IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 203 of 2015

BETWEEN : **PREYA LATA aka PRIYA LATA** of Wailoaloa, Nadi.

PLAINTIFF

A N D : **VILIAME VALACEGU** of Lautoka

FIRST DEFENDANT

A N D : **FIJI ELECTRICITY AUTHORITY** a body corporate having its registered office at 2 Marlow Street, Suva.

SECOND DEFENDANT

(Ms) Arthi Bandhanna Swamy for the Plaintiff.
Non appearance for the First Defendant.
Mr. Roneel Kumar for the Second Defendant.

Date of Hearing : - **03rd November 2016**
Date of Ruling : - **10th February 2017**

RULING

(A) INTRODUCTION

(1) The matter before me stems from the inter party Summons filed by the Second Defendant, pursuant to **Order 18, rule 18 (1) (d) of the High Court Rules, 1988** and under the inherent jurisdiction of the Court, seeking the grant of the following Orders;

> a) *The Plaintiff's Statement of Claim against the Second Defendant be dismissed and struck out;*

b) *Costs of this action and/or other ancillary costs associated with this matter; and*

c) *Such other relief as this Honourable Court deems just.*

UPON the Grounds that:

a) *The Plaintiff's Statement of Claim pleading careless driving, negligence and/or other pertinent issues such as proving the case beyond reasonable doubt had been dealt with via a Ruling in the Magistrates Court, Lautoka on 16th June2015;*

b) *This is an attempt by the Plaintiff to abuse the court process and rehash a careless driving offence that the Magistrates Court, Lautoka had already ruled on via an acquittal of the First Defendant; and*

c) *The frivolous Statement of Claim ought not to be entertained and struck off in its entirety.*

(2) The Second Defendant relied on the affidavit sworn by **Hasmukh Patel**, Chief Executive Officer of the Fiji Electricity Authority.

(3) The application for striking-out is strongly opposed by the Plaintiff. The Plaintiff filed an **'Affidavit in Opposition'** opposing the application followed by an **'Affidavit in Reply'** thereto.

(4) The Plaintiff and the Second Defendant were heard on the Summons. They made oral submissions to Court. In addition to oral submissions, Counsel for the Plaintiff and the Second Defendant filed a careful and comprehensive written submission for which I am most grateful.

(B) THE FACTUAL BACKGROUND

(1) What is this case about? What are the circumstances that give rise to the present application?

(2) **The Claim**

This is an action for damages for personal injuries arising out of alleged negligence.

On 19th November 2015, the Plaintiff issued a **Writ of Summons** together with a Statement of Claim in which she alleged that –

Para 1. *THAT the Plaintiff was involved in a car accident, which took place at Veseisei Village, Queens Road, Lautoka on the 14th day of February 2013.*

2. *THAT at all material times the Plaintiff was a passenger in a motor vehicle registration no. CR 275 driven by one Anand Pillay.*

3. *THAT at all material times the 2nd Defendant is the owner of the vehicle registration no. FT 186 (herein after referred to as the "said vehicle").*

4. *THAT at all material times the 1st Defendant was in control and driving motor vehicle registration no. FT 186 along the Queens Road, Veseisei Village, Lautoka.*

5. *THAT at all material times the 1st Defendant was employed by the 2nd Defendant and was in possession and control of the said vehicle under the instructions of the 2nd Defendant.*

6. *THAT on the 14th of February 2013, whilst in control of the said vehicle, the 1st Defendant drove the said vehicle so carelessly, negligently and dangerously so as to collide with motor vehicle registration No. CR 275 at the Queens road, Veseisei Village, Lautoka.*

PARTICULARS OF THE CARELESS/NEGLIGENT DRIVING

a) *Driving at an excessive speed in all the circumstances of the case.*

b) *Failing to negotiate turns and losing control of the motor vehicle.*

c) *Failing to slow down, stop and/or manoeuvre the said vehicle so as to avoid colliding with the Plaintiff's vehicle.*

d) *Coming onto the path of the Plaintiff's vehicle.*

e) *Failing to exercise due care and attention in all circumstances of the case.*

7. *THAT as a result of the aforesaid accident the Plaintiff has suffered injuries and as a result she was hospitalised and due to the said accident she has suffered loss and damages, pain and suffering, loss of amenities of life and loss of earning capacity.*

PARTICULARS OF INJURY

a) *The Plaintiff was admitted at Lautoka Hospital on the 14th day of February 2013 and after treatments and operations she was discharged from the hospital on 20th February 2013.*

INJURIES

b) *Fractured mandible (complete fracture at the angle of the left side of mandible).*

8. *THAT the Plaintiff after her discharge from the hospital was still suffering pain in her jaw and as a result, she was unable to return to work till June 2013.*

9. *THAT the Plaintiff as a result of the accident has recurring pain as: she,*

   a) *Experiences significant jaw pain on a daily basis*

   b) *Has pain on increase.*

   c) *Has to take Paracetamol regularly to control her pain.*

   d) *She still gets flash back of said accident due to which she develops some anxiety about driving.*

10. *THAT as a result of the said collision the Defendant was charged for careless driving and was issued with Traffic Infringement Notice.*

11. *THAT at the time of the accident the Plaintiff was employed as Customer Service Associates where she was earning estimated income in the sum of $79.52 weekly.*

12. *THAT the Plaintiff could not work from 14th February 2013 till June 2013 due to the said accident.*

13. *THAT the Plaintiff now is very restricted with her physical activities.*

14. *THAT the Plaintiff has suffered loss and damages both special and general.*

In its Defence, the Second Defendant says;

Para 2. *THE 2nd Defendant only admits paragraphs 3,4 and 5 of the Claim to the extent that –*

   a) *At the material time, vehicle registration number FT 186 was owned by it.*

   b) *But notes that the Claim against the 1st Defendant named in the Claim is a non-existent person and not someone who was employed with the 2nd Defendant under that name at the material time.*

   c) *In as far as the 2nd Defendant's records of employment show, it had employed a person other than that named as the 1st Defendant at the material time; and*

   d) *Therefore, the 2nd Defendant says the entire Claim and Writ of Summons of the Plaintiff is flawed; AND*

e) *The Claim ought to be immediately struck out given the incorrect/wrong person is named as the 1st Defendant under the law suit; and*

f) *The 2nd Defendant has been wrongfully joined as a 2nd Defendant to the Claim too.*

3. *AS to paragraph 6 of the Claim, the 2nd Defendant denies the entire contents of the said paragraph and puts the Plaintiff to strict proof of the same.*

4. *THE 2nd Defendant does not have any peculiar knowledge of the matters pleaded under paragraphs 7, 8 and 9 of the Claim and therefore cannot admit the same. Furthermore, the 2nd Defendant says that it will need to rely on Medical Reports prepared by independent doctors to verify the same. In the same token, the 2nd Defendant has no peculiar knowledge of any permanent injury suffered by the Plaintiff.*

5. *AS to paragraph 10 of the Claim, the 2nd Defendant denies the same and puts the Plaintiff to strict proof.*

6. *THE 2nd Defendant denies paragraphs 11, 12, 13 & 14 and puts the Plaintiff to strict proof of the same and furthermore says that –*

   a. *The Plaintiff's Claim is flawed;*
   b. *It has brought about the suit against a non-existent 1st Defendant;*
   c. *Has wrongfully joined the 2nd Defendant to this action without case; and*
   d. *The Claim ought to be struck out for suing a non-existent party*

The Plaintiff's Reply

Para 1. *THE Plaintiff denies the contents of paragraphs 1 and 2 of the Statement of Defence (herein referred to as the "said Defence") and puts the Defendant to strict proof of the same and further states that as per the police report the vehicle registration no. FT 186 belongs to 2nd Defendant and the said vehicle was under the control of the 1st Defendant at the time of the accident.*

2. *THE Plaintiff denies the contents of paragraphs 3, 4 and 5 of the said Defence and puts the Defendant to strict proof of the same.*

3. *THE Plaintiff denies the contents of paragraph 6 and 7 of the said Defence and puts the Defendant to strict proof of the same.*

WHEREFORE the Plaintiff prays that the 2nd Defendant's Statement of Defence be struck out and dismissed with costs to the Plaintiff on a solicitor and client indemnity basis.

(C) <u>THE LAW</u>

(1) Against this factual background, it is necessary to turn to the applicable law and the judicial thinking in relation to the principles governing **"striking-out"**. Rather than refer in detail to various authorities, I propose to set out hereunder important citations, which I take to be the principles remain in play.

(2) Provisions relating to striking out are contained in **Order 18, rule 18 of the High Court Rules, 1988 .** 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.*

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

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

> *"It is only plain and obvious cases that recourse should be had to the summary process under this rule, per Lindley MR. in <u>Hubbuck v Wilkinson(1899) 1 Q.B. 86,</u> p91 Mayor, etc., of the <u>City of London v Homer (1914) 111 L.T. 512, CA)</u>. See also <u>Kemsley v Foot and Qrs</u> (1952) 2KB. 34; <u>(1951) 1 ALL ER, 331</u>, 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 <u>Duchy of Lancaster v L. & N.W. Ry</u> 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)."*

(4) 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"*

(5) 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".

(6) 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."*

(7) 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.*

(8) In **Paulo Malo Radrodro v 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 vexatious is said to mean cases which are obviously frivolous or vexatious 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, vexatious or hopeless allegation – Lorton LJ in* ***Riches v Director of Public Prosecutions (1973) 1 WLR 1019 at 1027"***

g) *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.***

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

i) *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.***

j) *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.*

k) *"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.***

l) *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, vexatious or hopeless allegation – Lorton LJ in **Riches v Director of Public Prosecutions (1973)1 WLR 1019 at 1027**"*

(9) **In Halsbury's Laws of England ,Vol 37, page 322** the phrase "**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 vexatious 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."*

(10) The phrase "**abuse of process**" is summarised 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"*

(11) 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".*

(D) ANALYSIS

(1) Let me now turn to the application bearing in my mind the above mentioned legal principles and the factual background uppermost in my mind.

(2) Before I pass to consideration of submissions, let me record that counsel for the Plaintiff and the Second Defendant in their written submissions have done a fairly exhaustive study of judicial decisions and other authorities which they considered to be applicable.

I interpose to mention that I have given my mind to the oral submissions made by counsel, helpful written submissions and the judicial authorities referred to therein.

(3) The Second Defendant in this application is relying on **Order 18, Rule 18 (1) (d) of the High Court Rules of Fiji, 1988** and **the inherent jurisdiction of the court**. Order 18, rule 18 states that:

> *"18 (1)The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action or anything in any pleading or in the endorsement, 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 that the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be..."*

(4) The Second Defendant contended that; (I focus on paragraphs 4 to 10 of the Second Defendant's affidavit in support)

- *The First Defendant was charged in the Magistrates Court at Lautoka sometime in 2014 pertaining to a Carless Driving offence (attached and marked Annexure "B") which is a copy of the Charge. Furthermore, the Ruling earlier found in favour of the First Defendant in that it established that he whilst driving the Second Defendant's registration vehicle no. FT 186 on Queens Road at the material time WAS NOT careless and/or negligent; and he was then acquitted accordingly.*

- *It has also pleaded in its Statement of Defence ("Defence") that the Plaintiff has sued the wrongly named First Defendant who remains non-existent. Further, the Second Defendant had never at any time employed that named person – First Defendant in the Plaintiff's Statement of Claim ("Claim"). The Second Defendant says the Plaintiff has brought about this frivolous claim against the Second Defendant without just cause.*

- *The Plaintiff's Claim for damages and negligence cannot succeed as the Ruling earlier mentioned rendered the First Defendant was not negligent and/or carelessly driving at the material time of the accident on 14th February 2013. The Prosecution had failed to prove the First Defendant guilty of carless driving of the Second Defendant's vehicle number FT 186, and had not established this offence beyond reasonable doubt.*

- *Given the Ruling found the First Defendant an acquittal in 2015, the Second Defendant submits that the Magistrate could not find any evidence to support the fact that the First Defendant was negligently and careless driving vehicle registration FT 186 – belonging to the Second Defendant. Since the careless driving offence was not proven, the Second Defendant therefore submits that the Plaintiff cannot then bring her claim in another Court of law trying to establish the negligence/careless driving factors coupled with the purported injuries she sustained. Those pertinent issues were dealt with by the Lautoka Magistrates Court via the Ruling earlier mentioned. It is therefore submitted by the Second Defendant that this is an abuse of the Court process by the Plaintiff and/or its solicitors.*

- *The Plaintiff's Claim is frivolous and an abuse of the Court process.*

- *To continue with the current proceedings would only seek to cause unnecessary costs and inconvenience to the Second Defendant and it is definitely an abuse of process by the Plaintiff.*

(5) **In response, the Plaintiff says;** (I focus on paragraphs 6 to 11 of the Plaintiff's affidavit in opposition)

- *THAT my solicitors have filed this action against the 1st Defendant VILIAME VALACEGU on the basis of the Police Report dated 4th April 2013. (Annexed herein and marked as Exhibit "A" is a copy of the Police Report).*

- *THAT in the said Police Report the 1st Defendant's name is VILIAME VALACEGU*

- *THAT my solicitors have now been served with an application by the 2nd Defendant to strike out my statement of claim and they have annexed the ruling of the Lautoka Magistrate's Court, in which the 1st Defendant's name is spelled as VILIAME VAKACEGU SARANUKU which I have only come to aware of the correct spelling of the name of the 1st Defendant through the said ruling.*

- *THAT I have been advised by my Solicitors that on 11th January 2016 my solicitors had written a letter to Fiji Electricity Authority and had advised them that the name of the 1st Defendant was obtained from the Police report which we enclosed with the said letter for their reference, however Fiji Electricity Authority did not thought that it's essential to inform my Solicitors that the name which appears on the police report is incorrect and they had always hide that information from my solicitors and the Honourable Court. (Exhibit "B" is a copy of the letter dated 11th January 2016).*

- *THEREFORE the said mistake was made in error as my Solicitors had filed the said Claim as per the police report therefore it was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue.*

- *THAT on 1st June 2016 my Solicitors had written a letter informing the Fiji Electricity Authority Counsel to re-consider on the striking out application and to withdraw the same or we will seek cost on indemnity basis. (Exhibit "C" is a copy of letter dated 1st June 2016.*

(6) **Determination**

(i) As noted above, the Courts rarely will strike out a proceeding. 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.

In this regard, I am inclined to be guided by the decision of the New Zealand Court of Appeal in "**Lucas & Sons (Nelson Mail) v O. Brien** (1978) 2 N.Z.L.R 289 as being a convenient summary of the correct approach to the application before the court. It was held;

> *"The Court must exercise ....jurisdiction to strike out pleadings sparingly and with great care to ensure that a Plaintiff was not improperly deprived of the opportunity for a trial of his case.* ***However, that did not mean that the jurisdiction was reserved for the plain and obvious case; it could be exercised even when extensive argument was necessary to demonstrate that the Plaintiff's case was so clearly untenable that it could not possibly succeed."***
>
> (Emphasis added)

Where, a claim to strike out depends upon the decision of one or more difficult points of law, the court should normally refuse to entertain such a claim to strike out. But, if in a particular case the court is satisfied that the decision of the point of law at that stage will either avoid the necessity for trial altogether or render the trial substantially easier and cheaper ; the court can properly determine such difficult point of law on the striking-out application. In considering whether or not to decide the difficult question of law, the court can and should take into account whether the point of law is of such a kind that it can properly be determined on the bare facts pleaded or whether it would not be better determined at the trial in light of the actual facts of the case; **See;** ***Williams & Humber Ltd v H Trade markers (jersey) Ltd (1986) 1 All ER 129 per Lord Templeman and Lord Mackay.***

A striking-out application proceeds on the assumption that the facts pleaded in the Statement of Claim are true. That is so even although they are not or may not be admitted. However, it is permissible to refer to Affidavit evidence where the evidence is undisputed and is not inconsistent with the pleadings.

In Attorney-General v McVeagh [1995] (1) NZLR 558 at 566 the Court said:

> ***The Court is entitled to receive Affidavit evidence on a striking-out application, and will do so in a proper case.*** *It will not attempt to resolve genuinely disputed issues of fact and therefore will generally limit evidence to that which is undisputed. Normally it will not consider evidence inconsistent with the pleading, for a striking-out application is dealt with on the footing that the pleaded facts can be proved; see* ***Electricity Corporation Ltd v Geotherm Energy Ltd [1992] 2 NZLR 641, 645-646, Southern Ocean Trawlers Ltd v Director-General of Agriculture and Fisheries [1993] 2 NZLR 53*** *at pp 62-63, per Cooke P. But there may be a case where an essential factual allegation is so demonstrably contrary to*

indisputable fact that the matter ought not to be allowed to proceed further.

(Emphasis added)

One word more, as I indicated earlier, the Defendant's application is made under Order 18, Rule 18 (1) (d) of the High Court Rules, 1988 **and under the inherent jurisdiction of the Court.** Therefore, it is permissible to refer to Affidavit evidence.

In **Khan v Begum (2004) FJHC 430**, Hon. Justice John Connors said;

> *Quite apart from the jurisdiction conferred by the Rules to strike out frivolous and vexatious pleadings and action where the cause of action is not revealed, the court also has a separate inherent jurisdiction, which is, relied on to control proceedings and to prevent an abuse of its process. Under the inherent jurisdiction, the court can, as it can under the provisions of the Rules, stay or dismissed proceedings which are an abuse of process as being frivolous or vexatious or which fail to show a reasonable cause of action.*
> *It is said that the fact the court has this inherent jurisdiction is one of the characteristics which distinguishes the court from the other institutions of the government. It is a jurisdiction, to be exercised summarily and as I have said, is in addition to the jurisdiction conferred by the Rules.*
>
> ***It is not in issue that if a party relies solely upon Order 18 Rule 18 then no evidence may be considered by the court in making its determination but that limitation does not apply where the applicant relies upon the inherent jurisdiction of the court.***

(Emphasis added)

Therefore, it is permissible to refer to Affidavit evidence, in addition to the facts pleaded in the Statement of Claim.

(ii) The issues for consideration by the Court are the same whether pursuant to the Rules or in reliance of the inherent jurisdiction.

(7) With all that in my mind let me now move to consider the Second Defendant's application for striking out.

(8) In this application under Order 18, rule 18 (1) (d) Counsel for the Second Defendant has made two submissions. His first submission is this; (I focus on paragraph 05 of his written submissions)

> *"In bringing about a claim in the High Court for negligence, the Plaintiff has abused the court's process given the careless driving issue was dealt with in the Ruling of the Lautoka Magistrate of 19th June 2015 where the Magistrate found that the State failed to prove the case beyond reasonable doubt.*
>
> *Since the driver of the vehicle was acquitted, how is it then that negligence can be established again in the High Court? It all amounts to an abuse of process by the Plaintiff."*

(9) In response, the Plaintiff says; (I focus on paragraph 19 of the Plaintiff's written submissions)

> *Para 19* ……………………………………………………………………………… *the Defendant was acquitted in the criminal action as the prosecution failed to prove the elements of the alleged offence. Whereas in the case of State v Viliame Vakacegu Saranuku the court has held that, the state has not discharged its duty and has not established the offence beyond a reasonable doubt. In civil proceedings the Plaintiff is required to prove its case on the balance of probabilities not beyond reasonable doubt. The Civil Jurisdiction is not affected by the acquittal in a Criminal Action and the cause of action of the Plaintiff is based on negligence. It is submitted with respect that the application is grossly misconceived in law. There is no legal basis for an application on the grounds made by the Defendant.*

(10) So I come to the first. The question is what is the **admissibility of the acquittal**?

In my opinion, however, contrary to the submission of Counsel for the Second Defendant, on the trial of the issue in the Civil Court, the opinion of the Criminal Court is irrelevant because, the issue in the Criminal proceedings is not identical with that raised in the claim for damages. The Civil Court must base its findings on the facts placed before it without any regard to the proceedings before another tribunal. The issue in the Civil Action is precisely not the same as in the Criminal Court. The question of negligence in a Civil Action is whether there has been a lack of due care towards the Plaintiff.

This approach accords with **Hollington v F.Hewtharn & Company Ltd (1943) 2 ALL E.R. 35p.**

I can see no reason why the rule of law enunciated by **Goddard L.J. in Hollington** should not be applied in the case before me.

Dealing with the questions thus far, I would hold that in spite of the force with which Counsel for the Second Defendant put his submission, it is wrong for the Second Defendant to rely on the opinion of the Criminal Court in support of an application to strike-out the claim.

(11) That brings me to the next submission. The second submission on behalf of the Second Defendant is this; (I focus on paragraph 4 (c) of his written submissions).

> *Para 4 (c) ....the Plaintiff has sued a **non-existent person** by naming the First Defendant as one Viliame Valacegu whom the Second Defendant had notified in writing to the Plaintiff's Solicitors on 24th December 2015 that such a person did not exist within its organisation. Apart from that in both affidavits of the Second Defendant, this pertinent fact was raised in that since there was a "**non-existent person**" named in the Writ, the entire application by the Plaintiff ought to be struck out as it has caused the Second Defendant to defend such proceedings.*

In response, the Plaintiff says; (I focus on paragraphs 15 and 16 of her written Submissions)

> *Para 15. The 2nd Defendant is relying on the fact on one side that the Plaintiff has sued the wrong person and on the other side that the 1st Defendant has been acquitted accordingly. (Refer paragraph 4 and 5). Thus the 2nd Defendant admits and confirm that we have sued the right person, its just an error in the name of the 1st Defendant. We just have got the name wrong, an honest mistake. Order 15 Rule 6 (1) of the High Court Rules very clearly states that:*
>
> > *"6 (1) No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party; and the Court may determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter."*
>
> *16. The 2nd Defendant was always aware that the 1st Defendant's name was wrongly spelt as they were provided with the police report and they never raised that the name on the report is wrong until this application was filed. (refer paragraph 5, 6, 7, 8 and 9 of the Affidavit in reply of Preya Lata sworn on 30th June 2016) Therefore by way of amendment the error can be corrected and an application is pending before the honourable Court.*

(12) So I come to the second.

According to the Writ of Summons, the First Defendant is named as **"Viliame Valacegu"**. The Second Defendant says that the First Defendant's correct name should be **"Viliame Vakacegu Saranuku"**.

Counsel for the Second Defendant referred to South African, Western Cape High Court case, **HUV Cape Spice v Hotspice Sauce cc (2011) ZAWHC** . Counsel heavily relied on this decision which, he said, applies to the case before me. I closely read the decision. In that case the entity described in the summons as **"HUV Cape Spice, a private Company with limited liability duly incorporated with the Companies law of the Germany",** did not exist. In an opposing Affidavit, the Defendant admitted **"HUV Cap Spice"** Company was registered in Germany but stated that its proper description is that of **"a firm or business duly registered under Trade Regulation Act"**. The South African High Court held that the citation of the Plaintiff is nothing more than a misdescription and thus the Summons was not a nullity.

Turning to the facts of the case before me, in the Writ of Summons, the First Defendant is named as **"Viliame Valacegu"**. The Second Defendant says that the First Defendant's correct name should be **"Viliame Vakacegu Saranuku"**.

It is contended, on behalf of the Second Defendant that since the First Defendant as cited was not existent, the Writ of Summons is a nullity.

With all due respect to the argument, I am not at all persuaded by the submissions of Counsel for the Second Defendant that the Writ of Summons is a nullity.

The second Defendant cannot, in my Judgment, expect the Court to assess the requirements of Justice with its eyes in blinkers; It must look at all the circumstances.

The Second Defendant admits that on 14th February 2013, there was a motor vehicle accident between vehicle registration number FT 186 owned by the Second Defendant and driven by **'Viliame Vakacegu Saranuku'**, (employed by the Second Defendant) and the vehicle registration number CR 275 driven by one Anand Pillay. The Plaintiff was a passenger.

Viliame Vakacegu Saranuku, the driver of the Second Defendant was incorrectly cited as **"Viliame Valacegu"** in the Writ of Summons. In my view, the citation of the name of the driver of the Second Defendant as **"Viliame Valacegu"** is nothing more than a bona fide mistake. The Second Defendant has not shown that the incorrect citation of the name of its driver had itself caused them prejudice; and Counsel on behalf of the Second Defendant has frankly accepted that they could show no such prejudice. Then the Claim cannot be struck out unless the proceedings are brought for some improper or collateral motive. The Second Defendant is unable to identify any such improper or collateral motive.

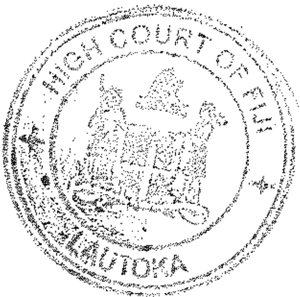
The Plaintiff cannot be said to bringing the proceedings with a collateral or improper motive, because she alleges facts which entitle her to claim damages for personal injuries she sustained and there are no grounds for depriving the Plaintiff of that remedy if she is entitled to it.

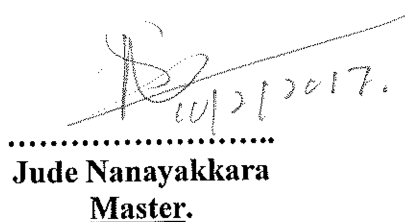
In such cases, the claim is not necessarily struck-out at once. A proper opportunity to amend should be given. This approach accords with the Judgment of Evans L.J. in **"Lunrho Plc and Others v Fayed and Others (No.5)," (1994) 1 ALL ER 188P.**

(E) ORDERS

(1) The Second Defendant's Summons to strike-out the Claim is dismissed.

(2) The Second Defendant is to pay costs of $1000.00 (summarily assessed) to the Plaintiff within 14 days hereof.





....
Jude Nanayakkara
Master.

At Lautoka
10th February 2017