

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 14 OF 2015

BETWEEN : **NAINASO I RA HOLDING LIMITED** a limited liability company having its registered office at 33 Raojibhai Patel Street, Suva, P O Box 4132, Samabula Post Office, Suva.

PLAINTIFF

AND : **RAJNEEL KARAN SINGH** of Samuel K Ram Lawyers, 2nd Floor, Kamel Building, Kings Road, Ba Town, Legal Clerk.

1ST DEFENDANT

AND : **SAMUEL K RAM trading as SAMUEL K RAM LAWYERS**, a legal practice, duly established under the Legal Practitioners Decree, and having its registered office at 2nd Floor, Kamel Building, Kings Road, Ba, P. O. Box 3318, Ba.

2ND DEFENDANT

AND : **MATAQALI NAINASO HOLDINGS LIMITED**, a duly incorporated private company having it registered office at 2nd Floor, Kamel Building, Kings Road, Ba, P. O. Box 3318, Ba.

3RD DEFENDANT

AND : **YASAWA PROJECTS COMPANY LIMITED** a duly incorporated private company, having its registered office at 2nd floor, Kamel Building, Kings Road, Ba. P. O. Box 3318, Ba.

4TH DEFENDANT

AND : **CAPITAL GROUP INVESTMENTS (FIJI) LIMITED**, a duly incorporated private company having its registered office at Suva, Fiji, P O Box 15859.

5TH DEFENDANT

A N D : **ANWAR KHAN**, of Drasa, Lautoka, P. O. Box 5490, Lautoka
Businessman.

6TH DEFENDANT

A N D : **KELEVI NABA**, of Drasa, Lautoka, Retired.

7TH DEFENDANT

A N D : **PATIMIO BACAIVALU**, of Drasa, Lautoka, Company Director.

8TH DEFENDANT

A N D : **Waisea Ratubusa**, of Vatuwaqa, Suva, Pharmacist.

9TH DEFENDANT

Appearances : Mr S. Krishna for the first defendant/applicant
No appearance for the plaintiff/respondent

Date of Hearing : 28 January 2019

Date of Ruling : 18 April 2019

R U L I N G

[on striking-out]

Introduction

[01] This ruling is concerned with an application for striking-out filed by the first defendant/applicant (*'the first defendant'*).

[02] On 03 April 2017, the first defendant, Rajneel Karan Singh filed a summons supported by an affidavit sworn by him to strike out the claim on the ground that the statement of claim does not disclose a reasonable cause of action against him as it is frivolous, vexatious, scandalous and/or is otherwise an abuse of process of the court (*'the application'*).

[03] This application has been filed by Mr S. K. Ram, Barrister and Solicitor on behalf of the first defendant. It will be noted that Mr Ram is the second defendant in these proceedings. By an order of the Court, Mr Ram is restrained from appearing for the first defendant on the ground of conflict of interest. As a result, Messrs Krishna & Co has come on board to defend the first defendant. Messrs Krishna & Co is also solicitors for the second defendant.

[04] At the hearing, Mr Krishna of counsel for the first defendant made oral submission and also tendered written submission in addition. The plaintiff did not participate in the hearing of the matter. Nor did they file any objection.

The background facts

[05] The background facts so far as relevant to this application are as follows.

[06] Mr Rajneel Karan Singh (Rajneel), the first defendant is a law clerk at Messrs Samuel K Ram Lawyers. Mr Samuel K Ram (*'Ram'*) trading as Samuel K Ram Barrister and Solicitor is a legal practitioner, the second defendant (*'second defendant'*). The plaintiff's claim arises out of an allegation that both of them with other defendants acted fraudulently and colluded with the other defendants to deprive the plaintiff of their land which is valued at \$20m. It is alleged that the second defendant caused the first defendant to swear an affidavit in the winding-up proceedings to have the plaintiff company wound up even before its incorporation. Initially, a winding-up order was granted. It was however withdrawn on appeal after a protracted legal battle. It is also alleged that the first and the second defendants along with other defendants at the time of filing the winding-up petition, made representations to the High Court at Lautoka that were false, fraudulent and misleading in that they presented the winding-up petition naming a non-existent company to be the petitioner on their behalf. The plaintiff claims among other things \$20m against the defendants including the first and second defendants. The defendants are also facing the allegation of libel, slander and defamation.

[07] The allegation, according to the statement of claim, against defendants including the first defendant is as follows [paras 38, 39 and 41 of the statement of claim:

**“PARTICULARS OF FRAUD INDUCING THE ISSUE OF
IRREGULAR WINDING UP ORDER**

38. *That the 1st, 2nd, 7th, 8th and 9th Defendants knew that the third defendant was non-existent yet they agreed to file a Winding Up Petition in the 3rd Defendants name at the High Court in Lautoka thus causing the High Court to mistakenly and innocently issue a Winding Up Petition by mistake against the Plaintiff and eventually the issue of an irregular Winding Up Order, which has resulted in the permanent deprivation of the Plaintiffs \$20,000.000.00 leasehold Tourism Property from a irregularly issued Winding Up Order. These Defendants are jointly and severally liable.*

PARTICULARS OF FRAUD VIA FORGERY AND DECEPTION

39. *That the 1st, 2nd, 7th, 8th and 9th defendants knowingly filed in the High Court, forged documents and documents that contained signatures obtained by these Defendants from Mataqali Nainaso members through falsely pretending to these members that their signatures were to be used for the release of funds from the 10th Defendant. Our signatures presented were simply forged. The members were not informed that their signatures were to be used for winding up the Plaintiff company. The 1st and 2nd Defendants swore affidavit and filed them in the High Court in furtherance of the fraud. This has resulted in the issue of the irregular Winding up Order against the Plaintiff causing the loss of its \$20,000,000.00 Tourism Leasehold property. These Defendants are jointly and severally liable.*

PARTICULARS OF DEFAMATION

41. *That the 1st, 2nd, 3rd, 4th, 6th, 7th, 8th and 9th Defendants in filing false and fraudulent documents and falsely alleging the Plaintiff Company was insolvent and falsely alleging that the Plaintiffs substratum had failed and having these statements published in the newspapers and in the Government Gazette has caused the Plaintiff Company and its Directors great loss in standing and trust. The Directors of the Plaintiff Company have since been*

*removed from positions of trust in their community and subjected to ridicule.
These Defendants are jointly and severally liable."*

The Law

[08] The application to strike out is made under Order 18 Rule 18 of the HCR, which so far as material states that:

"Striking out pleadings and indorsements (O 18, R18)

18 (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement if 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;*
- (b) it is scandalous, frivolous or vexatious;*
- (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 paragraph1 (a).

..."

Discussion

[09] The first defendant applies to the court to strike out the plaintiff's claim in its entirety as against him. He relies on all four grounds in Rule 18 of the HCR.

[10] Interestingly, the application to strike out the claim has been filed on 3 April 2017, which is after the three-day trial of the matter was re-fixed for 10, 11 and 12

April 2017. Initial trial date which was fixed for 14, 15 and 16 November 2016 was vacated on an application made by the defendants.

[11] It will be noted that the first defendant has made his application to strike out after filing his defence to the claim on 2 March 2015. The summary of his defence is that [see paras 5 to 10 of his statement of defence]:

“ ...

5. *He says that he is a law clerk and his functions in relation to his employment with the 2nd Defendant is limited and he cannot make comments on the allegations from paragraph 10 to paragraph 44 and denies each and every allegations made therein. The Plaintiff is put to strict proof in relation to all of the allegations.*
6. *The First Defendant further says that at all material times up to the 8th of February 2013, the Second Defendants was acting on the instructions of 3rd, 4th, 6th, 7th, 8th, and 9th Defendants.*
7. *On or about 8th of February 2013, the instructions given to the Second Defendant were terminated.*
8. *He is bound by his employment contract to a duty of confidentiality in relation to all matters in which the Second Defendant is instructed.*
9. *The confidentiality requirements have not been waived by either of the 3rd, 4th, 6th, 7th, 8th and 9th Defendants and as such he cannot plead details of matters arising from the instructions given to the Second Defendants.*
10. *The First Defendant who is employed by the Second Defendant will rely on the matters pleaded by the Second Defendant in his Statement of Defence.*

...”

[12] It will be also noted that the first defendant specifically states in his statement of defence that he will rely on matters pleaded by the second defendant in his statement of defence (see para 10 of his statement of defence).

Reasonable cause of action (R 18 para 1 (a))

- [13] In determining whether the statement of claim discloses a reasonable cause of action (para 1 (a)), I will consider only the statement of claim because evidence is not admissible on application under paragraph 1 (a).
- [14] Mr Krishna of counsel for the first defendant (who is also counsel for the second defendant) submits that the claim against the first defendant must be struck out as it discloses no reasonable claim against him. The essence of his submission is that: 1. the plaintiff did not have a lease in its name, and they cannot establish that they lost a tourism lease. From the evidence in support of the striking out application it is clear that the processing of the lease was held on pending determination of the winding up matter, 2. The first respondent was trustee for the land-owning unit. They could not have lost the lease because even if it was reverted to iTLTB, they would also hold it as trustees for the same land owning unit, 3. Even if there is a lease, the pleading do not show any connection between the loss of \$20 million tourism lease and the presentation of the winding-up petition, and 4. Prior to making of the winding-up order, a certificate of incorporation had been issued in the name of third (3rd) defendant. The presentation of the petition did not give a right of re-entry. This right could only be exercised upon “compulsory or voluntary liquidation”. The presentation of the petition does not amount to a company being in liquidation.
- [15] Every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his or her claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits (see *O 18, R 6 (1)*). It is clear that evidence is not to be pleaded in pleadings.
- [16] The plaintiff has pleaded the material facts on which it relies for its claim. The HCR, R18, R 6 (1), requires that the statement of claim must not plead the evidence by which those facts are to be proved.
- [17] The White Book (18/19/10) explains the phrase ‘*no reasonable cause of action*’ as follows:

“A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered (per Lord Pearson in Drummond-Jackson v British Medical Association [1970] WLR 688; [1970] 1 All ER 1094, CA).” (Emphasis supplied)

[18] The Fiji Court of Appeal in *Attorney-General v Shiu Prasad Halka* 18 FLR 210 at page 215 said:

“The power to strike out given by Order 18 rule 18 (formerly Order 18 rule 19) is one which is to be sparingly exercised and only in exceptional cases. It should not be exercised where legal questions of importance and difficulty are raised.”

[19] The fact that a case is weak and will probably not succeed is not a ground for striking out (*Wenlock v Molony* (1965) All E R 871).

[20] In *National MBF Finance Limited v Buli* (Civil Appeal No. ABU 57 of 98), the Court of Appeal explained the principles of striking out as follows:

“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 pleadings as they appear before the court.”

[21] The plaintiff’s action arises out of the winding-up order (albeit it was subsequently set aside by the court on the basis that it was irregularly obtained in the absence of NiRHL’s absence) which was obtained against it by the third defendant (MNHL) before its (third defendant) incorporation. In the winding-up proceedings, the first defendant had filed an affidavit in support on behalf of the

third defendant before its incorporation. The plaintiff alleged among other things that they lost their \$20m tourism lease as a result to the winding-up application.

[22] The question then arises whether a winding-up proceeding can be had against a company by another company which is yet to be incorporated. This issue appears to be a legal issue to be decided at the trial. If a legal issue can be raised upon the facts pleaded. In my opinion, the statement of claim at least raises the legal issues whether the third defendant when it was yet to be incorporated could have brought a winding-up proceedings to wind up the plaintiff's company, and whether the presentation of the winding-up petition amounts to a company being in liquidation.

[23] I find that the following issues are triable issues which need examination and cross-examination:

1. Whether the plaintiff lost their \$20m tourism lease as a result of the winding-up application.
2. Whether the plaintiff had a lease in its name.
3. Whether presentation of the petition itself could amount to fraud or misrepresentation leading to the purported re-entry.

Conclusion

[24] For these reasons, I find that the statement of claim as pleaded discloses a reasonable cause of action against the first defendant and that there are sufficient particulars in the statement of claim as regards to the allegation it makes. I find also that the claim is not frivolous, vexatious, and scandalous or is not otherwise an abuse of process of the court.

[25] The alternative claim that in the event that the claim is not struck out, orders are sought for discovery of the documents (in relation to: the settlement of the claim as between the plaintiff and iTaukei Land Trust Board and the purported cancellation of the lease by the iTLTB in the name of the plaintiff) was not

pressed at the hearing. I would, therefore, make no order on the alternative application.

[26] I would make no order as to costs.

The result

1. Striking-out application filed by the first defendant is struck out and dismissed.
2. There shall be no order as to costs.
3. The matter is now adjourned for mention only at 9.30 am on 10 May 2019.

H. H. Mohamed Ajmeer
18/4/19

.....
M. H. Mohamed Ajmeer
JUDGE



At Lautoka

18 April 2018

Solicitors:

For the first defendant/applicant: Messrs Krishna & Company, Barristers & Solicitors