

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 122 of 2017

BETWEEN : **AIR PACIFIC LIMITED** trading as FIJI AIRWAYS a limited liability company
having its registered office at Nasoso Road, Nadi.
INTENDED APPELLANT | ORIGINAL DEFENDANT|

AND : **SUDESH SHARMA** of Lomawai, Sigatoka, Businessman and Farmer
INTENDED RESPONDENT/ ORIGINAL PLAINTIFF

Appearances: Mr. Charan R. for the Plaintiff
Ms. Prasad R. for the Defendant
Date of Hearing: 14 June 2023
Date of Ruling: 10 August 2023

R U L I N G

INTRODUCTION

1. Air Pacific Limited (“APL”), the defendant in the original action, is appealing an interlocutory decision of the Master which was delivered on 14 December 2021.
2. In the decision in question, the Master had dismissed an application filed by APL to strike out Mr. Sudesh Sharma’s statement of claim against APL.
3. The full background to this case is set out in the Master’s Ruling (**Sharma v Air Pacific Ltd (trading as Fiji Airways)** [2021] FJHC 382; HBC122.2017 (14 December 2021)) and in my earlier ruling (**Air Pacific Ltd (trading as Fiji Airways) v Sharma** [2022] FJHC 574; HBC122.2017 (9 September 2022)).
4. Sharma and his daughter were at the terminal at Nadi International Airport on 09 July 2015 *en route* to Australia when he noticed that the departure time on his ticket was 15 minutes later than the one on his daughter’s ticket. Concerned, Sharma approached an officer servicing the counter – desk to see if he and his daughter could be placed on the same flight. The officer told him that this was not possible. He sought the assistance of another officer who advised him that Sharma and daughter were in fact on the same flight.

5. Sharma then went back to the counter desk clerk. He told her that she should have known of this and that she should give accurate information to customers.
6. The counter desk clerk apparently took issue with Sharma's approach. She immediately lodged a complaint with the Police. The complaint was that Sharma had used foul and abusive language.
7. The police then came to question Sharma. However, they released him a short-while later. Sharma then proceeded to board the flight to Sydney. However, he was told that he could not take the flight unless he was cleared by the Police. Sharma then returned home to wait for the Police to take the necessary steps.
8. Two weeks later the Police called Sharma to clear him. No charges were laid against him. He eventually flew out to Sydney on 27 July 2015.
9. As a result of all this, Sharma had missed an appearance before a Local Court in Australia on 10 July 2015 for a criminal case.
10. When he finally arrived in Australia on 28 July 2015 – he immediately surrendered himself to the Australian Police. Apparently, a bench warrant had been issued against him on account of his failure to attend his criminal case on 10 July 2015. He was placed in custody and was released on bail with strict conditions two days later. A travel ban was issued on him. His passport was seized. He was also required to report to Ryde Police Station three times a week.
11. Sharma sues Air Pacific based on his claim that its counter-desk clerk had falsely and maliciously reported him to police and caused him to suffer damages. As one would expect, Sharma and Air Pacific differ as to the tone in which Sharma spoke to the counter desk officer.
12. The main question then is, assuming that Sharma did not use any foul and abusive language at all material times, whether (i) the counter desk staff acted falsely and maliciously and (ii) whether there is an immunity.
13. The evidence in the affidavit sworn by one Ms. Sulita Vunitabua on 05 September 2017 for and on behalf of the Appellant/Defendant in support of the striking out application reveal much more. As both counsel conceded to during the hearing, there were actually two flights on the day in question and that Sharma and his daughter were actually on two separate flights. Also, when Sharma tried to arrange to be put on the same flight as his daughter, he was told by Vunibua to pay an extra fee, which he did.

COMMENTS ON THE MASTER'S APPROACH

14. The application to strike out which was before the Master was filed pursuant to Order 18 Rule 18 (1) (a). An application under this Rule requires no evidence. Such an application is decided on the presumption that the facts as pleaded in the claim are proven.

15. I also accept that the power to strike out a pleading under Order 18 Rule 18 of the High Court Rules 1988 is a discretionary power.
16. The general principle is that an order for striking out should only be made where it is plain and obvious that the claim or defence cannot succeed (as per Lord Pearson in Drummond-Jackson v British Medical Association [1970] 1 All ER 1094; Marsack J.A. in Attorney General v Halka [1972] 18 FLR 210; Salmon LJ in Nagle v Feilden [1966] 1 All ER 689 at 697. Courts should not strike out an action merely because it appears weak, or, the plaintiff or the defendant is unlikely to succeed in his or her claim or defence.
17. APL had sought to strike out Sharma's claim on three grounds (i) that the claim does not disclose reasonable cause of action (ii) that the action is scandalous, frivolous and vexatious, and (iii) that, it is otherwise abuse of the process.
18. In my earlier Ruling, I did express the view that the Master did not err in his reasoning when he concluded that (i) the facts as pleaded did not disclose a case for defamation and (ii) however, the '*alleged false report*' may fall under the 'actionable malicious falsehood' and (iii) whether or not it does is a question of fact which is a triable issue.
19. The Master noted that AP's counsel had argued that Sharma does not allege that the alleged 'false report' was made in connection with his goods or business. Rather, it was about Sharma's own conduct at the Airport on the day in question.
20. The Master then dealt with this point by referring to section 11 of the Defamation Act 1971 (Cap 34) which I set out below:

11.-(1) In an action for slander of title, slander of goods or **other malicious falsehood**, it shall not be necessary to allege or prove special damage-

- (a) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form; or
- (b) if the said words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by him at the time of the publication.

21. The Master then said that it is not necessary to allege or prove special damages in case of slander of title or slander of goods or other malicious falsehood:

It is the duty of the trial judge to determine whether those words in that '*alleged false report*' fall under the above exceptions [under section 11(1)(a) or (b)]or not, and or whether the plaintiff is relieved from alleging or proving his special damages as provided by the above provisions. This court, which only considers the mere allegations in the pleadings to determine existence of reasonable cause of action, cannot go to the merits of the matter and decide the link between the damages and the alleged report, as the counsel for the defendant company argued, when the statute

clearly set out the circumstances which relieve the plaintiff from alleging or proving damages. As a result, I decide that, the pleadings disclose a reasonable cause of action for malicious falsehood and they cannot be struck out, exercising the jurisdiction which is sparingly used only when the pleadings are obviously unsustainable.

22. Accordingly, he did not feel compelled to strike out the plaintiff's action on the basis that, the plaintiff's pleadings do not disclose reasonable cause of action.
23. Having said that, the Master then on to consider whether Sharma's claim is *frivolous and vexatious* and an *abuse of process*.
24. He concluded as follows:

There is nothing in this case which can suggest that, the plaintiff sued the defendant company in order to annoy or harass it. Nor it seems that, this action is for collateral purpose or aimed at serving extortion or oppression or exerting pressure so as to achieve an improper end. There cannot be any such reason for an individual to sue an established air carrier unless such person has some kind of grievance against it. **It cannot be said for sure, at this moment, that the plaintiff will be able to prove his case against the defendant company so as to get remedy for his alleged grievance. It depends on how he fulfills the necessary requirements for a cause of action for malicious falsehood. However, it cannot be said now that his action is frivolous or vexatious or abuse of the process of the court.** (emphasis added)

25. In the end, he dismissed the striking out application and ordered the defendant to pay the plaintiff costs in the sum of \$1,000.

FURTHER COMMENTS

26. At the hearing, Mr. Charran highlights that there are actually two aspects to Sharma's claim. The first is about the complaint to the Police. On this, Mr. Prasad has actually made substantial submissions and referred to case authority on the issue of whether or not the complainant is immuned from prosecution and/or from civil liability.
27. The second is about the fact that, after the Police had responded to the complaint against Sharma, and conducted a small investigation at the Airport, the Police had cleared Sharma on the spot. They did not even take a statement of Sharma or the complainant. The Airline Company however actually still refused to let Sharma take the 9.00 a.m flight later that morning of 09 July 2015, even though there was no Stop Departure in place against Sharma. Mr. Charran argues that, without a Stop Departure Order, Sharma had a right to liberty and freedom of movement which AP thwarted when it refused him to board the 9.00 a.m flight later the same morning. Mr. Charran even offered that there was even malice in the Airline's approach later that morning. He stresses that if this matter goes to trial, the evidence of the Police Officers involved will be crucial in establishing that Sharma was indeed cleared and that there was no Stop Departure Order, let alone any charges, laid against him.

28. I am convinced by Mr. Charran's argument. This aspect of the claim was not challenged before the Master in the striking out application, nor has Mr. Prasad canvassed it in his submissions.
29. In my view, there is indeed a reasonable cause of action based on this "second" aspect to the claim. Admittedly, the facts as pleaded in the claim do raise this as a very strong case, given that it appears to be not in dispute that Sharma was indeed interviewed by the Police and that the Police did not take his statement, nor did the Police formally charge him of any offence – and that the Airline did in fact refused to allow Sharma to board the 9.00 a.m. flight of the morning in question.
30. Flowing from the above, I would rather postpone the determination of the question whether the defendant is protected by absolute privilege and immunity from the "first" aspect of the claim (the complaint to Police). I would rather deal with this together with the second aspect of the claim (the failure of the Airline to allow Sharma to board the 9.00 a.m. flight after Police had cleared him).

CONCLUSION

31. I am grateful for the substantial submission and research by Mr. Prasad on the issue of whether the Airline staff is protected by absolute privilege and immunity from suits – with regards to the complaint to the Police. However, as Mr. Charran highlights, there is a second aspect to this case which was never addressed in the striking out application before the Master and in the appeal.
32. Appeal dismissed. Costs to the Respondent which I summarily assess at \$1,000 – 00 (one thousand dollars only).



A handwritten signature in blue ink, appearing to be "Anare Tuilevuka", written over a horizontal dotted line.

Anare Tuilevuka

JUDGE

Lautoka

10 August 2023