

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 228 of 2013

BETWEEN: **SEKAIA SULUKA** and **TEVITA RALULU** on behalf of themselves and all other persons who are Retired Police Officers.

PLAINTIFFS

AND: **FIJI POLICE GROUP WELFARE SCHEME** having its office at Police Head Quarters, Vinod Patel Building, Nasinu.

1st DEFENDANT

AND: **CHAIRMAN OF FIJI POLICE GROUP WELFARE SCHEME (Ravi Narayan)** of c/- Police Head Quarters, Vinod Patel Building, Nasinu.

2nd DEFENDANT

AND: **FIJI POLICE GROUP WELFARE SCHEME SECRETARY (Rishi Deo)** of c/- Police Head Quarters, Vinod Patel Building, Nasinu.

3rd DEFENDANT

AND: **COMMISSIONER OF POLICE** c/- Police Head Quarters, Vinod Patel Building, Nasinu.

4th DEFENDANT

BEFORE: **Master Vishwa Datt Sharma**

COUNSEL: **Ms. Maisamoa** - for the Plaintiff
Ms. Taukei. S with Ms. Faktofaun - for the Defendants

Date of Hearing: 07th April, 2016

Date of Ruling: 31st May, 2016

RULING

(Application by the Plaintiff for Summary Judgment pursuant to Order 14 Rules 1, 2, 3 & 8 and Order 27 Rules 3 & 4 of the High Court Rules 1988 and the Inherent Jurisdiction of this Honourable Court.)

INTRODUCTION

1. The **Plaintiff** filed a Summons on 09th September, 2015 and sought for the following orders-
 - (i) **That Summary Judgment be entered against the Defendants herein in the sum of \$8,000,000.**
 - (ii) **Interest at the rate of 6% per annum from the initiation of this matter until the full payment.**
 - (iii) **That the matter be set for assessment of damages of the remaining claims by the Plaintiffs as provided in the prayers of relief in the Writ of Summons and Statement of Claim.**
 - (iv) **Costs of this action.**
2. The application is made pursuant to ***Order 14 Rules 1, 2, 3 & 8*** and ***Order 27 Rules 3 & 4 of the High Court Rules, 1988 and the Inherent Jurisdiction of this Honourable Court.***

BACKGROUND

3. The Plaintiffs are alleging that on or about 2009, they had entered into a Contract with the Defendants, as per the Fiji Police Group Welfare Scheme (**FPGWS**) Circular which sets out the benefits available to the Police Officers under this in- house scheme. This Circular implemented a deduction of \$15 as premium from all Police Officers across the board to which they are entitled to upon reaching the retirement age of 55 years or in any event which necessitates pay out from FPGWS.
4. The Plaintiff are further alleging that the Defendants have breached the Contract entered upon between the parties since the Plaintiffs have not been paid or given their Term Life Endowment Cover and other benefits to which they are entitled to under FPGWS.
5. The Plaintiffs are also alleging fraud, negligence and breach of legitimate expectations against the Defendants.
6. Whereof, the Plaintiffs are claiming Judgment in the sum \$8,000,000, Damages under different heads, Costs and interest accordingly.

PLAINTIFF'S SUBMISSIONS

7. In essence the Plaintiff submitted that upon the perusal of the Defendant's Defence with that of the Statement of Claim, it was noted that the Defendant's have **admitted most of the Claim** as included in the Writ. Therefore, the Plaintiff finds that the Defendants have **no Defence** to the Claim.
8. Since the Defendants have furnished an Affidavit, and if **no triable issues and defence** are raised within the Affidavit, then the Court must enter Summary Judgment against the Defendants.
9. Further, the Plaintiff cites **Order 27 Rule 3 & 4 of the High Court Rules, 1988**, stating that if an admission is made by a party to a cause through his or her pleadings or otherwise, the other party may apply to the Court for Judgment based on the **admission** without further delay or waiting for the determination of the Court. The Affidavit filed by Isikeli Ligairi on behalf of the Defendants reveals admission.
10. The Plaintiff adopted his written submissions with case authorities for Courts consideration and decision.

DEFENDANT'S SUBMISSIONS

11. The Defence submitted that the Plaintiff's as well as the Defendant's affidavits raise complicated questions of law and triable issues of fact as follows-
 - Whether there was a contract entered between the Plaintiff and the Defendant?
 - If so, was the contract breached by the Defendants?
 - Whether there was negligence on the part of the Defendants?
 - Whether there was fraud on the part of the Defendants?
 - Whether the Defendants have breached legitimate expectation for the Plaintiffs?
12. The Defendants submit they have a valid and meritorious Defence as per the Statement of Defence filed on 13th September, 2003.
13. The application is in violation of **Order 14 Rule 12 and Order 77 Rule 5 (1) of the High Court Rules** which expressly prohibits summary judgment against the State.

14. That FPGWS is a body established under the Fiji Police Force (**'FPF'**) and FPGWS is solely managed and controlled by the FPF.
15. The FPF is a statutory body and functions as an agent of the State. The 4th named Defendant exercises the powers and authority vested on him by the law and further derived his or her power in relation to the administration of the FPF, from **section 8 of the Police Act Cap 85**.
16. The Defendant reiterates **Order 14 Rule 12 and Order 77 Rule 5 (1)** in this regard and submit that the application be dismissed and substantive matter to proceed to proper hearing.
17. The Defence adopted their written submissions with case authorities accordingly.

THE LAW

18. **Order 14 of the High Court Rules, 1988 deals with Summary Judgment applications which states-**

1.-(1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.

(2) Subject to paragraph (3), this rule applies to every action begun by writ other than-

(a) an action which includes a claim by the plaintiff for libel, slander, malicious prosecution or false imprisonment,

(b) an action which includes a claim by the plaintiff based on an allegation of fraud.

(3) This Order shall not apply to an action to which Order 86 applies.

19. **Order 27 Rules 3 & 4 of the High Court Rules, 1988 deals with Judgment on admissions and admissions and production of documents specified in list of documents as follows-**

3. Where admissions of fact or of part of a case are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the Court for such judgment or order as upon those admissions he may be entitled to, without waiting for the determination of any other question between the parties and the Court may give such judgment or make such order on the application as it thinks just.

4.-(1) Subject to paragraph (2) and without prejudice to the right of a party to object to the admission in evidence of any document, a party on whom a list of documents is served in pursuance of any provision of Order 24 shall, unless the Court otherwise orders, be deemed to admit-

(a) that any document described in the list as an original document is such a document and was printed, written, signed or executed as it purports respectively to have been, and

(b) that any document described therein as a copy is a true copy. This paragraph does not apply to a document the authenticity of which the party has denied in his pleading.

ANALYSIS and DETERMINATION

20. On 09th September, 2015 the Plaintiff filed a **Summons seeking for Summary Judgment.**
21. According to the **principles of summary judgment**, the Defendant is required to file an **affidavit that deals specifically with the Plaintiff's claim and state clearly the defence and facts** it relies upon to support it. If there is **no affidavit filed** at least the **Statement of Defence** must clearly set out the **Defence.**

In *Coral Surf Resort Ltd v Yam Civil Action No. 66 of 2008*, Master Tuilevuka (as he was then) stated as follows-

'Once a claim is established, the evidential and persuasive burden

*shifts to the Defendant (see **Thomas J in Hibiscus Shopping Town Pty Ltd v Woolworths Ltd** [1993] FLR 106 at 109) who must adduce affidavit claim and affidavit and also state clearly and precisely what the defence is and what facts he relies on to resist the entry of summary judgment: **Magan Lal Brothers Ltd v L.B.Masters & Company** Civil Appeal No. 31/84.'*

22. The **defendant resisting the summary judgment must establish that there is an issue or question in dispute** with respect to the **claim** or the part of the claim which ought to be **tried** or there ought for some reasons to **be a trial of that claim or part**. If the **defendant fails** to do so, then the **court will enter summary judgment against the defendant** on that claim or part pursuant to **Ord. 14, r.3** of the **HCR. 1988**.
23. Pursuant to **Ord. 14, r. 1 (1) of the HCR, 1988, where in an action to which this applies, a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that that defendant has no defence to a claim included in the writ, or particular part of such a claim, apply to the court for summary judgment against that defendant.**
24. **Further, pursuant to Ord. 14, r.1 (2), subject to paragraph (3), this rule applies to every action begun by Writ other than an action which includes a claim by the Plaintiff for libel, slander, malicious prosecution or false imprisonment, and an action which includes a claim by the Plaintiff based on an allegation of fraud.**
Sub paragraph (3) stipulates that this order shall not apply to an action to which Order 86 applies.
25. Bearing in mind the above provisions of the law, it is therefore important that I must decide whether **summary judgment** is available to the plaintiff in this case with regards to the **nature of the claim**.
26. In this case, the writ of summons was served and the defendant has filed an acknowledgement of service giving notice of **intention to defend** the action. Thereafter, on 13th September, 2013, a Defence was filed. The plaintiff therefore is **entitled**, pursuant to **Ord.14**, to apply for summary judgment against the defendant. Further, the filing of a statement of defence before an application for summary judgment does not preclude an application being made, nor does it prevent summary judgment being granted if the court is of the view that there is no defence to the claim.

27. The Fiji Court Appeal in *Carpenters Fiji Ltd v Joes Farm Produce Ltd* [2006] FJCA 60; ABU 0019U of 2006S (10 November 2006), Case dealing with summary judgment application, laid down the well-established principles in relation to the entry of **summary judgment** under paragraph 21 as follows:

(a) "The purpose of O.14 is to enable a plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set up, a bona fide defence or raise an issue against the claim which ought to be tried.

(b) The defendant may show cause against a plaintiff's claim on the merits e.g. that he has a good defence to the claim on the merits or there is a dispute as to the facts which ought to be tried or there is a difficult point of law involved.

(c) It is generally incumbent on a defendant resisting summary judgment, to file an affidavit which deals specifically with the plaintiff's claim and affidavit and states clearly and precisely what the defence is and what facts are relied on to support it

*(d) Set off, which is a monetary cross claim for a debt due from the plaintiff, is a defence. A defendant is entitled to unconditional leave to defend up to the amount of the set off claimed. If there is a set off at all, each claim goes against the other and either extinguishes or reduces it *Hanak v Green* (1958) 2 QB 9 at page 29 per Sellers LJ.*

*(e) Likewise where a defendant sets up a bona fide counter claim arising out of the same subject matter of the action, and connected with the grounds of defence, the order should not be for judgment on the claim subject to a stay of execution pending the trial of the counter claim but should be for unconditional leave to defend even if the defendant admits whole or part of the claim. *Morgan and Son Ltd - v - Martin Johnson Co* (1949) 1 K 107(CA).*

See 1991 The Supreme Practice Vol 1 especially at pages 146, 147, 152 and 322."

28. Reference is also made to the *Halsbury's Law of England (4th Ed) Volume 37 para 413-415, which states as follows-*

413: Defendant showing cause:

Where the Plaintiffs application for summary judgment under Order 14 is presented in proper form and order, the burden shifts to the defendant, and it is for him to satisfy the court and there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial. Unless the defendant does so, the court may give such judgment for the plaintiff against the defendant as may be just having regard to the nature of the remedy or relief claims.

The defendant may show cause by affidavit or otherwise to the satisfaction of the court. He must "condescend upon particular", and, in all cases, sufficient facts and particulars must be given to show that there is a genuine defence. The defendant must serve his affidavit on the plaintiff or his solicitor at least three days before the return day. The affidavit may contain matters of hearsay provided the sources of information and grounds of belief are disclosed. The court has power to order a defendant showing cause or an officer of a body corporate to produce any document, and to attend and be examined on oath if there are special circumstances making it desirable to do so. By necessary implication, the obligation on the defendant to show cause allows the plaintiff to answer the defendant's case.

414: Unconditional leave to defend:

The power to give summary judgment under Order 14 is intended to apply only in clear cases, where there is no reasonable doubt that the plaintiff is entitled to judgment and where it is entitled to judgment and where it is inexpedient to allow a defendant to defend for mere purposes to delay. Leave to defend will therefore be given where the defendant shows that he has a fair case, that there is an issue or question which ought to be tried, or that there are reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence.

However, the defendant does not have to show a complete defence, but only a fair probability of a defence, or that there is a real substantial issue or question to be tried, or that there is a dispute as to facts or law which raises a reasonable doubt whether the plaintiff is entitled to judgment. The procedure under order 14 was not intended to shut out a defendant who could show that there was an issue or question that ought to be tried or that for some other reason there ought to be a trial.

Leave to defend will be given where the amount recoverable to be clearly subject to a reasonable inquiry or to an account being taken.

415: Conditional leave to defend:

The court may give a defendant against whom an application for summary judgment is made under Order 14 leave to defend the action with respect to the claim, or the part of the claim, to which the application relates either unconditionally or conditionally, that is, on such terms as to giving security or time or mode of trial or otherwise as the court thinks fit. Conditional leave to defend will be granted where the court forms the view, on the material before it, that the defence set up is a sham defence or it is shadowy, or that there is little or no substance in it or that there is something suspicious in the defendant's mode of presenting his case or the master is very nearly prepared to give judgment for the plaintiff. However, if there is no sign of bad faith nor anything to show that the defence is a sham nor any suspicious circumstances as to the mode of presenting the case, leave to defend should not be conditional, nor should it be conditional where the practical result would be likely to deprive the defendant unjustly to his defence. The usual form of conditional leave to defend requires the payment of the whole or part of the claim into court.

29. Reference is also made to the case of ***Metal works & Joinery Limited v Fiji Islands Revenue & Customs Authority***, Justice Pathik applying the Court of Appeal decision delivered by Greig J in ***Australia Guarantee Corporation (NZ) Ltd-v- Mc Beth [1992] 3 NZLR 54 at 58*** held in

determining the issue before him on the facts and circumstances of this case:-

'The summary judgment procedure is a simple expeditious way to enable a plaintiff to obtain judgment where there is no real defence to the claim made see Pemberton v Chappell [1987] 1 NZLR 1 at 2. The essence of the procedure is the plaintiffs own verification by affidavit of his own statement of claim and the allegation made in it: Harry Smith Car Sales Ltd v Clay com Vegetable Supply Co Pty Ltd [1978] 29 ACTR 21. There has to be balancing between the right of the defendant to have his day in court and to have his proper defences explored and the appropriate robust and realistic approach called for by the particular facts of the case: see Bilby Dimock Corporation Ltd v Patel [1987] 1 PRNZ 84 and Cegami Investment Ltd v AMP Financial Corporation [NZ] [1990] 2 NZLR 308 at p. 313. Although the onus is upon the plaintiff there is upon the defendant a need to provide some evidential foundation for the defences which are raised. If not the plaintiffs verification stands unchallenged and ought to be accepted unless it is patently wrong.'

30. I have perused the Defendants **Statement of Defence** filed on 13th September, 2013. The Defendants either agree to or denies various paragraphs of the Plaintiff's Statement of Claim. Further, triable issues and questions in dispute have been raised in terms of the following-
- Whether there was a contract entered between the Plaintiff and the Defendant?
 - If so, was the contract breached by the Defendants?
 - Whether there was negligence on the part of the Defendants?
 - Whether there was fraud on the part of the Defendants?
 - Whether the Defendants have breached legitimate expectation for the Plaintiffs?
31. On the other hand, I also find that the Plaintiff has also raised some triable issues and questions of law as follows-
- The Defendants have admitted most of the Plaintiffs' claim and therefore the Defendants do not have any Defence.

- In this regard, in terms of **Order 27 Rule 3**, on Defendant's admission, without waiting for the determination of any other question between the parties, the Plaintiff is entitled to summary judgment.
 - How can affidavit verify the facts in the claim? The documentary evidence annexed to Suluka's (Plaintiff) affidavit is also to be found within the affidavit of Isikeli Ligairi (Defence). Therefore the Defendants do not have any Defence.
 - That the Defendants have not disclosed in their affidavit that there are triable issues.
32. The Court in having to decide whether the Defendant's Defence is a meritorious one or not, then the Court has to consider at all the circumstances of this case in its entirety (per **Brown L.J, Blaiberg v Abrams, 77 L.T.J 55 C.A.**)
33. In this case, I find that the Defendants have raised triable issues together with some questions in dispute as discussed hereinabove. Therefore, these triable issues and questions in dispute ought to be tried in a proper trial and determined accordingly.
34. Further, the Defence Counsel also submitted that the Plaintiff's application before the court is in violation of **Order 14 Rule 12** and **Order 77 Rule 5 (1) of the High Court Rules** which expressly prohibits applications for summary judgment against the state and therefore should be fatal.

No summary judgment against the State (O.1.4, r. 12)

12. Nothing in the foregoing provisions of this Order shall apply or be construed in derogation of or in any way affect, the provisions contained in Order 77 in so far as they apply in relation to proceedings against the State.

AND ***Summary judgment (O.77, r.5)***

5.-(1) No application against the State shall be made under Order 14, rule 1, or Order 86, rule 1, in any proceedings against the State nor under Order 14, rule 5, in any proceedings by the State.

35. The Plaintiff's application in this particular case is related to summary judgment under Order 14 of the High Court Rules, 1988. Reference is made to the following **Notes to Or.14 or 5** in the **Supreme Court Annual Practice**

1958 p263 which is very much appropriate and ought to be taken into consideration:

“The power to give summary judgment under Order 14 is ‘intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment, and where therefore it is inexpedient to allow a defendant to defend for mere purposes of delay’ (Jones v Stone [1894] A.C. 122). As a general principle, where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a bona fide defence, he ought to have leave to defend (Ward v Plumley, (6 T.L.R. 198).

36. Taking into consideration all above and in exercise of this Court’s discretion whilst applying the appropriate applicable principles to the nature of the Plaintiff’s application, the Defendants ought to be allowed to defend this action in a proper hearing.
37. I make the following orders-

ORDERS

- (i) **The Plaintiffs’ application seeking an order for summary judgment is hereby refused and accordingly dismissed.**
- (ii) **Costs against the Plaintiff is summarily assessed at \$1,000.**
- (iii) **Matter to take its normal cause of action.**

Dated at Suva this 31st Day of May, 2016



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MR VISHWA DATT SHARMA
Master of High Court, Suva

cc. **Mr. Maisamoa of Vakaloloma & Associates, Suva.**
Ms. Taukei & Ms. Faktafoun of AG’s Chambers, Suva.