

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 118 of 2011

BETWEEN : **WAME NIUTAMATA** as Administrator of the Estate of the late Salanieta Kotomaimoala Lega
of Nausori, School Teacher.

PLAINTIFF

AND : **SHALEN PRAKASH** of Vuduna Road, Nausori, Mini Van Driver.

1st DEFENDANT

AND : **UMLESH CHAND** of Tuirara Subdivision, Makoi, Driver.

2nd DEFENDANT

AND : **THE ATTORNEY GENERAL OF FIJI** of Level 7, Suvavou House, Victoria Parade, Suva.

3rd DEFENDANT

AND : **SURESH CHAND** of Naselai Bau Road, Nausori.

4th DEFENDANT

AND : **PIONEER CONCRETE** a limited liability company having its registered office at Lot 1 Kura
Street, Laucala Beach, Industrial.

5th DEFENDANT

BEFORE: **Master Vishwa Datt Sharma**

COUNSELS: **Ms. Ulamila Fa** for the Plaintiff
Ms. Taukei for 2nd & 3rd Defendants
Ms. Leweni for 4th & 5th Defendants

Date of Ruling: **10th August, 2017**

RULING

[Application by the 2nd Defendant seeking an order to strike out the Plaintiff's Statement of Claim pursuant to Order 18 Rule 18 (1) (a) of the High Court Rules, 1988]

APPLICATION

1. This is the 4th Defendant and purported 5th Defendants' Summons to Strike Out, seeking for the following orders:
 - (a) *That the Plaintiff's Statement of Claim be struck out against the 4th Defendant and purported 5th Defendant;*
 - (b) *In the alternative, the Plaintiff's action be dismissed on the trial of a preliminary issue that the Plaintiff's action is irregular and unpaintable [on the grounds provided in 1 (i) hereunder against the 4th and purported 5th Defendants; and*
 - (c) *That the 4th and purported 5th Defendants be granted costs on a full solicitor client indemnity basis.*

On the Ground:

- (i) It discloses no reasonable cause of action;
 - (ii) It is scandalous, frivolous or vexatious; and or
 - (iii) It is otherwise an abuse of the process of this Honourable Court.
2. *The service of the Writ purporting to be on an entity known as "Pioneer Concrete" be set aside as being irregular as there is no entity known as such.*
3. The application is made pursuant to *Order 2 Rule 2, Order 3 Rule 4, Order 12 Rule 6 18 Rule 18 of the High Court Rules 1988* and under *the inherent jurisdiction of the High Court.*
4. The Plaintiff **opposed** the 4th and 5th purported Defendant's Striking out application.
5. The application was heard in terms of the **written and oral submissions** together with the affidavit evidence made in this proceeding by the Plaintiff and the 4th and purported 5th Defendants.

Plaintiff's Brief Submissions

6. (i) Order 2 Rule 2 of the High Court Rules relates to setting aside for irregularity.
- (ii) The Plaintiff submits that there is no irregularity in his Writ of Summons or the Statement of Claim.
- (iii) The argument put forward by the 4th and 5th Defendants that irregularity exists in the name of the 5th Defendant is a typo error and it is so minute that it can be corrected by amendment.
- (iv) The name of the 5th Defendant is Pioneer Concrete Industries Limited. The Writ of Summons named the 5th Defendant as Pioneer Concrete. The Writ goes further to say that Pioneer Concrete is a limited Company having its registered office at Lot 1 Kura Street, Laucala Beach Industrial. (Full submissions is on file and taken into consideration.

4th and 5th Defendants Brief Submissions

7. (i) *The crux of the issue is that the Plaintiff had initially filed and served the current writ and Statement of Claim on an entity that does not exist. The 5th Defendant is "pioneer Concrete" whereas the real entity that ought to have been served is an entity called "Pioneer Concrete Industries Limited."*
- (ii) *It is significant to note this Honourable Court's finding in respect of this issue in the ruling delivered on the Defendant's application to set aside default judgment on 07th June, 2016 HBC 96 of 2014 refers.*
- (iii) *Here, there is no question that the endorsement of the Writ required amendment.*
- (v) *It is significant to note that the Defendants counsel had informed the Plaintiff's solicitors as early as 7th October, 2014 that the action was irregularly instituted against the wrong entity.*
- (vi) *The Defendants advised the Plaintiff to amend the pleadings and the failure to do so would result in the Defendant's seeking costs on a full solicitor/client basis. (Full submissions is on file and has been fully taken into consideration).*

THE LAW and PRACTICE

8. The law on striking out pleadings and endorsements is stipulated at *Order 18 Rule 18 of the High Court Rules 1988* which states as follows-

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).*

9. 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 LJ 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"*
10. 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.*

ANALYSIS and DETERMINATION

11. I have perused and examined the written and oral submissions made by both Counsels on the 4th and purported 5th Defendants strike out application.
12. It would be appropriate rather than going into the details of this application for strike out that this Court should just deliberate on the **preliminary issue** whether there is in **existence of the 5th Defendant** known as 'Pioneer Concrete' or thereal entity that ought to have been named and served is an entity called "**Pioneer Concrete Industries Limited?**".
13. Both Counsels in their written submissions are somewhat in agreement that the **5th Defendant** should be known as "**Pioneer Concrete Industries Limited**" and not Pioneer Concrete.
14. I have personally perused Court File *HBC Case No. 96 of 2014* wherein the Default Judgment was set aside against the Defendant "**Pioneer Concrete Industries Limited**" which was entered into irregularly. This happens to be my own judgment delivered on 07th June, 2016.
15. Further, the Plaintiff in her submissions states that the name appearing on the Writ of Summons is a **typo error** and it is so **minute** that it can be **corrected by amendment**. She added that the name of the **5th Defendant** is **Pioneer Concrete Industries Limited**.
16. The Writ of Summons named the **5th Defendant** as **Pioneer Concrete**. The Writ goes further to say that Pioneer Concrete is a limited Company having its registered office at Lot 1 Kura Street, Laucala Beach Industrial.
17. The Defendant also informed Court that early as 07th October, 2014, that he informed the Plaintiff that the action was irregularly instituted against the **wrong entity**.
18. The Defendants advised the **Plaintiff to amend the pleadings** and the failure to do so would result in the Defendant's seeking costs on a full solicitor/client basis.
19. Thus the application by the 4th and 5th purported Defendants before court for determination.
20. Both Counsels were summoned to appear before me to find out if the parties were of the view that the **Plaintiff be allowed to amend its Writ and the Statement of Claim** by **consent on payment of indemnity costs** on the basis as to what was submitted in their oral

- and written submissions. Plaintiff's Counsel did not agree to the indemnity costs of \$7,000 sought by the Defendant.
21. It is only appropriate in the circumstances, since both parties agree that an **amendment of the Plaintiff's Writ and the Statement of Claim** should be carried out, with the exception of the substantial amount of indemnity costs be paid by the Plaintiff to the Defendant.
 22. This court is of the finding that it is common knowledge and obvious in such circumstances that the **Writ and the Statement of Claim** needs to be **amended** in light of my ruling in **HBC 96 of 2014**. The **5th Defendant's** name should be amended to read "**Pioneer Concrete Industries Limited**".
 23. It may be so, as submitted by the Plaintiff that although the **5th Defendant's** name on the Writ and the Statement of Claim refers to as "**Pioneer Concrete**" but further reading of the Statement Claim states and mentions the name as "**Pioneer Concrete Industries Limited**".
 24. On the basis of the admission by the Plaintiff **prima facie** is that the **5th Defendant** should be corrected and referred to and appear on the Writ and the Statement of Claim as "**Pioneer Concrete Industries Limited**" and not Pioneer Concrete.
 25. In the abovementioned circumstance and rational, I accept the **submissions** of the **4th and 5th Purported Defendant's** that in lieu of the **Striking Out Application**, the Plaintiff be **granted leave** to file and serve an **Amended Writ** and the **Statement of Claim** within 7 days. Accordingly, I so order.
 26. The **4th and 5th Defendants** are at liberty to file and serve their Defenses to the Plaintiff's Amended Writ of Summons and the Statement of Claim 14 days thereafter.
 27. There will be a further order that the Plaintiff pay the **4th and 5th Defendants** a sum of **\$1,500 as indemnity costs** within 7 days timeframe.
 28. This is a 2011 matter pending in Court for the reasons best known to all the parties to the proceedings and must be expedited in all just and fairness to all involved herein. Therefore, it is also prudent that I impose an "**Unless order**" in place to ensure that the parties carry out the Court orders of today without any delay. Upon the failure and/or non-compliance of today's Court Orders either by the Plaintiff or the **4th and 5th Defendants**, this Court will activate the "**Unless order**" put in place and will proceed to either strike out the Plaintiff's Writ and the Statement of Claim and/or the **4th and 5th Defendant's Defence**.

29. Accordingly, I make the following orders-

ORDERS

- (i) That the Plaintiff is hereby granted leave to file and serve an Amended Writ of Summons and the Statement of Claim within 7 days timeframe on or before the 17th August, 2017 at 4 pm.
- (ii) That the 4th and 5th Defendants are at liberty to file and serve their Defences 14 days thereafter on or before 31st August, 2017 at 4 pm.
- (iii) That the Plaintiff is hereby ordered to pay a sum of \$1,500 indemnity costs to the 4th and 5th Defendants within 7 days timeframe.
- (iv) 'Unless Order' is invoked and will be activated upon the non-compliance of Court's orders of 10th August, 2017 as enumerated at paragraphs 25-28 inclusive accordingly.
- (v) Orders accordingly.

Dated at Suva this 10th day of August, 2017



MR VISHWA DATT SHARMA
Master of High Court, Suva

cc: Law Solutions, Suva
A. K. Lawyers, Ba