

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 322 of 2023

BETWEEN:

RATU EPENISA SERU CAKOBAU
PLAINTIFF

AND:

THE COMMANDER OF THE REPUBLIC OF FIJI MILITARY FORCES
1ST DEFENDANT

AND:

THE COMMISSIONER OF POLICE
2ND DEFENDANT

AND:

THE ATTORNEY GENERAL OF FIJI
3RD DEFENDANT

BEFORE:

Acting Master L. K. Wickramasekara

COUNSELS:

O'Driscoll & Company for the Plaintiff
Army Legal Services for the 1st Defendant
Attorney General Chambers for the 2nd and 3rd Defendants

Date of Hearing:

By way of Written Submissions

Date of Ruling:

18th February 2025

RULING

- 01.** 1st Defendant, on 02/08/2024, filed Summons to Strike Out the Writ of Summons and the Statement of Claim filed by the Plaintiff on 19/10/2023. This Summons for Strike Out has been filed pursuant to Order 18 Rule 18 (1) (a) of the High Court Rules 1988.
- 02.** The Plaintiff has opposed the same and pursuant to the directions of the Court, both the parties have filed comprehensive written submissions on this summons.
- 03.** Both counsels for the Plaintiff and the 1st Defendant moved to have the Ruling delivered upon the written submissions filed.
- 04.** 1st Defendant's contention is that the Plaintiff's claim is statute barred and as such there is no live cause of action in the matter and thus the Writ and the Statement of Claim must be struck out pursuant to Order 18 Rule 18 (1) (a) of the High Court Rules 1988.
- 05.** The 1st Defendant submits that the claim of the Plaintiff has breached the statutory limitation under two legal provisions. Firstly, the 1st Defendant argues that the Plaintiff's claim should have complied with Section 52 (1) of the Republic of Fiji Military Forces Act 1949, which prescribes a 03 months' time limitation for bringing an action for any acts done under the Act. It is further submitted that the acts alleged in the Plaintiff's Statement of Claim have occurred on 08/06/2018 and hence it breaches this time limitation.
- 06.** Secondly, the 1st Defendant argues that the Plaintiff's Statement of Claim falls under Section 4 (1) (d) (i) of the Limitations Act 1971 which provides a 03 years' time limitation for personal injury claims. It is therefore submitted that this claim breaches the said time limitation as it was filed only on 19/10/2023, which is over 04 years and 04 months from the date of the alleged incident.
- 07.** The Plaintiff, on the other hand, submits that its claim is based on 'tort' and is not coming under the Republic of Fiji Military Forces Act 1949. It is further submitted that the Plaintiff is a civilian and is not governed under the Republic of Fiji Military

Forces Act 1949. This act as per the Plaintiff shall govern the organization, structure, duties, and operations of the Fiji Military Forces including the conduct of military personnel and is designed to establish the framework for military discipline, command, and regulation within the armed forces of Fiji.

08. The Plaintiff further claims that Section 4 (1) (d) (i) of the Limitations Act 1971 has no application to its claim but that the Plaintiff's claim falls under Section 5 (1) of the Limitations Act which provides a 06-year statutory limitation for bringing in an action in 'tort'.
09. As the current summons for striking out is solely based on the Plaintiff's claim being statute barred, it is important to note the relevant legal provisions as depended upon by the parties. I shall reproduce these provisions in this Ruling for the sake of clarity.
10. It is important to note the long title of the Republic of Fiji Military Forces Act 1949. It reads to the effect, "*An Act to Provide for the Establishment, Maintenance and Regulation of Military Forces and for Purposes Incidental thereto*".
11. Section 52 of the Republic of Fiji Military Forces Act 1949 reads as follows,

Immunities of soldiers

- 52 (1) *No action shall be brought against any officer or soldier for anything done by him or her under this Act unless the same is commenced within 3 months after the act complained of was committed nor unless notice of such action has been given at least one month before such action was commenced.*
- (2) *In every action brought against any officer or soldier for anything done by him or her under this Act the plaintiff shall expressly allege in his or her statement of claim that such act was done either maliciously or without reasonable and probable cause or through gross negligence, and if at the trial of such action he or she fails to prove such allegation he or she shall be non-suited or a verdict shall be given for the defendant.*

12. Section 4 (1) of the Limitations Act 1971 reads as follows,

Limitation of actions of contract and tort, and certain other actions

- 4(1) *The following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued, that is to say—*
 - (a) *actions founded on simple contract or on tort;*
 - (b) *actions to enforce a recognizance;*

- (c) actions to enforce an award, where the submission is not by an instrument under seal;
- (d) actions to recover any sum recoverable by virtue of any Act, other than a penalty or forfeiture or sum by way of penalty or forfeiture, provided that—
 - (i) in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under any Act or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to 6 years there were substituted a reference to 3 years; and
 - (ii) nothing in this subsection shall be taken to refer to any action to which section 6 applies.

13. Although the Plaintiff has submitted, in its written submissions, that the Plaintiff's claim falls under Section 5 (1) of the Limitations Act 1971, this section has no relevance to the Plaintiff's claim. However, as the Plaintiff's submission is to the effect that its claim is based on a 'tort' and that there's a 06-year time limitation for such actions, it is clear that the Plaintiff is relying on Section 4 (1) (a) of the Limitations Act 1971 in its defence against the argument that its claim being statute barred.

14. I shall now consider the legal provisions relating to an application for striking out. As per the Summons for Striking Out, the application has been made pursuant to Order 18 Rule 18 (1) (a) on the following ground.

- a) It discloses no reasonable cause of action

15. Order 18 Rule 18 (1) of the High Court Rules 1988 reads as follows.

Striking out pleadings and indorsements (O.18, r.18)

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).*
- (3) *This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.*

- 16. Master Azhar (as he then was), in the case of **Veronika Mereoni v Fiji Roads Authority**; HBC 199/2015 (Ruling: 23/10/2017) has succinctly explained the essence of this Rule in the following words.

“At a glance, this rule gives two basic messages, and both are salutary for the interest of justice and encourage the access to justice which should not be denied by the glib use of summery procedure of pre-emptory striking out. Firstly, the power given under this rule is permissive which is indicated in the word “may” used at the beginning of this rule as opposed to mandatory. It is a “may do” provision contrary to “must do” provision. Secondly, even though the court is satisfied on any of those grounds mentioned in that rule, the proceedings should not necessarily be struck out as the court can, still, order for amendment. In Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 3) [1970] Ch. 506, it was held that the power given to strike out any pleading or any part of a pleading under this rule is not mandatory but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending plea. MARSACK J.A. giving concurring judgment of the Court of Appeal in Attorney General v Halka [1972] FJLawRp 35; [1972] 18 FLR 210 (3 November 1972) held that:

“Following the decisions cited in the judgments of the Vice President and of the Judge of the Court below I think it is definitely established that the jurisdiction to strike out proceedings under Order 18 Rule 19 should be very sparingly exercised, and only in exceptional cases. It should not be so exercised where legal questions of importance and difficulty are raised”.

- 17. Pursuant to Order 18 Rule 18 (2), no evidence shall be admissible upon an application under Order 18 Rule 18 (1) (a), to determine if any pleading discloses no reasonable cause of action or defence. No evidence is admissible for this ground for the obvious reason that the court can conclude absence of a reasonable cause of action or defence merely on the pleadings itself, without any extraneous evidence.

- 18. His Lordship the Chief Justice A.H.C.T. GATES (as His Lordship then was) in Razak v Fiji Sugar Corporation Ltd [2005] FJHC 720; HBC208.1998L (23 February 2005) held that:

"To establish that the pleadings disclose no reasonable cause of action, regard cannot be had to any affidavit material [Order 18 r.18(2)]. It is the allegations in the pleadings alone that are to be examined: Republic of Peru v Peruvian Guano Company (1887) 36 Ch.D 489 at p.498".

19. Citing several authorities, Halsbury's Laws of England (4th Edition) in volume 37 at para 18 and page 24, defines the 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 statement of case are considered" Drummond-Jackson v British Medical Association [1970] 1 ALL ER 1094 at 1101, [1970] 1 WLR 688 at 696, CA, per Lord Pearson. See also Republic of Peru v Peruvian Guano Co. (1887) 36 ChD 489 at 495 per Chitty J; Hubbuck & Sons Ltd v Wilkinson, Heywood and Clark Ltd [1899] 1 QB 86 at 90,91, CA, per Lindley MR; Hanratty v Lord Butler of Saffron Walden (1971) 115 Sol Jo 386, CA.

20. Given the discretionary power the court possesses to strike out under this rule, it cannot strike out an action for the reasons that it is weak, or the plaintiff is unlikely to succeed, rather it should obviously be unsustainable. His Lordship the Chief Justice A.H.C.T. Gates (as he then was) in **Razak v Fiji Sugar Corporation Ltd** (supra) held that:

"The power to strike out is a summary power "which should be exercised only in plain and obvious cases", where the cause of action was "plainly unsustainable"; Drummond-Jackson at p.1101b; A-G of the Duchy of Lancaster v London and NW Railway Company [1892] 3 Ch. 274 at p.277."

21. It was held in **Ratumaiyale v Native Land Trust Board [2000] FJLawRp 66; [2000] 1 FLR 284 (17 November 2000)** that:

*"It is clear from the authorities that the Court's jurisdiction to strike out on the grounds of no reasonable cause of action is to be used sparingly and only where a cause of action is obviously unsustainable. It was not enough to argue that a case is weak and unlikely to succeed, it must be shown that no cause of action exists (**A-G v Shiu Prasad Halka** [1972] 18 FLR 210; **Bavadra v Attorney-General** [1987] 3 PLR 95. The principles applicable were succinctly dealt by Justice Kirby in **London v Commonwealth** [No 2] 70 ALJR 541 at 544 - 545. These are worth repeating in full:*

*1. 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 (**General Street Industries Inc v Commissioner for Railways (NSW)** [1964] HCA 69; (1964) 112 CLR 125 at 128f; **Dyson v Attorney-General** [1911] 1 KB 410 at 418).*

*2. 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 (**Munnings v Australian Government Solicitor** (1994) 68 ALJR 169 at 171f, per*

Dawson J.) or is advancing a claim that is clearly frivolous or vexatious; (*Dey v. Victorian Railways Commissioners* [1949] HCA 1;(1949) 78 CLR 62 at 91).

3. An opinion of the Court that a case appears weak and such that it is unlikely to succeed is not alone, sufficient to warrant summary termination. (*Coe v The Commonwealth* (1979) 53 ALJR 403; (1992) 30 NSWLR 1 at 5-7). Even a weak case is entitled to the time of a court. Experience teaches that the concentration of attention, elaborated evidence and argument and extended time for reflection will sometimes turn an apparently unpromising cause into a successful judgment.

4. 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. (*Coe v The Commonwealth*(1979) 53 ALJR 403 at 409). 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 so in circumstances more conducive to deciding a real case involving actual litigants rather than one determined on imagined or assumed facts.

5. 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 pleadings. (*Church of Scientology v Woodward* [1982] HCA 78; (1980) 154 CLR 25 at 79). A question has arisen as to whether O 26 r 18 applies only part of a pleading. (*Northern Land Council v The Commonwealth* (1986) 161 CLR 1 at 8). However, it is unnecessary in this case to consider that question because the Commonwealth's attack was upon the entirety of Mr. Lindon's statement of claim; and

6. 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”.

22. Pursuant to the Fiji Court of Appeal decision in *Abhinesh Singh, Jyoti Singh v Rajesh Singh & Others*; ABU089.2020 (28 July 2023), His Lordship Justice Gunaratne, P, has defined ‘a cause of action’ in the following terms,

“What is “a cause of action?”

-the essential two elements

52. The first is “a right” claimed by a party and the second is the “denial of that alleged right”.”

23. The Plaintiff alleges in the Statement of Claim that the agents of 1st and 2nd Defendants wrongfully arrested him on 08/06/2018 and thereby breached his constitutional right to personal liberty. It is also claimed that the 1st and 2nd defendants through their agents also breached the constitutional rights of an ‘Accused or

Detained' person. Accordingly, the Plaintiff is moving for the following relief in its Statement of Claim,

WHEREFORE *the Plaintiff claims for the following relief:*

- a) A declaration that the Plaintiff had been unlawfully arrested and detained by the Defendants for a period of 30 hours.*
- b) General damages including aggravated and exemplary damages for wrongful and unlawful detention to be assessed.*
- c) General damages for breach of the Plaintiff's Constitutional rights to be assessed.*
- d) Special damages to be supplied as per paragraph 23.*
- e) Costs of this action to be assessed.*
- f) Interest as per paragraph 27.*
- g) Such further reliefs and orders as this Honorable Court deem fit in the circumstances.*

- 24.** In the above context, it is clear that the Plaintiff's cause of action is based in 'tort' and the claim is against the State on vicarious liability. In view of the above context, this Court do not find that the Republic of Fiji Military Forces Act 1949 has application to this matter. The 1st Defendant, in its written submissions fails to highlight how the Plaintiff's claim falls under the Republic of Fiji Military Forces Act 1949.
- 25.** The Plaintiff's claim is obviously not brought against the 1st Defendant for anything done by him or her under the Republic of Fiji Military Forces Act 1949. It is an action in 'tort' for wrongful arrest and breach of constitutional rights of the Plaintiff.
- 26.** Court therefore finds that the argument that Plaintiff's claim is statute barred pursuant to Section 52 (1) of the Republic of Fiji Military Forces Act 1949 is misconceived and therefore fails.
- 27.** Similarly, the 1st Defendant has failed in its written submissions to show that the Plaintiff's claim is for personal injuries and thus it is subject to the time limitation under Section 4 (1) (d) (i) of the Limitations Act 1971.
- 28.** There's no claim for personal injuries made by the Plaintiff in his Statement of Claim. As such it is obvious that Section 4 (1) (d) (i) of the Limitations Act 1971 has no application in this matter.
- 29.** Pursuant to the Plaintiff's claim being made in 'tort', the applicable section in the Limitations Act is section 4 (1) (a) of the Limitations Act 1971 and the time limitation therefore shall be 06 years from the alleged date of the act complained of. Since the date of the alleged act is 08/06/2018, this claim has clearly not breached the said

statutory time limitation. Thus, it is the finding of the Court that the 1st Defendant's argument under the Limitations Act 1971, is also misconceived and accordingly fails.

30. In overall consideration of the Statement of Claim, this Court is of the considered view that there is a reasonable cause of action disclosed in the Statement of Claim which raises triable issues between the Plaintiff and the Defendants in these proceedings.
31. The Court, accordingly, concludes that the Defendants had failed to pass the threshold for allowing an application to strike out the Writ of Summons and/or the Statement of Claim pursuant to Order 18 Rule 18 (1) (a) of the High Court Rules 1988 and that this application, therefore, necessarily fails.
32. In its final outcome, the Court makes the following orders.
 1. The Summons to Strike Out as filed by the 1st Defendant on 02/08/2024 is hereby refused and struck out subject to the 1st Defendant paying a cost of \$ 1000.00 to the Plaintiff, as summarily assessed by the Court, as costs of this proceeding.



**L. K. Wickramasekara,
Acting Master of the High Court.**

**At Suva
18/02/2025**
