

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 347 of 2014

IN THE MATTER OF STAR
AMUSEMENT LIMITED

IN THE MATTER OF SUPREME
COURT JUDGMENT (GBV 005 of
2012) delivered on Wednesday
28th August 2013

BETWEEN : **STAR AMUSEMENTS LIMITED** a limited liability company having its
registered office at Suva.

PLAINTIFF

AND : **THE REGISTRAR OR TITLES**

1ST DEFENDANT

AND : **THE ATTORNEY GENERAL OF FIJI**

2ND DEFENDANT

BEFORE: **Master Vishwa Datt Sharma**
COUNSEL: **Mr. Vijay Maharaj for the Plaintiff**
Ms. Taukei for 1st & 2nd Defendants

Date of Hearing: **08th June, 2015**
Date of Ruling: **14th September, 2016**

RULING

[Defendant's Application to Strike out the orders (b), (c) and (d) of the
Plaintiff's Originating Summons Pursuant to Order 18 Rule 18 (1) of the
High Court Rules, 1988 and inherent Jurisdiction of Court]

INTERLOCUTORY APPLICATION

1. The **Defendants** filed a **Striking Out** application was filed by the **Defendants** seeking the following orders-
 - (i) That **Orders (b), (c) and (d)** sought by Plaintiff in their Originating Summons be struck out under **Order 18 Rule 18 (1) of the High Court Rules, 1988 and under the inherent jurisdiction of this Hon. Court;**

On the **Ground: That it is an abuse of the process of the Court.**

2. The application is supported by an Affidavit deposed by Ajay Singh.
3. The application is strongly opposed.

THE LAW

4. The law on **striking out pleadings and endorsements** is stipulated at **Order 18 Rule 18 of the High Court Rules 1988** which states as follows-

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.

PLAINTIFF'S CASE

5. The **Plaintiff** commenced proceedings by filing an **Originating Summons** on 09th December, 2014 and sought for the following orders-:
- (a) *An Order that the Defendants be compelled forthwith to remove the money judgment No. 700866 from Native Lease No. 14279 to give effect to the orders made by the Supreme Court of Fiji;*
 - (b) *An Order that the Defendants do pay damages to the Plaintiff sustained by the Plaintiff due to the negligence on the part of the first Defendant;*
 - (c) *Cost of this action;*
 - (d) *Such further and other relief.*
6. The Plaintiff contends that Originating Summons is a proper procedure to have commenced this action as the claim is only confined to **damages** in the form of 'out of pocket expenses' incurred in the sum of \$32,000 by the Plaintiff in defending the action of the Defendant.
7. The Plaintiff gave notice to the Registrar of Titles in terms of **section 140 and 141 of the Land Transfer Act, Cap 131**.
8. The Defendant has paid \$4,000 costs awarded by the Supreme Court and the balance claim in damages stands at \$28,000.
9. The Defendant has not demonstrated any abuse of the process and therefore the Defendant's summons should be struck out with costs.
10. No reason has been given why Plaintiff's relief for costs should be struck out when it is not in dispute that the Defendant only rectified the memorial as per Supreme Court Order after the Plaintiff commenced the within action, thereby incurring further costs.

DEFENDANT'S CASE

11. The Defendant in his affidavit states that they have complied with Order (a) within the Originating Summons hereinabove and a Court Order No. 812556 has

been entered into the memorial of the Title for Native Lease No. 14279 on 21st April, 2015.

12. That the cost of \$4,000 awarded by the Supreme Court has been paid to the Plaintiff and the same is confirmed by the Plaintiff.
13. The Defendant disputes the Plaintiff's claim for damages in the sum of \$32,000 and states that it should not be filed by way of an Originating Summons but a Writ action. (*Order 5 Rule 2 (c) refers*).
14. The Defendant is seeking an order to strike out the Plaintiff's Claim.

Issues for Determination

9. Following are the **issues** which require determination by this honourable court-

First Issue

- (i) Whether the Plaintiff's claim is an **abuse of the process of the Court?**

Second Issue

- (ii) Whether the Claim should have been filed in terms of a Writ of Summons and a Statement of Claim?

ANALYSIS and DETERMINATION

10. I will now proceed to determine the **First Issue** which is -**Whether the Plaintiff's claim is otherwise an abuse of the process of the Court?**
11. It is well settled that this Court has inherent jurisdiction to strike out the claim or pleadings for **abuse of Court process** and reference is made to paragraph 18/19/18 of the Supreme Court Practice 1993 Vol. 1.-
At paragraphs 18/19/17 and 18/19/18 of Supreme Court Practice 1993 (White Book) Vol 1 it is stated as follows:-

"Abuse of Process of the Court"- Para. (1) (d) confers upon the Court in express terms powers which the Court has hitherto exercised under its inherent jurisdiction where there appeared to be "an abuse of the process of the Court." This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation (see Castro v. Murray (1875) 10 P. 59, per Bowen L.J. p.63). See also "Inherent jurisdiction," para.18/19/18."

"It is an abuse of the process of the Court and contrary to justice and public policy for a party to re-litigate the issue of fraud after the self-same issue has been tried and decided by the Irish Court (House of Spring Gardens Ltd. v. Waite [1990] 2 E.R. 990, C.A)."

"Inherent Jurisdiction - Apart from all rules and Orders and notwithstanding the addition of para.(1)(d) the Court has an inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of its process (see Reichel v. Magrath (1889) 14 App.Cas. 665). (para 18/19/18).

12. In Halsbury's Laws of England Vol 37 page 322 the phrase "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 endorsement 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 endorsement 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."

13. The phrase "abuse of process" is summarized in 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"

14. In Tawake v Barton Ltd [2010] FJHC 14; HBC 231 of 2008 (28 January 2010), Master Tuilevuka (as he was then) summarised the law in this area as follows:

"The jurisdiction to strike out proceedings under Order 18 Rule 18 is guardedly exercised in exceptional cases only where, on the pleaded facts, the plaintiff could not succeed as a matter of law. It is not exercised where legal questions of importance are raised and where the cause of action must be so clearly untenable that they cannot possibly succeed (see Attorney General -v- Shiu Prasad Halka 18 FLR 210 at 215, as per Justice Gould VP; see also New Zealand Court of Appeal decision in Attorney -v- Prince Gardner [1998] 1 NZLR 262 at 267."

15. The summary procedure should not be used to determine whether there is any **"abuse of the process of the court"**, rather the matter must be heard to determine the issue in the Originating Summons in terms of the **'Damages'** making a claim whether it is groundless and unfounded in the sense that the plaintiff does not know of any facts to support it.
16. The Plaintiff is seeking orders at prayers (b) and (c) of his Originating Summons that **'The Defendant do pay damages to the Plaintiff sustained by the Plaintiff due to the negligence on the part of the First Defendant and costs.**
17. It is too early at this stage of the proceedings to determine whether the action should be struck out on the grounds of **"Abuse of the process of the Court"**, since the Plaintiff is seeking an order for **'Damages'** in terms of 'out of pocket expense' and the court needs to hear evidence in order to determine the issue of **'Damages'**.
18. Therefore, the Plaintiff's substantive Originating Summons cannot be just struck out on a summary application.

19. Further, the **Second Issue** raised is "Whether the Claim should have been filed in terms of a Writ of Summons and a Statement of Claim?"
20. I make reference to *Order 5 Rule 2 of the High Court Rules, 1988*, which provides as follows-

Proceedings which must be begun by writ (O.5, r.2)

2. Subject to any provision of an Act, or of these Rules, by virtue of which any proceedings are expressly required to be begun otherwise than by writ, the following proceedings must, notwithstanding anything in rule 4, be begun by writ; that is to say, proceedings-

(c) in which a claim is made by the plaintiff for damages for breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under an Act or independently of any contract or any such provision), where the damages claimed consist of or include damages in respect of the death of any person or in respect of personal injuries to any person or in respect of damage to any property.

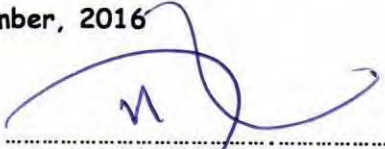
21. I find that prayer (a) in terms of the Originating Summons has now been complied with as is also confirmed by the Plaintiff's Counsel herein. In terms of prayer (b) - An order is sought against the First Defendant to pay "**Damages**" to the Plaintiff sustained by the Plaintiff due to negligence on the part of the First Defendant. This issue in terms of 'Damages' is pending court's determination.
22. Therefore, to determine the aforesaid issues of 'Damages' raised herein, examination of the appropriate witnesses are of a paramount requirement to reach a just decision in the circumstances. The Plaintiff needs to substantiate evidence on "Damages" incurred. Damages cannot be established on Affidavit evidence alone. The aspects and nature of the Damage needs to be tested and established in a Court of Law on Oral evidence and subjected to cross examination. Therefore, the proper procedure should be to have a proper trial. This is only possible if an application in terms of Damages is commenced by a Writ action and not by an Originating Summons.
23. Having perused and analyzed the issues raised by both parties to the proceedings coupled with the principles dealing with the present application to **Strike out the Plaintiff's Originating Summons**, this court holds the submissions of the Defendant that the **proper application for this Court to determine the Substantive issue of 'Damages' must be commenced by a Writ of Summons and a Statement of Claim** that will in the circumstances provide

the Defendant with full particulars of the case and allow the Defendant to defend if so wishes or deals with the matter in the alternative.

24. It would not be appropriate in the circumstances and at the discretion of this Court to convert the Originating Summons into a Writ action but to start afresh.
25. Accordingly, I make the following orders-
- (i) That the Defendant's Summons seeking the Striking Out of the Plaintiff's Originating Summons and the Statement of Claim succeeds.
 - (ii) The Originating Summons is struck out accordingly.
 - (iii) The Plaintiff is liberty to file and serve a Writ of Summons and a Statement of Claim.
 - (iv) That the Plaintiff to pay the Defendant a sum of \$500 as costs of this application within 14 days.

Dated at Suva this 14th day of September, 2016




MR VISHWA DATT SHARMA
Master of High Court, Suva

cc: M. C. Lawyers, Suva
Attorney General's Chambers, Suva