IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

HBM NO. 41 OF 2017
HBC 236 OF 2017

BETWEEN	:	**FEDERATED AIRLINES STAFF ASSOCIATION**
		PLAINTIFF
AND	:	**AIR TERMINAL SERVICES (FIJI) LIMITED**
		DEFENDANT

Counsel	:	Mr. K. Tunidau for the Plaintiff
	:	Ms. M. Rakai for the Defendant o/i M/s Sherani & Co.
Written Submissions by	:	Both parties on 16th March, 2018
Date of Hearing	:	16th March, 2018
Date of Ruling	:	18th April, 2018
Ruling by	:	Justice Mr. Mohamed Mackie

R U L I N G

A. Introduction

The Summons (Application)

1. This ruling is in relation to the Summons (Application) filed by the Defendant/Applicant (hereinafter sometimes referred to as "the Defendant") on 12th December, 2017 and supported on 21st December, 2017 before a Brother Judge of this Court during my annual vacation.

2. This application is supported by an affidavit of **Mr. Richard Donaldson**, the Manager Human Resources of the Defendant Company, sworn on 12th December, 2017 and filed with the annexures marked from **"A"** to **"J"**.

3. At the hearing held before me on 16th March, 2018 both the learned Counsel made their oral submissions and filed respective written submissions as well. I thank both the Counsel for the oral and written submissions, by which I was immensely assisted in arriving at my decision.

4. By this Application the Defendant seeks following orders, under Order 18, Rules 18 (1) (a) and (d) of the High Court Rules 1988 ('the HCR').

    1. That the claim against the Defendant be wholly struck out;
    2. The filing of the Defendant's defence be stayed until 7 days after the hearing and determination of this application;
    3. The Plaintiff pays the cost of this application to the Defendant; **On the ground that:**

        i. The writ of summons and Statement of claim discloses no reasonable cause of action;
        ii. Is otherwise an abuse of the process of the Court.

5. **Chronology of the main events**:

    a. On **03rd November, 2017** an Ex-parte Notice of Motion was filed by the Plaintiff seeking an injunctive relief against the Defendant, supported by the affidavit of Mr. Vilikesa Naulumatua, the National Secretary.

    b. On **6th November, 2017** an Ex-parte interim injunction was issued restraining the Defendant from evicting the Plaintiff from its office premises by changing the Door-lock thereto.

    c. On **13th November, 2017** the writ of Summons and the Statement of Claim filed.

    d. On **12th December, 2017** Defendant filed the Striking out Application supported by the affidavit of Mr. Richard Donaldson dated 12th Dec, 2017. (the application at hand)

    e. On **12th December, 2017** Defendant also filed Notice of Motion to set aside the Ex-parte Interim injunction dated 6th November, 2017, supported by the affidavit of Mr. Richard Donaldson.

    f. On **05th January ,2018** the Plaintiff/Respondent (hereinafter sometimes may be referred to as "the Plaintiff") filed an affidavit in opposition to the Defendant's Setting aside application, sworn by Mr. Vilikesa Naulumatua the National

Secretary of the Plaintiff Union, together with documents marked "VN-1" & "VN-2".

g. On **16th January, 2018** the Plaintiff filed the application for leave to issue Committal proceedings against the Acting Chief Executive Officer of the Defendant Company and on **18th January, 2018** this Court granted leave for same.

h. On **19th January, 2018** an affidavit in reply was filed by Mr. Richard Donaldson to the Affidavit of Mr. Vilikesa Naulumatua filed in opposition to the Striking out and Setting aside applications of the Defendant.

i. On **15th March, 2018** the Defendant filed Summons for stay of Committal proceedings supported by the Affidavit of Mr. Hare Mani, the Acting Chief Executive Officer of the Defendant Company and same awaits the hearing after the response from the Plaintiff.

j. On **16th March, 2018** the hearing in to the Defendant's Striking out Application was taken up, on which this ruling is hereby made.

k. A notable event that took place on **16th March, 2018**, apart from the lengthy hearing into the Striking out application, was the granting of consent by the Plaintiff for the setting aside application filed by the Defendant and accordingly, the Court allowed the same, which resulted in the vacation of the Ex-parte interim injunction issued against the Defendant on 6th of November, 2017.

l. Even though, the interim injunction order was vacated, since the plaintiff was strong-minded to proceed with the Committal proceedings the Court, having heard both the Counsel, decided to go into it subsequent to this ruling on the Striking out application.

B. Background Facts:

Brief background facts relevant to this case are as follows:

6. The Plaintiff, which is the in – house Trade Union of the Defendant Company, has been, admittedly, in occupation and using as its office a part of the space in the Defendant's Administration and facilities building since 1981, for which the Plaintiff is said to have paid a nominal monthly lease rental of F$ 150.00 from the year 1998 till the issue of formalization of the lease and enhancement of lease rental came up in the year 2013 as evidenced by the letter dated 10th September,2013 sent by the Defendant Company to the Plaintiff Union. (Letter marked as **"VN-2")**

7. The Defendant by the said letter proposed new monthly rental at the rate of $ 1,525.00 with additional payment of $ 475.20 for the monthly Electricity consumption and $ 217.00 for the cleaning services, to be effective from 1st October, 2017. The Plaintiff by its response letter dated 25th September 2017, while expressing its displeasure over the proposed rate of rental and other charges, indicated that it should be decided after discussion between both the parties. Though, the Defendant had, subsequently, on two occasions, sent two draft lease agreement (VN-5 & VN-6) for signature, the Plaintiff did not sign the same citing the reason that the matter should be discussed.

8. Though, the Defendant sent the letter dated 26th February, 2014 with an alternative proposal on the new amounts to be levied and subsequently sent a final reminder dated 31st March, 2014 there was no positive response from the Plaintiff. Accordingly, the Defendant sent the eviction notice dated 30th April, 2014.

9. Thereafter, several extensions were given, for the Plaintiff to pay the arrears and vacate, but the Plaintiff failed to vacate citing the same reasons, particularly, about its long stay in the premises and the relationship both parties have had during its period of stay. Since nothing materialized even after sending few more letters extending the time to vacate, finally the Defendant sent the letter dated **1st November, 2017 (VN-17")** advising the Plaintiff to vacate , stating that the Company intends to change the Door Lock of the premises in order to commence the renovations on 6th November, 2017.

10. It is after the receipt of the above letter dated 1st November, 2017; the Plaintiff rushed to this Court, filed the **Ex-parte Notice of Motion** on 3rd November 2017, which was allotted with case number HBM **41 of 2017** and supported the same before me on **6th November 2017** praying for the following injunctive reliefs.

    i. An order restraining the Defendant whether by itself and/or through its servants , agents or otherwise whosoever from interfering with the peaceful occupation by the Plaintiff of FASA Office situated at ATS facilities Building, Cruikshank Road, Nadi Airport in any manner whatsoever until further Order of this Court.

    ii. An Order restraining the Defendant whether by itself and/or through its servants , agents or otherwise whosoever from changing the Door Locks of the Plaintiff's Office situated at ATS facilities Building Cruikshank Road, Nadi Airport.

    iii. An Order restraining the Defendant from evicting the plaintiff from the Plaintiff's Office situated at ATS facilities Building, Cruikshank Road, Nadi Airport.

    iv. An Order restraining the Defendant from any interference of the Plaintiff's executive and Union Members in accessing the Plaintiff's Office at ATS facilities Building , Cruikshank Road, Nadi Airport in any manner whatsoever.

11. The Court, after hearing the learned Counsel for the Plaintiff and foreseeing the imminent eviction of the plaintiff by the Defendant according to the contents of the said letter marked "VN-17" and considering the other surrounding circumstances, issued the interim injunction as prayed for in order to maintain the status-quo.

12. However, when granting the injunction as above, the Court specifically ordered, among other things, that the Plaintiff should file its writ of summons and the statement of claim, including its **substantial relief,** within 7 days.

13. Accordingly, on 13th November, 2017 the Plaintiff filed its writ of summons and the, purported, statement of claim moving for the following reliefs, which was assigned with **case** No: - HBC 236 of 2017.

(a) That the restraining orders against the Defendant to continue until further Orders of this Honorable Court;

(b) General damages;

(c) Cost;

(d) Interest;

(e) Post judgment interest;

(f) Such further or other orders as the Court deems just;

C. Issues for Determination

14. Following are the issues which require determination by this Court;-

(a) Whether the Plaintiff's Writ of Summons and the Statement of Claim discloses any reasonable cause of action?

(b) Whether the Plaintiff's Writ of Summons and Statement of Claim is an abuse of the process of the Court?

D. The Law & Principles:

15. The law on striking out pleadings and endorsements is stipulated under 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)".

16. **Footnote 18/19/3 of the 1988 Supreme Court Practice reads;**

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

17. 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"

18. 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".

19. In ***Tawake v Barton Ltd [2010] FJHC 14; HBC 231 of 2008 (28 January 2010)***, Master Tuilevuka (as he was then) summarized 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."

20. His Lordship Mr. Justice Kirby ***in Len Lindon –v- The Commonwealth of Australia (No. 2) S. 96/005*** summarized the applicable principles as follows:-

> "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.
>
> 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...
>
> 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.
>
> 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.

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.

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".

21. ***In Paulo Malo Radrodro v Sione Hatu Tiakia & ors HBC 204 of 2005*** the High Court in striking out the claim filed by the plaintiff made the following observations on the exercise of Jurisdiction under Order 18 rule 18 application;

"The principles applications 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 vexatious or obviously unsustainable – Lindley LJ in Attorney General of Ducky of Lanaster v L.N.W. Ry [1892] 3 Ch. 274 at 277.

c. It is only in plain and obvious cases that a recourse should be had to the summary process under this rule – Lindley MR in Hubbuck v Wilkinson [1899] 1 Q.B. 86.

d. The purposes of the Court's jurisdiction to strike out pleading are 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. 218 at 238"- James M. Ah Koy v Native Land Trust Board & Ors – 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 v Pooley [1885] 10 DPP Cas. 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."

22. For the purposes of determining if an action is an abuse of process, in the case of ***Sheetal Investments Ltd v Australia and New Zealand Banking Group Ltd [2011] FJHC 271; HBC 227.2010 (12 May 2011)*** the court quoting Halsbury's Laws of England said that:

> "...In Halsbury's Laws of England Vol. 37 page 322 the 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 vexation 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 no 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 pleadings 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 ...'

23. The term 'abuse of process' is defined in the following extract from ***Walton v Gardiner (1993) 1777 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....."

24. The case of ***Timber Resource Management Ltd v Minister for Information [2011] FJHC 770; HBC 212.2000 (22 November 2011)*** states that:

"....The term abuse of the process of the court' is also explained in White Book as follows:

This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevents its machinery from being used as a means of vexation and oppression in the process of litigation. (Castro v Murray (1875) 10 Ex. 213; Dawkins v. Prince Edward of Saxe Weimar; Willis v. Earl Beauchamp (1886) 11 P. 59, PER Brawn L.J. p. 63)....."

E. Discussion:

25. Issue (a) whether the Plaintiff's Writ of Summons and Statement of Claim discloses any reasonable cause of action?

The following notes to Order 17 r19 of the Supreme Court Practice (UK) 1979 Vol. 1 or 18/19/11 on what is meant by the term 'a reasonable cause of action' sufficiently provides the answer to the applications.

".....A reasonable cause of action means a cause with some chance of success when only the allegations in the pleadings are considered (per Lord Pearson in Drummond Jackson v British Medical Association [1970] 1 WLR, 688; [1970] 1 All ER 1094 CA). So long as the statement of claim or the particulars (Davey v Bentinck [1893] 1 QB 185) disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak, and not likely to succeed is no ground for striking out ***(Moore v Lawson (1915) 31 TLR 418, CA.; Wenlock v Moloney [1965] 1 WLR 1238 1 W.L.R. 1238 [1965] 2 All ER 871, CA)....***"

26. Reference is also made to Lindley M.R. in ***Hubbuck & Sons, Ltd v Wilkinson, Heywood & Clark Limited [1899] 1QB 86 at page 91*** said:

".....summary procedure is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks. The use of the expression "reasonable cause of action" in rule 4 shows that the summary procedure there introduced is only intended to be had recourse to in plain and obvious cases".

27. The Defendant's application to strike out in this case is made prior to filing the statement of defence. The law is however settled that the defendant could make an

application to strike out a writ of summons without filing a statement of defence. ***Charan v- Narayan [1993] FJHC 45. HBC 388d.92s. (21 May 1993); Smith v Croft No.2 (1988) 8 ch 114; Helferman v Byrne [2008] FJHC 154.*** Therefore, I don't find any hurdle in granting the 2nd Order sought by the Defendant in the summons for strike out, if necessity arises.

28. It is also well-established law that when courts exercise the discretionary power of examining an application to strike out, such power must be exercised with great caution and must only strike out a cause in plain and obvious cases. Factors such as the case is weak or not likely to succeed are not grounds for striking out a summons. ***Navualaba v Commander, Royal Fiji Military Forces [2004] FJHC 352; HBC 172j.2003s (11 February 2204); Korovusere v Attorney – General [2004] FJHC, HBC 0314d.2003s (11 February 2004); Halsbury's Laws of England 4th Ed. Vol 37 para 435.***

29. When called upon to decide whether the Plaintiff's Writ of Summons and the Statement of Claim discloses any reasonable cause of action, the Court will limit its exercise **only to the pleaded facts** to examine whether the party, against whom an application is made, can make out a promising case on a reasonable cause of action founded on such existing pleadings, for which more elaboration can be permitted by way of amendment in order to make the existing cause of action more conspicuous.

30. A totally new cause of action, which does not have a tangible relationship with the already pleaded facts, cannot be introduced by amendment to survive the strike out. In order to meet the challenge, it is the duty of the party against whom an application is made to show that a reasonable cause of action is well and truly fossilized in the already pleaded facts.

31. It was after the receipt of the letter dated 1st November, 2017 (VN-17), the Plaintiff in this case was driven to Court seeking injunction to stop the Defendant from changing the Door Lock, which act would, probably, have ousted the Plaintiff, had the Defendant proceeded to execute its plan as indicated in the said letter.

32. The sole cause of action, relied on by the Plaintiff to obtain the injunction and, subsequently, pleaded in its statement of claim, was a threat of extra- judicial eviction from the premises in question which, according to the plaintiff, was brought in by the said letter dated 1st November, 2017. Once the interim injunction was issued the threat of such eviction was ruled out and the Plaintiff's continued possession in the premises stood assured, however, subject to the outcome of the relevant legal mechanism that may be utilized in future to evict the plaintiff or till the issue is amicably resolved as contemplated in the Master Agreement, in which the Plaintiff is now on an attempt to fish for a cause of action to survive the strike out application by the Defendant.

33. In the affidavits filed on behalf of the Defendant and in both the oral and written submissions of the learned Counsel for the Defendant (Defence counsel) it has been categorically stated that the Defendant will be filing an eviction proceedings against the Plaintiff under section 169 of the Land Transfer Act and awaiting the setting aside of the injunction order to go ahead with it. This means, the Defendant concedes that the plaintiff cannot be evicted by any other means except for by a due eviction proceedings. Thus, the Plaintiff's continued possession of the disputed premises is further assured until it is terminated by either of the way stated above and thereby the interim injunction became redundant.

34. It is after realizing the above factual position and/or for the reason/s best known to him , learned counsel for the plaintiff on the day of hearing into this strike out application, consented for the setting aside application and accordingly setting aside application being allowed the interim injunction was vacated. As a result, the Plaintiff continues to enjoy the premises without incurring any hindrance or damages and the sole purpose of filing the Ex-parte Notice of Motion for injunction and the Statement of claim too, for the same relief, has now been duly achieved as far as the Plaintiff is Concerned. The plaintiff did not pray for anything more than that. There is nothing left in the remaining pleadings for a reasonable cause of action or a legal issue to be brought out for this Court to adjudicate.

35. The Plaintiff in his Statement of claim has not prayed for any other substantial reliefs except for the continuation of the injunction order and damages. If the Plaintiff had any other reasonable cause of action, it could have been explicitly pleaded in the statement of claim, filed after sufficient interval of obtaining injunction or could have amended the current pleading to bring out the , purported , cause of action without waiting for nearly 4 months, paving the way for striking out application. The Defendant cannot be allowed to suffer until the Plaintiff finishes its voyage of discovery for a reasonable cause of action to amend the statement of claim.

36. No damages have so far been caused or suffered by the Plaintiff. Plaintiff and the premises in suit remain intact with the assurance that it will not be evicted other than by a court order. Thus, the prayer for damages in the statement of claim will not bring home any relief.

37. Surprisingly, the plaintiff did not move for any substantial relief in the prayer to the statement of claim, apart from praying for the interim injection to remain in force and for damages. Also in the averments therein the plaintiff does not specifically plead that it has a legal or equitable right to be adjudicated by this Court, except for averring about the, alleged, breach of contract and statutory duty.

38. When the Ex-parte Notice of Motion, for injunctive relief, was supported before me on 6th November 2017, the salient part of the oral submission of the Plaintiff's Counsel, as I observed, was as follows.

> Paragraph 3:
> ***"The Company has given the Association ample time to find their alternate location and our advice is the Association to vacate immediately as door locks will be replaced by Sunday, yesterday, the 5th November; and it is on that basis that we come before His Lordship for injunctive orders"*** (Emphasis mine)

39. On the said occasion, Counsel did not make submission to the effect that the Plaintiff has right whatsoever to occupy the premises in suit under any provision known in law or by virtue of the MEMORANDUM OF AGREEMENT (MOA) on which the plaintiff now relies on and complains about breaches. Wittingly or unwittingly, Counsel has impliedly indicated to the Court that the Plaintiff has to vacate and the only question is being evicted suddenly in the above manner.

What is this Memorandum of Agreement (MOA) about?

40. Basically, the MEMORANDUM OF AGREEMENT (MOA) is an agreement signed between the Plaintiff and the Defendant giving recognition to the Plaintiff Association to be the sole representative of the workers for the purpose of collective bargaining the industrial matters of the employees of the Defendant Company and other matters connected thereto. It does not contain any clause for the provision of an Office space for the Plaintiff Association within the Company premises or specifically recognizes the existing occupation of the Plaintiff.

41. The plaintiff's Counsel places much reliance in clause **D in Article 1** of the (MOA) to substantiate his argument that there is a serious legal issue to be determined. Relevant clause is reproduced bellow for easy reference:

> ***"Notwithstanding any other provision of this Agreement, the parties hereto recognize the desirability of implementing the practices of industrial democracy, or employee participation in decision- making, at all levels of the Company's operations and therefore undertake to work closely together towards the foregoing purpose..."***

42. The above clause, when read in conjunction with paragraph 2(a) under Article 25 ,namely GRIEVANCE PROCEDURE, it clearly shows that where the Association and the Company are parties to a difference or a dispute the matter shall be processed in accordance with the procedures referred to in 1 (d) above. This means referring the

matter to the Grievance Committee found under Article 25 of the MOA for the resolution of it.

43. The Plaintiff has to explain as to how a cause of action accrues to it and why it should rush to this Court for the resolution of a matter of this nature, while an in-house mechanism is available under the very MOA.

44. The Plaintiff cannot take up a position to the effect that it was not a party to decision making with regard to the issue in hand, in terms of Article 1 D of the MOA, when Mr. Manasa Ratuvili, who represents the plaintiff at the Executive Board had taken part at the Board meeting held on 10th November, 2016, where the decision has, admittedly, been taken for the renovations affecting the premises in dispute as well. This seems to have escaped the attention of the Counsel for the Plaintiff. What more the Plaintiff expects in the name of participation in decision making? How can it claim this gives a reasonable cause of action?

45. In paragraphs 6, 9, 11 and 13 of the written submission filed on behalf of the Plaintiff, the learned Counsel has adduced 4, purported, causes of action which read as follows.

> 6. "The **First Cause of Action** therefore is that by letter dated 1st November, 2017, the Defendant contravened Article 1, D of the Master Agreement.
>
> 9. The **Second Cause of Action** is that the Defendant failed to invoke section 169 of the Land Transfer Act, after its issuance of notice to quit. The letter of 1st November, 2017 denied the Plaintiff the right to show cause under the provision.
>
> 11. The **Third Cause of Action** is the contravention of section 39 of the constitution brought about by the effect of letter dated 1st November, 2017.
>
> 13. The **Fourth Cause of Action** is the intimidation and threat upon the Plaintiff by the contents of the letter dated 1st November, 2017."

46. It is to be observed that all the above, purported; causes of actions are based on the impugned letter dated 1st November, 2017. It was purely relying on this letter; the Plaintiff obtained the injunction and managed to protect its existence in the premises in suit. Though, the injunction is no more in force , the plaintiff has been given further assurance that it will not be evicted except for by a Court order under Section 169 of the LTA.

47. There is nothing left behind for the plaintiff to obtain from this Court on the purported causes of action purely founded on the said letter dated 1st November 2017 and the said letter poses no more threat to the plaintiff. If the plaintiff still relies on the above,

purported, causes of action to withstand the Striking out and to proceed with in this action, I think the plaintiff is utterly wrong in its decision.

48. I shall not comment on the submissions that deal with the pending committal proceedings, impending Section 169 proceedings or Employment related matters for obvious reason and as those submissions need not warrant my consideration to arrive at this decision.

Whether the claim is otherwise an abuse of the process of the Court?

49. It is well settled that this Court has inherent jurisdiction to strike out the claim or pleadings for abuse of Court process and reference is made to paragraph 18/19/18 of the Supreme Court Practice 1993 Vol. 1.-

At paragraphs 18/19/17 and 18/19/18 of Supreme Court Practice 1993 (White Book) Vol 1 it is stated as follows:-

> *"Abuse of Process of the Court"- Para. (1) (d) confers upon the Court in express terms powers which the Court has hitherto exercised under its inherent jurisdiction where there appeared to be "an abuse of the process of the Court." This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation (see Castro v. Murray (1875) 10 P. 59, per Bowen L.J. p.63). See also "Inherent jurisdiction," para.18/19/18."*
>
> *"It is an abuse of the process of the Court and contrary to justice and public policy for a party to re-litigate the issue of fraud after the self-same issue has been tried and decided by the Irish Court (House of Spring Gardens Ltd. v. Waite {1990} 2 E.R. 990 C.A)."*

50. When the Plaintiff's Counsel moved this Court for the interim injunction by the Notice of Motion on 6th November,2017 , the Plaintiff was well aware or ought to have been aware that the Defendant cannot evict the Plaintiff in that threatened summary manner. The letter marked VN -18 substantiates this position. Yet, the plaintiff proceeded to obtain this short lived injunction, which was withdrawn by the Plaintiff itself. This is nothing but an abuse of process.

51. Then, having obtained an unwarranted injunction, the plaintiff went ahead, filed the, purported, writ of summons and the statement of claim moving for the same relief already obtained by way of injunction, without praying for any substantial relief and in

the absence of a reasonable cause of action, when such a move was unnecessary in view of undisturbed possession the plaintiff continued to enjoy.

52. The Plaintiff being very well aware of the true position as to where it stands, particularly, having admitted that the Company had given ample time to find an alternative venue and showing that the only issue was the sudden eviction by change of door lock, obtained an unwarranted injunction by abuse of the Court process and continued to do so by filing a statement of claim, which will not take the plaintiff anywhere, but cause hardship, embarrassment and inconvenience to its own employer.

53. The Plaintiff being very well aware that any dispute or difference crops up between the Plaintiff and the Defendant as signatories to the MOA; it should have been subjected to the Grievance Procedure found under Article 25 (B) 1(d) acting under Article 25. B (2) (a) of the said MOA, resorted to this court and abused the process by passing the mechanism in the MOA.

54. The abuse of the process of the Court arises where the process of it is used, not in good faith and for proper purposes, but as a means of vexatious or oppressive or for inferior purposes, or, more simply, where the process is misused. . See ***Sheetal Investment Ltd V Australia and New Zealand Banking Group Ltd [2011] FJHC; HBC 227.2010 (13 May 2011) & Janov v Morris [1981] 3 All ER 780.***

F. <u>Conclusion</u>:-

55. When the above activities of the Plaintiff are closely scrutinized, the inescapable conclusion this Court can arrive at is that the Plaintiff is in an attempt to use this issue to achieve its ulterior motives by abusing the process of this Court and I am of the view this Court cannot and should not lend its hand for such a move.

56. Having considered the application for strike out, together with the contents of the affidavits, written & oral submissions and after analyzing the issues raised, in the light of the relevant law and governing principles, this court arrives at the following considered decision that the plaintiff's writ of Summons and the Statement of Claim does not bring out a reasonable cause of action and same is an abuse of the process of the Court.

57. Though, the circumstances warrant the imposition of costs on indemnity basis, considering the Employer – Employee relationship between the parties, and the absence of the prayer for such a relief in the Defendant's Summons for Strike out, I decide not to order indemnity costs.

G. Final Decision

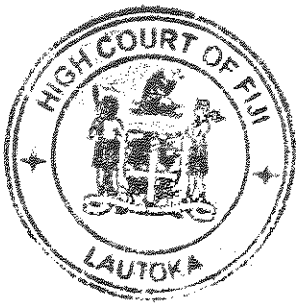
a. The Defendant's Summons filed on 12th December 2017 for striking out allowed.

b. The Plaintiff's Writ of Summons and the Statement of Claim dated and filed on 13th November 2017, under Action NO.**HBC 236 of 2017,** stands struck out.

c. The Action No. **HBM 41 of 2017** is hereby dismissed, subject to the final determination on the pending committal proceedings.

d. The Action No. **HBM 41 of 2017** will be mentioned before this Court, after 3 weeks from today, to fix a hearing date, if the plaintiff is desirous of continuing with the committal proceedings.

e. There shall be a summarily assessed cost of $ 1,500.00, payable by the Plaintiff unto the Defendant within 21 days, in respect of the Action No. HBC 236 of 2017.



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A.M.Mohammed Mackie

Judge

At Lautoka
18th April, 2018