

**PALAS AUTO SERVICES LTD v HANDYMANS LTD
(HBC00128 of 2008S)**

HIGH COURT — CIVIL JURISDICTION

5 HETTIARACHCHI J

2 May 2012

10 **Practice and procedure — pleadings — striking out proceedings — error in naming defendant — whether court has power to amend defendant’s name — whether pleadings are abuse of process — action designed to overcome winding up petition — lack of bona fide — High Court Rules O 18 r 18, O 20 r 5(3), O 32.**

15 The plaintiff filed a writ of summons along with the statement of claim against the defendant, stating that the defendant was a firm operating under the name and style of Handyman’s Outlet. The defendant deposed in its affidavit that the defendant and Handyman’s Outlet were two separate entities, which operated differently and distinctly from each other. The defendants filed a summons to strike out the plaintiff’s claim on the grounds that it was an abuse of process and also that the action was instituted against the wrong party. According to the defendant’s affidavit, the plaintiff filed this action after a
20 winding up notice was issued against the plaintiff by Handyman’s Outlet.

Held –

The plaintiff’s failure to name the correct defendant in the statement of claim is not an incurable defect and therefore should not render the statement of claim untenable. However, the plaintiff did not oppose Satesh Patel’s affidavit which clearly confirms that
25 the action of the plaintiff is designed to overcome the winding up application, and portrays the lack of bona fide on the part of the plaintiff. The plaintiff’s action is a clear case of abuse of process and also an attempt to use Court’s machinery improperly.

Plaintiff’s Writ of Summons struck out.

Cases referred to

30 *Domer v Gulf Oil (Great Britain)* (1975) 119 Sol Jo 392; *Steamship Mutual Underwriting Association Ltd v Trollope and Colls (City) Ltd* [1986] 33 BLR 77; *Stephenson v Garnett* [1898] 1 QB 677, followed.

Hubbuck & Sons Ltd v Wilkinson Clark Ltd [1899] 1 QB 86, considered.

35 *Walton v Gardiner* [1993] 177 CLR 378, cited.

P. Narayan for the Plaintiff

P. Sharma for Defendant

40 [1] **Hettiarachchi J.** This is the defendant’s summons to strike out the plaintiff’s claim on the grounds that it is an abuse of process and also that the action was instituted against the wrong party.

[2] In support of the summons, an affidavit sworn by Satish Patel, the Managing Director of the Defendant’s company was filed.

45 **Background Facts**

[3] The plaintiff is a duly incorporated company having its registered office at Queens Road, Nadi.

50 [4] The plaintiff filed writ of summons together with the statement of claim against the defendant. In the statement of claim, the plaintiff stated that the defendant was a firm operating under the name and style of Handyman’s Outlet and is also the distributor of DuPont products in Fiji.

[5] According to the statement of claim, in January 2004, the plaintiff and DuPont (Australia) Ltd entered into an agreement. According to the agreement, the plaintiff agreed to purchase DuPont products from the defendant as agent of the DuPont (Australia) Ltd and DuPont (Australia) agreed to provide a 12½ % discount on purchase of DuPont products by the plaintiff.

[6] The plaintiff alleges that the defendant breached the terms of the said agreement and as a result the plaintiff has suffered loss and damages.

Therefore, the plaintiff seeks orders inter-alia that:-

- (i) Judgment in the sum of AU\$ 6626.23 and FJ\$ 8584.88;
- (ii) Interest on the judgment sum; and
- (ii) Costs

[7] It is against the above claim, the summons to strike out was filed by the defendant.

[8] In the statement of claim it is stated that the defendant is a firm operating under the name and style of Handyman's Outlet.

[9] In the defendant's affidavit, it is deposed that the defendant and Handyman's Outlet are two separate entities of which operations are different and distinct from each other.

[10] It is further deposed that the defendant is a separate company and its operation does not include selling, retailing or distributing paint and other related items as claimed by the plaintiff.

[11] Furthermore, it is deposed that Handyman's Outlet was registered as business on 3.5.1985 and the deponent was the registered owner of the business. Therefore, the deponent states that this action should not have been instituted against the defendant.

[12] Further, according to the affidavit, the plaintiff filed this action after a Winding Up Notice was issued against the plaintiff by Handyman's Outlet.

[13] In response to the defendant's affidavit, an affidavit sworn by the law clerk of the plaintiff's solicitors was filed.

[14] In that affidavit it is deposed that the error in naming the defendant as reflected in the proceedings is due to the records obtained from the Registrar of Companies and Business Names on 28.4.2008 and court has the powers to amend the defendant's name under the slip rule.

Relevant legal principles

[15] Provisions relating to striking out of proceedings are contained in O 18 r 18 of the High Court Rules.

Order 18 r 18 of the High Court Rules reads:

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 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] The factors to be considered when considering an application of this nature is highlighted in *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd* [1899] 1 QB 86 as follows:

'Only in plain and obvious cases that recourse should be had to the summary process under O 18 r 18(1)'

Analysis

[17] It is undisputed that the plaintiff has sued the wrong party. Further, the plaintiff through Mr Numanayawa's affidavit also acknowledges that the plaintiff should have sued Handyman's Outlet and not the defendant.

[18] In the said affidavit, it is stated that the court has the power to amend the defendant's name under the slip rule.

[19] The defendant submitted that the plaintiff should have sought the amendment by way of summons and affidavit in support, as required by O 20 r 5(3) and O 32 r 1.

Order 20 r 5(3) reads:

'An amendment to correct the name of the party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.'

[20] In light of the above section, an amendment to correct the name can be allowed even if the effect of the amendment will be to substitute a new party. Hence, the plaintiff's failure to name the correct defendant in the statement of claim, in my view, is not an incurable defect and therefore should not render the statement of claim untenable. Thus, the plaintiff's action against the defendant shall not be struck out solely on that ground.

[21] The second ground advanced by the defendant, as can be seen from the summons, is that the pleadings are an abuse of process.

[22] 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 indorsement does not 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 pleading or indorsement 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 summarized in the following extract from *Walton v Gardiner* (1993) 177 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] As to how abuse of process is to be determined while assessing the effectiveness of the plaintiff's cause of action, the following authorities are also of much significance.

In *Stephenson v Garnett* [1898] 1 QB 677 it was held:

5 *'It is an abuse of process of law for a suitor to litigate again over an identical question which has already been decided against him even though the matter is not strictly res judicata.*

Domer v Gulf Oil (Great Britain) (1975) 119 SolJo 392

10 *'Where proceedings which were viable when instituted have by reason of subsequent events become inescapably doomed to failure, they may be dismissed as being an abuse of the process of the court.'*

Steamship Mutual Underwriting Association Ltd v Trollope and Colls (City) Ltd (1986) 33 BLR 77

15 *'The issue of a writ making a claim which is groundless and unfounded in the sense that the plaintiff does not know of any facts to support it is an abuse of process of the Court and will be struck out.'*

[25] In Satesh Patel's affidavit, it is stated that the plaintiff filed this action in order to justify an accompanying injunction application after a Winding Up notice was issued against it by Handyman's Outlet. It is further stated that the monies owed by the plaintiff were from purchases of Dupoint Paint products made through Handyman's Outlet.

[26] It could be observed that in the Winding Up application the amount demanded by the petitioner is \$ 12359.20 and the company sought to be wound up is Pala's Auto Services Ltd. The plaintiff in his affidavit in response has not explained a word about the winding up application but kept on stressing the possibility of amending the statement of claim.

[27] Annexure 'G' in the affidavit of Satish Patel is an email dated 23.04.2008. In the email, a director of the plaintiff company offered to settle the outstanding sum of \$ 12359.20 as follows:

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- a. Pay \$ 3112.29 for the September;
 - b. Pay \$ 640.00 for the November;
 - c. The balance sum of \$ 8606.31 to be offset with paint which the plaintiff was entitled to, but was to be kept and sold by Handyman's Outlet.

35 [28] The above facts clearly show that the plaintiff owes a sum of \$ 12359.20 to the defendant. Further, it is noteworthy that the plaintiff did not deny the para 9 of the affidavit of Satesh Patel nor did oppose the annexure 'E' of the affidavit which clearly confirms the fact that the present action of the plaintiff is designed to overcome the Winding Up application pending against the plaintiff, and it further portrays the lack of bona fide on the part of the plaintiff.

40 [29] The plaintiff has very cleverly avoided in responding to the most decisive and central issues raised by Satesh Patel in his affidavit in support, which in my view is further indicative of the implausibility of the plaintiff's claim against the defendant.

45 [30] Having regard to the facts of the case and upon considering the relevant authorities and submissions made by counsel, it is my considered view that the plaintiff's action is a clear case of abuse of process and also an attempt to use courts machinery improperly.

50 [31] On the above premise, I strike out the plaintiff's Writ of Summons and the statement of claim.

[32] Costs are to be taxed if not agreed.

Application granted.

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