

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL APPEAL NO: HBC 325 of 2012

BETWEEN : **DILIP KUMAR** and **JYOTSNA KUMAR** both of Suva trading
as 'Binaco Textiles'.

PLAINTIFFS

AND : **PARSHOTAM LAWYERS** (formerly known as Parshotam &
Co.), Barristers and Solicitors of Suva (a firm)

DEFENDANTS

BEFORE : Justice Riyaz Hamza

COUNSEL : Mr. John Connors with Mr. Vijay Maharaj for the
Plaintiffs
: Mr. Devanesh Sharma with Mr. Vinit Singh for the
Defendants

Date of Hearing : 13 May 2016

Date of Ruling : 17 June 2016

RULING

Introduction and Background

- [1] This is an action instituted by the Plaintiffs by way of a Writ of Summons. The original Writ of Summons and Statement of Claim were filed on 12 December 2012.
- [2] On 27 May 2014, Court granted the Plaintiffs leave to file an amended Statement of Claim. As per the said Statement of Claim the Plaintiffs have stated as follows:

1. That the Defendants are and were at all material times a firm of Solicitors carrying on their practice at Level 2 Mid City Building, Waimanu Road, Suva.
2. At all material times the Plaintiffs were the tenants and occupiers of a bulk store situated at 49, Dabea Circle, Kalabo Subdivision and were owners of the goods stored therein.
3. On 10 September 1994, the Plaintiffs' warehouse was damaged by a fire in the circumstances that gave the Plaintiffs a right of compensation under the Fire Policy and/or right of action against their Insurance Company.
4. On or about January 1995 the Plaintiffs instructed and retained the Defendants who agreed to act as Solicitors for the Plaintiffs in making a claim and taking proceedings against the Insurance Company for compensation under the insurance policy.
5. It was an implied term of the said agreement and it was also the duty of the Defendants to exercise all due care, skill and diligence in and about the prosecution of the said claim and proceedings against the said insurance company.
6. In breach of the said term or the said duty or by reason of negligence on the part of the Defendants, their servants or agents, the Defendants failed to exercise any or any due skill or diligence in or about the prosecution of the said claim or proceedings.
7. And accordingly the Plaintiffs claim damages, interest pursuant to the Law Reform Miscellaneous Provisions (Death and Interest) Act, Costs and such further and other reliefs that Court may grant in the circumstances of the case.

[3] The Defendants filed an Amended Statement of Defence and Amended Counterclaim on 10 December 2014. The Plaintiffs filed a Reply to same on 19 December 2014.

- [4] On 2 February 2016, the Defendants filed a Summons to Strike Out this action. This was said to be in terms of Order 18, Rule 18 of the High Court Rules 1988, Order 33, Rule 3 of the High Court Rules 1988 and Section 4 of the Limitation Act (Chapter 35). The Summons was supported by an Affidavit deposed to by Subhas Chandra Parshotam, a Partner of the Defendants law firm.
- [5] The basis on which the Defendants were moving for the action to be struck out and dismissed was that the action was instituted beyond the time permitted under the Limitation Act for the Plaintiffs to commence the said action.
- [6] On 11 February 2016, the First Named Plaintiff, Dilip Kumar, filed an Affidavit opposing the Strike out application. Subhas Chandra Parshotam filed an Affidavit in Reply, on 22 February 2016.
- [7] The matter came up for hearing before me on 24 February 2016. On the said day the Counsel for the Plaintiff took up an objection that the latter Affidavit filed by Subhas Chandra Parshotam, raised several issues of fact and for that reason the Plaintiffs would require to cross examine him.
- [8] However, this matter was subsequently resolved, with the Plaintiffs and the Defendants filing several further Affidavits in support of their respective legal positions.
- [9] Accordingly, the matter was again fixed for hearing before me on 13 May 2016.
- [10] Subsequently, on the 19 April 2016, the Plaintiffs filed a Summons, and with the permission of Court an Amended Summons (on 29 April 2016), seeking leave to amend their Reply to Defendants Amended Statement of Defence and Counterclaim, filed on 19 December 2014, by adding the following paragraph after paragraph 3 of the said Reply:
- (4) In a specific reply to paragraph 7(b) of the Defendants amended Statement of Defence filed on 10 December 2014 the Plaintiffs say:

If which is denied, the Plaintiffs' claim is barred by Section 4 of the Limitation Act then it was due to the negligence on the part of the Defendants particulars of which are as follows:-

- (i) Failure to advise the Plaintiffs that any action against them had to be taken within 6 (six) years computed from 10 September 1995;
- (ii) Failure to advise the Plaintiffs to seek an independent legal advice before the expiration of the Limitation period with respect to any action against them.

[11] The said Amended Summons was filed pursuant to Order 20, Rule 5(1) of the High Court Rules.

[12] Thus when the matter came up before me on 13 May 2016, there were two pending interlocutory applications before Court.

- (i) The Summons to Strike Out, which was filed by the Defendants on 2 February 2016; and
- (ii) The Amended Summons to amend their Reply to the Defendants Amended Statement of Defence and Counterclaim, which was filed by the Plaintiffs on 29 April 2016.

[13] The Counsel for the Plaintiffs submitted that the Amended Summons filed by the Plaintiffs should be taken up for hearing first, whereas the Counsel for the Defendants, disagreed and, submitted that the Summons to Strike Out filed by the Defendants should be taken up for hearing first.

[14] Since there was no agreement on this issue, Court called upon both Counsel for the Plaintiffs and the Defendants to make oral submissions and to satisfy Court as to whose application should be taken up for hearing first. The two parties also filed written submissions, and referred to several case authorities, which I have had the benefit of perusing.

Legal Provisions and Analysis

- [15] The Defendants have filed the Summons for strike out in terms of the provisions of Order 18, Rule 18(1) of the High Court Rules 1988. The Rule is reproduced below:

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.

- [16] The Amended Summons filed by the Plaintiffs is in terms of Order 20, Rule 5(1) of the High Court Rules, which reads as follows:

5(1) Subject to Order 15, Rules 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 costs or otherwise may be just and in such manner (if any) as it may direct.

- [17] Both provisions above contain almost similar wordings granting Court the discretion in such matters, under stipulated conditions. In terms of Order 18, Rule 18(1) it is stated that **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; whereas in Order 20, Rule 5(1) it is stated that **the Court may at any stage of the proceedings allow** the Plaintiff to amend his Writ, or any party to amend his pleading. (Emphasis added).

- [18] However, the High Court Rules 1988 does not specifically declare that one Rule should take priority or precedence over the other, where there are competing applications.

[19] The Counsel for the Defendants cited the case of **Manasa Ralago & Others v. Digicel Fiji Limited**, [2012] FJHC 1074; Civil Action No. 40 of 2008 (11 May 2012). In this case the High Court of Labasa had before it two applications, one to strike out and the other to amend. The Master of the High Court held:

"It seems appropriate when looking at the action as a whole is to deal with the Plaintiff's application to strike out the defence and for summary judgment first before the Defendant's application, not because it was filed first, but that its determination given the nature of the action will affect the need to deal with the Defendant's application."

However, as has been correctly pointed out by the Counsel for the Plaintiffs, the above decision is not binding on this Court.

[20] The Defendants also referred to the case of **Shiu Ram v Carpenters Fiji Limited**, Civil Action No. HBC 81 of 2004 (1 October 2015). In this case too there was an application filed by the Defendant to strike out the Plaintiff's action and another application filed by the Plaintiff, by way of a Notice of Motion, seeking leave to amend the Statement of Claim. The High Court ruled that the striking out application should be heard first. However, the basis on which such a decision was arrived at has not been explained in the Judgment.

[21] The Counsel for the Plaintiffs referred to several authorities during the hearing of this matter. However, none of those authorities provide an answer as to what action should take priority or precedence, where there are competing applications, like in the instant case.

[22] Counsel referred to the cases of **Ambaram Narsey Properties Limited v. Mohammed Yakub Khan & Others**, (2001) 1 FLR pg 283; **Fiji Electricity Authority v. Balram & Others**, decision of the Fiji Supreme Court (3 March 1972); **Lami Investments Limited v. Kelton Investments Limited**, Civil Appeal Case No. ABU 60 of 2013 (26 February 2016); and **Rene Wurzel v. Minika Tappen Management Limited**, (2001) 1 FLR, pg. 275. However, all these authorities deal with amendment of pleadings and

does not provide any guidance as to what application should take priority or precedence, where there are competing applications.

- [23] Counsel for the Plaintiffs has also cited the case of **Hari Prasad v. Muni Prasad and others**, Civil Appeal Case No. ABU 53 of 2004S (15 July 2005), where it was held that “It is an established principle that if a pleading can be amended to meet a strike out application, then the discretionary power should not be exercised.....”
- [24] In the instant case, the Defendants filed a Summons to Strike Out this action, on 2 February 2016 and the matter was set down for hearing on 24 February 2016. The application for striking out could not be taken up for hearing on that day due to the reasons stated earlier in this Ruling [See paragraph 7 above]. As such, the application for striking out was again fixed for hearing before me on 13 May 2016.
- [25] On 29 April 2016, the Plaintiffs filed the Amended Summons to amend their Reply to the Defendants Amended Statement of Defence and Counterclaim. This was approximately two weeks prior to the hearing date set for the striking out application.
- [26] In the circumstances of this case, this Court simply cannot ignore the chronology of these events.
- [27] It is clear in Order 20, Rule 5(1) that ***the Court may at any stage of the proceedings allow*** the Plaintiff to amend the pleadings. Similarly, in terms of Order 18, Rule 18(1) it is clearly stated that ***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. Therefore, it is my view that, where there are competing applications, as in present case, the application that has been filed first should take precedence over an application that was filed subsequently.

Conclusion

[28] Considering all the facts and circumstances of this case, Court is of the view that both the pending interlocutory applications would be taken up for determination at one and the same hearing. However, the application filed by the Defendants for striking out would be taken up for hearing first. The Counsel for the Plaintiffs would be at liberty to make his submissions in response to the application for striking out and, (if he so wishes) at the same time, support the Plaintiffs' application made by way of Amended Summons to amend their Reply to the Defendants Amended Statement of Defence and Counterclaim. The hearing would proceed in that order until its conclusion. At the end of this hearing the Court would make one Ruling covering both applications.

[29] Accordingly, I make the following Orders:

ORDERS

1. Both pending interlocutory applications would be taken up for determination at one and the same hearing. The application filed by the Defendants for striking out would be taken up for hearing first. The Counsel for the Plaintiffs would be at liberty to make his submissions in response to the application for striking out and, (if he so wishes) at the same time, support the Plaintiffs' application made by way of Amended Summons. The hearing would proceed in that order until its conclusion. At the end of this hearing the Court would make one Ruling covering both applications.
2. Costs of this matter shall be costs in the cause.

Dated this 17th day of June 2016, at Suva.


Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

