claims any relief to which any other person is entitled jointly with him, all persons so entitled must, subject to the provisions of any Act and unless the Court gives leave to the contrary be parties to the action and any of them who does not consent to being joined as a plaintiff must, subject to any order made by the Court on an application for leave under this paragraph, be made a defendant.*
>
> *This paragraph shall not apply to a probate action.*

When one looks at Order 15, rule 4, it is apparent that the Plaintiffs have to satisfy the requirements of rule 4(1) (a) and (b) namely, same common question of law or fact arise in all the actions and all the rights to relief claimed arise out of the same transaction.

The Plaintiffs did not satisfy the above requirements. Therefore, the application for joinder fails.

In my view the summons to joinder is irregular as Order 15, rule 4 has no application to the current matter.

(E) CONCLUSION

Having had the benefit of written submissions and as well as arguments from Counsel, for which I am most grateful, and after having perused all the affidavits by the parties, this court concludes that,

(1) There does not exist basis to grant the Plaintiffs application for joinder.

(2) There does exist sufficient basis to grant the Plaintiffs application to amend the capacity in which the Defendants are sued.

(F) FINAL ORDERS

(1) The Plaintiffs are hereby granted leave to amend the capacity in which the Defendants are sued.

(2) The Plaintiffs are ordered to file the amended Writ and the Statement of Claim within 14 days from the date hereof.

(3) The Plaintiffs application for joinder is refused.

(4) I make no order for costs.

HIGH COURT OF FIJI
LAUTOKA

15/05/2015

Jude Nanayakkara
Acting Master of the High Court

At Lautoka
15th May 2015