

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 260 of 2014

BETWEEN : **ROBERT EPSTEIN** C/- University of the South Pacific, Suva, Fiji, Professor of Psychology.

PLAINTIFF

AND : **MORGAN TUIMALEALIFANO** C/- School of Social Sciences, University of the South Pacific, Suva, Fiji, Head of Department.

DEFENDANT

BEFORE: Master Vishwa Datt Sharma

COUNSEL: Mr. Prasad. N - for the Plaintiff
Ms. Narayan. S - for the Defendant

Date of Ruling : 30th July, 2015 @ 9am

RULING

[Defendant's Summons seeking leave to file Amended Statement of Defence and Counterclaims pursuant to Order 20 Rule 5 of the High Court Rules, 1988]

INTRODUCTION

1. This is the **Defendants Summons** seeking for the following orders-
 - (i) *That Leave granted to the Defendant to file the Amended Statement of Defence and Counterclaim in the form of annexed hereto;*
 - (ii) *That the costs of this application and the consequential amendment be costs in the cause.*
2. The application was made pursuant to *Order 20 Rule 5 of the High Court Rules, 1988 and ion the grounds contained in the affidavit in support Morgan Tuimalealifano.*
3. The Summons was strongly opposed by the Plaintiff.
4. The **Plaintiff** and the **Defendant** filed written submissions with case authorities and the Summons proceeded for hearing on a defended basis.

THE LAW

Legal Basis for Application

5. The Summons is filed under O 20 r 5 which, so far as is relevant, states —

"Amendment of writ or pleading with leave (O.20, r.5)

5.—(1) Subject to Order 15, rules 6, 8 and 9 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.
6. Insofar as the amendment proposes to add a counterclaim, O 15 r (2)(1) relevantly states —

"2.—(1) Subject to rule 5(2), a defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter (whenever and however arising) may, instead of bringing a separate action, make a counterclaim in respect of that matter; and where he does so he must add the counterclaim to his defence."

Principles on Amendment of Pleadings

7. The principles relating to the grant of leave to amend pleadings are well established and are set out in paragraph 20/8/6 of the *Supreme Court Practice 1999* ("**the White Book**") [Tab 1]. There it states the **basic principle** as follows —

"It is a guiding principle of cardinal importance on the question of amendment that generally speaking, all such amendments ought to be made" for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defects or error in any proceedings." (see per Jenkins L.J in R.L Baker Ltd v Medway Building & Supplies Ltd [1958] 1 W.L.P 1216, p 1231; [1958] 3 All E.R 540, p. 546)."

8. The principles have been discussed in a number of Fiji cases at first instance and at the appellate level. The cases are consistently to the effect that amendments which allow the real issues in controversy between the parties to be determined must be allowed, except if they will cause the other party serious prejudice. Amendments may even be allowed after the trial and before judgment.
9. Recently Justice Kumar in the case of *NBF Asset Management Bank v Taveuni Estates Limited & Others* [2014] FJHC 79; HBC543.2004 (17 February 2014) said-

"The test to be applied when dealing with Application to Amend Pleadings was stated by Full Court of Fiji Court of Appeal in *Sundar v Prasad* [1998] FJCA19' Abu0022u.97s (15 May 1998) as follows:-

'Generally, it is in the best interest of the administration of justice that the pleadings in an action should state fully and accurately the factual basis of each party's case. For that reason amendment of pleadings which will have that effect are usually allowed, unless the other party will be seriously prejudiced thereby (G.L. Baker Ltd. v. Medway Building and Supplies Ltd [1958] 1 WLR 1231 (C.A.)). The test to be applied is whether the amendment is necessary in order to determine the real controversy between the parties and does not result in injustice to other parties; if that test is met, leave to amend may be given even at a very late stage of the trial (Elders Pastoral Ltd v. Marr (1987) 2 PRNZ 383 (C.A.)). However, the later the amendment the greater is the chance that it will prejudice other parties or cause significant delays, which are contrary to the interest of the public in the expeditious conduct of trials. When leave to amend is granted, the party seeking the amendment must bear the costs of the other party wasted as a result of it.'

DEFENDANT'S CONTENTION (In brief)

10. According to the Plaintiff's Counsel, the Plaintiff and Defendant were at relevant times both employed at the University of the South Pacific. The Plaintiff was at relevant times a Professor of Psychology and the Defendant, his supervisor and Head of School.
11. In this action, the Plaintiff sues the Defendant for alleged defamation in an email addressed to senior managers of the University of the South Pacific and to the Plaintiffs lawyers. The Defendant's email was a reply to one sent by the Plaintiff, which the Defendant alleges was defamatory of him.

12. Defamation pleadings require a great deal of particularity. Due to the respective work commitments of the Defendant and his solicitors, he was unable to provide full instructions to his solicitors to formulate a defence and counterclaim that complied with the legal requirements within the time a defence was required to be filed under O18 r 2 of the High Court Rules. The Defendant's solicitor's therefore filed a bare defence to comply with the time limit under the rules and to avoid default judgment being taken out against him. This was filed on 9 October 2014 and served on the Plaintiff's solicitors on 13 October 2014.

PLAINTIFF'S OPPOSITION (In Brief)

13. The Plaintiff's basis for opposing the amendment are outlined in his Affidavit in Opposition filed on 23rd January, 2015 and can be summarized as follows-
- (a) the amended defence the Plaintiff seeks to introduce renders his defence substantially different from the original defence;
 - (b) The original defence is a blatant denial whereas the amended defence seeks to introduce the defences of justification and qualified privilege for the first time;
 - (c) the counterclaim is being pleaded for the first time and there was no counterclaim to amend;
 - (d) the Plaintiff believes the Defendant's reasons for the amendment to be untrue; he says this because no request or formal application had been made to his solicitors to file the statement of defence out of time;
 - (e) These circumstances render the application an abuse of process and mala fide;
 - (f) In the event this Court decides to allow the amendment, he seeks an order for costs on the basis that the Plaintiff has filed a Reply to Defence, incurred legal costs, and amendments are substantive and will require considerable amount of time to peruse in detail and respond.

ANALYSIS and DETERMINATION

14. The issue for Court to determine is "**whether leave to Amended the Statement of Defence and Counterclaim should be granted to the Defendant?**"
15. This application is made pursuant to *Order 25 Rule 5 of the High Court Rules, 1988*, which gives the court a **discretionary power** to allow the Plaintiff or any other party to the proceedings to amend their pleadings at any stage of the proceedings on such terms as to cost or otherwise as may be just and fair in such manner as it may direct.
16. Lord Keith of *Kinkel in Kettleman and Others v Hansel Properties Ltd* (1988) 1 ALL ER 38, observed that-

"The rule is that amendment should be allowed if necessary to enable the true issues in controversy between the parties to be resolved and if allowance would not result in injustice to the other party not capable of being compensated by an award of costs."

17. The Defendant when initially served with the Plaintiff's Writ of Summons, filed a Defence without any Counterclaim and states as follows-
 - "1. Save as to admit the contents in paragraphs 1 and 3, the Defendant denies each and every allegation of fact in the Claim as if the same were set out in full herein and specifically traversed one by one in sequence".
 - "2. The Defendant says that the Plaintiff is not entitled to any relief sought in the claim."
18. The Defendant should be wary of the fact that whenever a party to any civil proceedings after filing his Defence, later decides to seek leave to file a counterclaim, the counterclaim thus will tantamount to a separate cause of action.
19. Nevertheless, upon a careful perusal of the Plaintiff's Statement of Claim, I find that the substantive cause of action herein is that of "Defamation." The Statement of Claim must plead clearly all the particulars so that the Defence is able to grasp what the particulars are to enable the Defence a substantial Defence to defend its case accordingly.
20. It is well established that "Defamation pleadings" must be pleaded with special particularity. This was confirmed by the Supreme Court of Fiji in the case of *Ganesh Chand -v- Fiji Times Ltd and Ano* [2011] FJHC 2; CBV 005 of 2009 (8 April 2011) where it stated at paragraph 18 as follows-

"The objective of the pleadings is to narrow the issues between the parties and limit the scope of the trial. However, it is trite law that pleadings in a Defamation action are in a special category and must be prepared with great care and scrutiny. The rationale for this difference of treatment is the recognition that libel and slander are committed primarily with the use of words, and as Oliver Wendell Holmes once put it; "A word is not a crystal, transparent and unchanged; it is the skin of a living thought, and may vary greatly in colour and content according to the circumstances and the time in which it is used". What this means is that the meaning of a word will differ from time to time, nation to nation, culture to culture, and according to the context in which it is used, and the subtleties of such usage must be highlighted in the pleadings in a defamation suit. Levis v Daily Telegraph Ltd [1964] AC 234 refers."
21. Bearing in mind all above, in particular that the provisions of Order 20 Rule 5 gives the discretionary power to this court to accede to and allow the leave to the amendment as sought for and it is therefore only appropriate that this court accedes to the application of the Defendant and allow the leave to file and serve their Amended Statement of Defence together with the Counterclaim within 14 days timeframe. Accordingly, I allow the leave to the Amendment of the Defence together with a Counterclaim accordingly.
22. Further, leave granted to file the amendment of this nature together with the Counterclaim comes at a cost taking into consideration that a considerable amount of time will be spent by the Plaintiff to file and serve its Reply to the Amended Defence and Counterclaim when the Plaintiff had already initially filed a Reply to the Defendant's Statement of Defence. In all fairness to parties to this proceedings, I am inclined to and allow the summarily assessed cost of **\$1,500** to the plaintiff within 14 days timeframe.
23. Thus, in **Conclusion**, following are the final orders:

FINAL ORDERS

- a. The Defendants Summon filed on 12th of November, 2014 succeeds.
- b. Leave is hereby granted to the Defendant to file and serve his respective Amended Statement of Defence together with a Counterclaim within 14 days timeframe.
- c. The Defendant is ordered to pay cost to the Plaintiff summarily assessed at \$1,500 within the next 14 days timeframe.
- d. Orders accordingly.

Dated at Suva this 30th Day of July, 2018



Master
VISHWA DATT SHARMA

cc: *Jamnadas & Associates, Suva*
Munro Leys Solicitors, Suva