IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 162 of 2012

BETWEEN : **ABDUL YAMEN HAROON** of Martintar, Nadi a businessman trading under the name and style of Downtown D.V.D Shop.

Plaintiff

AND : **HERMANT KUMARI** of Suva, a businesswoman.

1st Defendant

AND : **VINAY LATA** of (other particulars unknown to the plaintiff) of Australia.

2nd Defendant

AND : **RAMANJALU NAICKER** of Nacovi, Nadi, Registered Bailiff.

3rd Defendant

Appearances : Messrs Babu Singh & Associates for the Plaintiff
M/S Rams Law for the Defendant

RULING

1. There are two applications before me.

2. The first one is a Summons to Strike Out filed by the first defendant Hemant Kumari on 18 October 2012 pursuant to Order 18 Rule 18(1) (d) of the High Court Rule 1988. The second is a Summons filed by the plaintiff Abdul Yamen Haroon on 20 February 2013 pursuant to Order 4 of the High Court Rules 1988 for an Order that Lautoka High Court Action No. 144 of 2012 be consolidated with Lautoka High Court Action No. 162 of 2012.

3. Hermant Kumari has sworn an affidavit in support of her Summons to Strike Out. According to Kumari, on 27 June 2012, she had instituted Civil Action HBC 144 of 2012 against Haroon at the High Court in Lautoka. That action was a claim for breach of the terms and conditions of a tenancy agreement between her and Haroon. Haroon did file his statement of defence in that earlier action. However, rather than file a counter-claim, Haroon would file the current action HBC 162 of 2012.

4. Kumari appears to argue that the current action HBC 162 of 2012 is rather ill-advised because it should have been pleaded as a counter-claim in HBC 162 of 2012. She argues that Haroon, as defendant in HBC 144 of 2012, could still have brought in the current 3rd defendant in that case vide third party proceedings.

5. Kumari deposes at paragraph 9 that:

> "both proceedings rely substantially on the same alleged facts of both the actions and the Court could have to deliberate on the same issues raised in the pleadings to make a determination"

6. Kumari's application to strike out is premised on the argument that it is improper for Haroon to have instituted HBC 162 of 2012 when his case in HBC 162 of 2012 could very well be pleaded as a counter-claim in HBC 144 of 2012 because, as Kumari puts it, both proceedings rely on the same facts and circumstances.

7. That both proceedings rely on the same facts and circumstances apparently, is a view that Haroon shares. This is evident from the very fact that on 20 February 2013, the Haroon would respond to the striking out application by filing an application for consolidation.

8. It appears to me that both parties are in agreement that the two actions could be dealt with together in the same action. While Kumari wishes to strike out HBC 162 of 2012 because of Haroon's failure to plead his case as a counter-claim in HBC 144 of 2012, Haroon on the other hand wishes to take remedial steps by consolidating the two actions.

9. I start by saying that the Courts rarely exercise that jurisdiction to strike out a pleading. It is with the same reluctance that I deal with the application to strike out. There is nothing before me to suggest that the current action is frivolous or vexatious or is devoid of any reasonable cause of action. If the only issue raised concerning the current action is that it should have been pleaded as a counter-claim in HBC 144 of 2012, then the logical solution is to consider consolidating the two actions.

10. Order 4 of the High Court Rules 1988 lays down the following:

> Consolidation of Proceedings
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> Where two or more causes or matters are pending, then, if it appears to the Court –
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> (a) that some common question of law or fact arises in both or all of them, or

(b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions, or

(c) that for some other reason it is desirable to make an order under this rule the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until the determination of any other of them.

11. The Supreme Court Practice 1988 Volume 1 at footnote 4/9/1 discusses in detail the principles that the Courts have applied in considering whether or not to consolidate actions. The following emerge on a review of the case law authorities cited therein:

(i) the main purpose of consolidation is to save costs and time.

(ii) where there is "some common question of law or fact bearing sufficient importance in proportion to the rest" of the subject matter of the actions – an order for consolidation will usually be made.

(iii) but – where the plaintiff in one action is the defendant in another, an Order for consolidation may be refused, unless one action can be ordered to stand as a counterclaim or third party proceedings in another action.

(iv) and where different solicitors have been instructed to appear for the different plaintiffs (Lewis v. Daily Telegraph (No. 2) [1964] 2 Q.B 601), an Order for consolidation –generally – will not be made.

(v) but where one firm of solicitors has been given the conduct of the consolidated action on behalf of all plaintiffs, an Order for consolidation has been made.

12. The Supreme Court Practice then gives the following example:

> So, for example, where there are several actions by different plaintiffs (represented by different solicitors) in which damages are claimed for personal injuries occasioned in the same accident, it may be possible to consolidate the actions up to the point where the issue as to liability is decided, giving the conduct of the action up to that point to one plaintiff's solicitors, and leaving the actions separate upon the issue as to the quantum of damages (see Healey v. Waddington & Sons Ltd ([1954] I. W.L.R 688 [1954] 1 All E.R. 861, C.A.). But more commonly an order would be made staying the latter actions pending the decision of the action which is nearer trial and, which may perhaps be expedited in the hope and expectation that the decision of liability in the test action will be accepted in the other actions (see e.g. Amos v. Chadwick [1877] 4 C.D. 869: [1878] 9 Ch. D 459.....But no order for consolidation will be made without hearing all parties affected, and therefore it will only be made on the hearing of applications in all actions (Daws v. Daily Sketch). Apart from these difficulties an order for consolidation may be refused where it would be likely to cause embarrassment at the trial. For example, where the actions are by different plaintiffs, based on the same libel, and the defences are different it would often be likely to embarrass the jury to consolidate them (ibid).
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> Where consolidation must be refused for one reason or another an order will often be made that one action shall follow the other in the same list and be heard before the same

Judge for (or the same Judge or jury). In this way common witnesses are saved the expense of two attendances, and the Judge will be in a position to try the actions in such order as may be convenient or even at the same time. Consolidated actions may be deconsolidated (Lewis v. Daily Telegraph (No. 2) [1964] 2 Q.B 601. C.A).

13. In **Housing Authority v Penioni Bulu** FCA No. 26/01, the Fiji Court of Appeal echoed the same principles in the following words:

> "Although the parties are the same they are in different capacities in the two actions and in such cases the Courts have always been averse to consolidation. To the extent that the issue was the same in both cases difficulties must arise as to onus of proof where a party is the Plaintiff in one case and a Defendant in another"

ORDERS

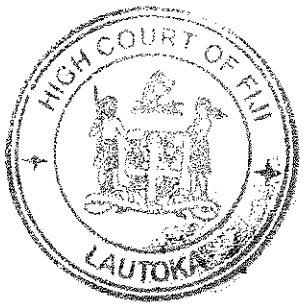
14. I Order as follows:

(a) The two actions are consolidated.

(b) Summons to strike out is dismissed.

(c) Parties to bear own costs.

(d) Case adjourned for mention on 06 November 2018 at 10.30 a.m. for further directions.



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Anare Tuilevuka
JUDGE
Lautoka

31 October 2018