

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

Civil Action No. HBC 42 of 2016

**BETWEEN** : **THOMAS PAUL** of MQ 35, University of the South Pacific, Staff Campus, Laucala Beach Estate.

PLAINTIFF

**AND** : **ARVIND PATEL C/- UNIVERSITY OF THE SOUTH PACIFIC** a duly incorporated body constituted under the University of the South Pacific Act Cap 266 and having its institution at Laucala Bay Road, Suva in Fiji.

FIRST DEFENDANT

**AND** : **UNIVERSITY OF THE SOUTH PACIFIC** a duly incorporated body constituted under the University of the South Pacific Act Cap 266 and having its institution at Laucala Bay Road, Suva in Fiji.

SECOND DEFENDANT

**BEFORE:** Master Vishwa Datt Sharma

**COUNSELS:** Ms. Narayan of the Plaintiff/Counsel  
Mr. Jon Apted with Krishneel Naidu for the Defendant

**Date of Ruling:** 24<sup>th</sup> April, 2018 @ 9am

**RULING**

*[Application by the Defendants seeking an order to strike out the Plaintiff Statement of Claim and Dismiss Action pursuant to Order 18 Rule 18 (1) of the High Court Rules, 1988 and under the Inherent Jurisdiction of this court]*

## APPLICATION

1. This is the **Defendant's Summons to Strike Out Statement of Claim and Dismiss Action** seeking for the following orders:
  - (a) *That the Statement of Claim be wholly struck out and the Action be dismissed;*
  - (b) *That in the alternative, paragraphs 16, 24, 25, 27, 28 and 31 of the Statement of Claim be struck out;*
  - (c) *That all proceedings herein be stayed pending the determination of this application;*
  - (d) *That the Defendants' costs of this application be paid by the Plaintiff;*
  - (e) *That any further or alternative orders as the Court deems just.*

### On the Grounds:

- (i) *That discloses no reasonable cause of action;*
  - (ii) *That it is scandalous, frivolous or vexatious;*
  - (iii) *That may prejudice, embarrass or delay the fair trial of the action; or*
  - (iv) *That it is otherwise an abuse of the process of the Court.*
2. The application was made pursuant to **Order 18 Rule 18 (1) of the High Court Rules 1988** and under **the inherent jurisdiction of the High Court**.
3. The **Plaintiff** opposed the Defendant's Striking out and Dismissal of the application and on 04<sup>th</sup> July, 2016 filed an Affidavit in Response to the Defendant's application.
4. A reply affidavit of the 1<sup>st</sup> Defendant was also filed on 18<sup>th</sup> August, 2016.
5. The application was heard in terms of the affidavit evidence filed coupled with the written and oral submissions made in this proceedings by the Defendants and the Plaintiff.
6. The following Affidavits and Submissions were filed:
  - Affidavit in Support deposed by Arvind Patel filed on 21<sup>st</sup> June, 2016;
  - Affidavit in Support deposed by Lily Vesikula filed on 21<sup>st</sup> June, 2016;
  - Affidavit in Response deposed by Thomas Paul filed on 04<sup>th</sup> July, 2016;
  - Reply Affidavit of Arvind Patel filed on 18<sup>th</sup> August, 2016;
  - Written submissions of the Plaintiff's; and
  - Written submissions of the Defendant's.

## BACKGROUND

7. The **Plaintiff's** Substantive Claim is for **Defamation** and seeks for **General Damages** for loss of reputation, interest, Post Judgment Interest and costs. The Plaintiff claims that his reputation has been damaged by the 1<sup>st</sup> Defendant who made several imputations concerning the Plaintiff and these imputations particularised are **Defamatory** in nature since the Plaintiff being an academic



and Professor of Finance employed by the Faculty of Business and Economics at the University of the South Pacific (USP).

8. The **Plaintiff's claim** further raises several issues relating the Plaintiff's entitlement to inducement allowance, Plaintiff's performance review, USP's official internal communication and alleged breaches of USP's policies.
9. The **Plaintiff** further says that he was **deprived of fairness**, was **prejudiced** and **discriminated** when he wrote to Vice Chancellor appealing the misuse of process of performance evaluation and refuted labelled allegations and advised that his performance evaluation and taking away of inducement allowance was in breach of USP review procedures.
10. The **Defendant** denied the substantive allegations of fact in the Plaintiff's Claim and say that all the pleaded Claims, including those of negligence and defamation, fall within the exclusive jurisdiction of USP's Visitor, and are outside of the jurisdiction of the Court, because they touch upon USP's internal laws and the administration of those laws. As a result, they submit the Claim should be struck out and dismissed because it does not disclose a reasonable cause of action, is frivolous and vexatious, may prejudice, embarrass or delay the fair trial of the action, and is otherwise an abuse of the process of the Court.
11. In the alternative, the Defendant's say that should the Court be of the view that it has jurisdiction to hear claims of negligence and defamation, then the Defendants submitted that the Claim does not plead the material facts necessary to raise any reasonable cause of action in respect of either negligence or defamation, is also frivolous and vexatious, may prejudice, embarrass or delay the fair trial of the action, and is otherwise an abuse of the process of the Court, and should be struck out.

#### LAW and PRACTICE

12. 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).*

13. In Paulo Malo Radrodro vs Sione Hatu Tiakia & Others, HBS 204 of 2005, the Court stated that:

*"The principles applicable to applications of this type have been considered by the Court on many occasions. Those principles include:*

- a. *A reasonable cause of action means a cause of action with some chance of success when only the allegations and pleadings are considered - Lord Pearson in Drummond Jackson v British Medical Association [1970] WLR 688.*
- b. *Frivolous and vexation is said to mean cases which are obviously frivolous or vexations or obviously unsustainable - Lindley LJ in Attorney General of Duchy of Lancaster v L.N.W Ry [1892] 3 Ch 274 at 277.*
- c. *It is only in plain and obvious cases that recourse would be had to the summary process under this rule - Lindley MR in Hubbuck v Wilkinson [1899] Q.B. 86.*
- d. *The purpose of the Courts jurisdiction to strike out pleading is twofold. Firstly is to protect its own processes and scarce resources from being abused by hopeless cases. Second and equally importantly, it is to ensure that it is a matter of justice; defendants are permitted to defend the claim fairly and not subjected to the expense inconvenience in defending an unclear or hopeless case.*
- e. *"The first object of pleadings is to define and clarify with position the issues and questions which are in dispute between the parties and for determination by the Court. Fair and proper notice of the case an opponent is required to meet must be properly stated in the pleadings so that the opposing parties can bring evidence on the issues disclosed - ESSO Petroleum Company Limited v Southport Corporation [1956] A.C at 238" - James M Ah Koy v Native Land Trust Board & Others - Civil Action No. HBC 0546 of 2004.*
- f. *A dismissal of proceedings "often be required by the very essence of justice to be done"..... - Lord Blackburn in Metropolitan - Pooley [1885] 10 OPP Case 210 at 221 - so as to prevent parties being harassed and put to expense by frivolous, vexations or hopeless allegation - Lorton LJ in Riches v Director of Public Prosecutions (1973) 1 WLR 1019 at 1027"*

14. His Lordship Mr Justice Kirby in Len Lindon -v- The Commonwealth of Australia (No. 2) S. 96/005 summarised the applicable principles as follows:-

- a. *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.*
- b. *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 ... or is advancing a claim that is clearly frivolous or vexatious...*
- c. *An opinion of the Court that a case appears weak and such that is unlikely to succeed is not, alone, sufficient to warrant summary termination... even a weak case is entitled to the time of a court. Experience teaches that the concentration of attention, elaborated evidence and arguments and extended time for reflection will sometimes turn an apparently unpromising cause into a successful judgment.*



- d. *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.... 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 in circumstances more conducive to deciding a real case involving actual litigants rather than one determined on imagined or assumed facts.*
- e. *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 pleading.*
- f. *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.*

#### ISSUES for DETERMINATION

15. Following are the issues which require determination by this honourable court:-

- (a) *Whether the Plaintiff's Writ of Summons and the Statement of Claim discloses any reasonable cause of action?*
- (b) *Whether the Plaintiff's Writ of Summons and the Statement of Claim is scandalous, frivolous or vexatious?*
- (c) *Whether the Plaintiff's Claim may prejudice, embarrass or delay the fair trial of the action; or*
- (d) *Whether the Plaintiff's Writ of Summons and Statement of Claim is otherwise an abuse of the process of the Court?*
- (e) *Whether this Court has the Jurisdiction to deal with this case?*

#### ANALYSIS and DETERMINATION

*Whether the Plaintiff's Writ of Summons and Statement of Claim discloses any reasonable cause of action?*

16. The following notes to *Order 17 r19 of the Supreme Court Practice (UK) 1979 Vol. 1 or 18/19/11* on what is meant by the term 'a reasonable cause of action' sufficiently provides the answer to the applications.

*".....A reasonable cause of action means a cause with some chance of success when only the allegations in the pleadings are considered (per Lord Pearson in Drummond Jackson v British Medical Association [1970] 1 WLR, 688; [1970] 1 All ER 1094 CA). So long as the statement of claim or the particulars (Davey v Bentinck [1893] 1 QB 185) disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak, and not likely to succeed is no*



*ground for striking out (Moore v Lawson (1915) 31 TLR 418, CA.; Wenlock v Moloney [1965] 1 WLR 1238 1 W.L.R. 1238 [1965] 2 All ER 871, CA)... "*

17. Reference is also made to Lindley M.R. in *Hubbuck & Sons, Ltd v Wilkinson, Heywood & Clark Limited* [1899] 1QB 86 at page 91 said:

*"....summary procedure is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks. The use of the expression "reasonable cause of action" in rule 4 shows that the summary procedure there introduced is only intended to be had recourse to in plain and obvious cases".*

18. In the current case before this court, in summary, the Plaintiff's Substantive Claim is for Defamation. The Plaintiff claims that his reputation has been damaged by the 1<sup>st</sup> Defendant who made several imputations concerning the Plaintiff and these imputations particularised are Defamatory since the Plaintiff being an academic and Professor of Finance employed by the Faculty of Business and Economics at USP. The Plaintiff further alleges that he was deprived of fairness, was prejudiced, and discriminated and that USP was in breach of USP review procedures. He now seeks for General Damages for loss of reputation, interest, Post Judgment Interest and costs.
19. The Defendants submitted that all the pleaded Claims, including those of negligence and defamation, fall within the exclusive jurisdiction of USP's Visitor, and are outside of the jurisdiction of the Court, because they touch upon USP's internal laws and the administration of those laws. As a result, they submit the Claim should be struck out and dismissed because it does not disclose a reasonable cause of action, is frivolous and vexatious, may prejudice, embarrass or delay the fair trial of the action, and is otherwise an abuse of the process of the Court.
20. It is for the Plaintiff to establish that he has a Cause of Action in this case in terms of the facts and the Pleadings filed herein. On the other hand, the Defendants must establish that the Plaintiff does not have a Cause of Action in this case.
21. The Plaintiff submitted that the "statement of claim is very clear on the facts relating to the Plaintiff's Claim. The Plaintiff was not accorded a fair opportunity to have any allegations raised by the USP to be properly investigated. The issue of duplicating exam papers from previous years as alleged by the Defendants, required an academic judgment by the experts in the respective field to determine the issue. If a grievance is made out of this issue, then the Visitor clearly has no jurisdiction to hear and determine the same. He added that this matter also involves a Claim for Defamation, and Negligence in removing the Plaintiff as Professor in Finance to teach the students without any job evaluation process is an act of bad faith and being biased and further breached its own set of policies for staff review. According to the Plaintiff the Visitor has no jurisdiction to hear and determine the matter on these issues and it is for the Courts to hear and make a determination accordingly."

The Defendant's submitted that the "all the pleaded claims including those of negligence and defamation fall within the exclusive jurisdiction of USP's Visitor, and are outside of the jurisdiction of the Court, because they touch upon USP's internal laws and the administration of those laws. Defence further submitted that the Claim does not plead the material facts necessary to raise any reasonable cause of action. Therefore, the Claim does not disclose a reasonable cause of action, and should be struck out. He also added that while



*the claim in negligence is not clear, the allegations in paragraph of the statement of claim shows that the Plaintiff's complaint is regarding the Defendant's alleged failure to follow policies, procedures and other internal laws. They touch upon internal laws and are related to the administration of those laws. They would require an interpretation and application of those laws. As a result, these allegations are subject to the exclusive jurisdiction of the Visitor."*

22. The Striking out application of the **Defendants** is an interlocutory **summary proceeding** and is only appropriate to cases which are **plain and obvious in its nature**.
23. The allegations and/or claims made in terms of the substantive matter as set out and enumerated by the Plaintiff in his Statement of Claim needs to be determined by witnesses and on documentary evidence subjected to cross examination at a full hearing. Such allegations raised therein cannot be determined on the affidavit evidence summarily alone since the entire evidence may not have been divulged in the affidavit filed herein.

Further, certain **imputations** are raised by the Plaintiff in terms of the issue and allegation of "**Defamation**" and therefore needs to be proved and established with evidence by the Plaintiff and the Defendants on the other hand needs to be given an opportunity to counter this allegation accordingly.

24. Bearing in mind the **facts** of this case and the **nature of the pleadings** filed by the parties to the proceedings, this case cannot be classed as '**plain and obvious**' in nature.
25. Therefore, *Prima Facie*, I find that the Plaintiff is at least raising substantive issues of "**Defamation and Negligence**" which obviously tantamount to the causes of action and this Court needs to deliberate upon and make a Decision accordingly.

*Issue (ii) Whether the Plaintiff's Writ of Summons & the Statement of Claim is Scandalous, Frivolous or Vexatious & Abuse of Process of the Court?*

26. It is well established that jurisdiction to strike out claim or pleadings should be used very sparingly and only in exceptional cases: **Timber Resource Management Limited v. Minister for Information and Others** [2001] FJHC 219; HBC 212/2000 (25 July 2001).
27. In **National MBF Finance (Fiji) Ltd v. Buli** Civil Appeal No. 57 of 1998 (6 July 2000) the Court stated as follows:-

*"The Law with regard to striking out pleadings is not in dispute. Apart from truly exceptional cases the approach to such applications is to assume that the factual basis on which the allegations contained in the pleadings are raised will be proved.*

*If a legal issue can be raised on the facts as pleaded then the Courts will not strike out a pleading and will certainly not do so on a contention that the facts cannot be proved unless the situation is so strong that judicial notice can be taken of the falsity of a factual contention. it follows that an application of this kind must be determined on the pleadings as they appear before the Court...."*

28. Whether the claim is **Scandalous**? Reference is made to the Supreme Court Practice 1993 (White Book) Vol. 1 at paragraph 18/19/14 states as follows-

*"The Court has a general jurisdiction to expunge scandalous matter in any record or proceedings (even in bills of costs, Re Miller (1884) 54 L.J.Ch. 205). As to scandal in affidavits, see O.41, r.6."*

*Allegations of dishonesty and outrageous conduct, etc., are not scandalous, if relevant to the issue (Everett v. Prythergch (1841) 12 Sim. 363; Rubery v. Grant (1872) L.R. 13 Eq.443).*

*"The mere fact that these paragraphs state a scandalous fact does not make them scandalous" (per Brett L.J. in Millington v. Loring (1881) 6 Q.B.D. 190, p.196). But if degrading charges be made which are irrelevant, or if, though the charge be relevant, unnecessary details are given, the pleading becomes scandalous (Blake v. Albion Assurance Society (1876) 45 L.J.C.P. 663)."*

29. Whether the nature and contents of the Plaintiff's Claim in terms of the Writ of Summons and the Statement of Claim tantamount to **scandalous** facts and are irrelevant and therefore makes the Plaintiff's Claim **Scandalous**?
30. The Plaintiff submitted that he has a **valid and genuine claim** against the Defendants.
31. The **Defendants** submitted that they are not asking Court to strike out the Claim on the ground that the proceedings are **Scandalous, but on the grounds that the Claim is frivolous and vexatious**.
32. However, the **Plaintiff's Claim** is yet to be put to the **Test in terms of the evidence** to be tendered at the hearing and then for the determination of the Claim. I will leave the issue of Scandalous nature of the Claim here.
33. The **issue** of whether the Plaintiff's Claim is **frivolous** or **vexatious**? Reference is made to paragraph 18/19/15 of the Supreme Court Practice 1993, Vol. 1 (White Book) which reads as follows:-

*"By these words are meant cases which are obviously frivolous or vexatious or obviously unsustainable per Lindley LJ in Attorney General of Duchy of Lancaster v. L. & N.W.Ry [1892] 3 Ch. 274, 277; The Pleading must be "so clearly frivolous that to put it forward would be an abuse of the Court" (per Juene P. in Young v. Halloway [1895] P 87, p.90; ...."*

34. **In Devi v. Lal [2014] FJHC 75; HBC 120.2008** (7<sup>th</sup> February, 2014) - It was held as follows-

*"The Oxford Advanced Learners Dictionary of Current English 7th Edition defines the words "frivolous" and "vexatious" as:-*

*Frivolous: "having no useful or serious purpose"*

*Vexatious: "upsetting" or "annoying"*

*"Therefore, for a claim to be frivolous or vexatious, the Appellants must establish that the claim lacks merit (i.e. has no useful purpose) and is only to upset or annoy the Applicants'.*



35. The **Plaintiff's** contention is that the Plaintiff's Claim has a **valid** and **genuine Claim** against the Defendant. It is not right for the Defendants to simply say whatever they like without having regard to the feelings and impression on the image of the Plaintiff.
36. The **Defendant's** contention is otherwise and stated that the Plaintiff's Claim is **Frivolous** and **vexatious** and the Court is empowered to strike out any claim that is **unsustainable**, is **unmeritorious**, is without a useful purpose or, is intended to upset or annoy a defendant. He cited the following authorities-

The Court defined frivolous and vexatious in the case of *Natadola Taxi and Tours v Marlin Cruise Lines (Fiji) Ltd [2014] FJHC 446* at paragraph 29 as follows-

*"Frivolous and vexatious is said to mean cases which are obviously frivolous or obviously unsustainable. The Court will strike out a pleading on this ground if the Claim, if known in law, is factually weak worthless or futile."*

The High Court in *Skerlec v Tompkins [2014] FJHC 318* held that-

*"The Oxford Advance Learners Dictionary of Current English 7<sup>th</sup> Edition defines 'frivolous and vexatious as-*

*Frivolous: 'having no useful or serious purpose"*

*Vexatious: "upsetting or annoying"*

*3.9 Therefore for Claim to be frivolous or vexatious the Appellants must establish that the Claim lacks merits (i.e. has no useful purpose) and is only to upset or annoy the Appellants."*

37. Taking into consideration the above matters together with the **written submissions** and **oral arguments** raised in Court by both Counsels, the **Defendants** need to establish that the **Plaintiff's Claim lacks merits**. This Court needs to hear and determine the same in terms of the applicable law and the evidence that the Parties to the proceedings may and or intend to produce at the hearing proper in order to allow this Court to deliberate and determine the substantive issues of alleged "Defamation, Negligence and that the Plaintiff was not given a fair opportunity to have any allegations raised by the USP to be properly investigated. Hence seeks for General Damages or loss of reputation, interest and costs. The Plaintiff claims that his reputation has been damaged by the 1<sup>st</sup> Defendant who made several imputations concerning the Plaintiff and these imputations particularised are Defamatory of the Plaintiff being an academic and Professor in Finance within the Faculty Business and Economics", accordingly.
38. However, this claim **prima facie** cannot be judged summarily to be **frivolous** or **vexatious**; it needs to be appropriately investigated, examined and determined in terms of the availability and admission of evidence in a court of law accordingly.
39. Therefore, in the given circumstances, the **Plaintiff's claim** cannot be said to be **frivolous** or **vexatious**.

**Issue (iii) - Whether the claim is otherwise an abuse of the process of the Court?**

40. 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)"*

41. 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."*

42. 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"*

43. The **Plaintiff** submitted that the basis of Claims against the Defendants is several as cited in the Statement of Claim. These Claims and/or issues need to be determined at a full Hearing. Having the matter struck out without giving due consideration to the full facts in dispute is what amounts



to an abuse of process of Court process. The matter has not been decided by the Court on the merits of the facts at anytime now.

44. The **Defendants** cited the case of *Meridian Service Agency Ltd v Koroi* [2011] FJHC 767, and cited this dicta from *Walton v Gardiner* (1993) 177 CLR 378 as follows-

*"Abuse of process includes instituting proceedings that will clearly fail, proceedings unjustifiably oppressive or vexatious in relation to the defendant, and generally any process that give rise to unfairness."*

*In NBF Asset Management Bank v Lutu (supra), the court held at p.3-*

*"On abuse of process, in considering this application, I have borne in mind the following passage from Halsbury's Laws of England 4<sup>th</sup> Edition ED Vol.37 para 434 on "abuse of process" which I consider pertinent:*

*"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."(As quoted above at paragraph 40).*

45. Again, the **summary procedure** should not be used to determine the "abuse of process of the court", rather the substantive matter needs to be heard to determine the issues within the writ and the statement of claim making a claim whether it is **groundless** and **unfounded** in the sense that the plaintiff does not know of any facts to support it.

46. Further reference is made to the case of *Timoci Uluivuda Bavadra v The Attorney General* (Sup. Ct. (now High.Court) C.A. No. 487 of 1987 where **Rooney J** said:

*"I am not required to try any issues at this hearing. All I have to decide whether there is an issue to be tried. It is not enough for the defendant to show on this application that the plaintiff's case is weak and unlikely to succeed".*

47. 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."*



**Issue (iv) - Whether the Statement of Claim will prejudice, embarrass or delay the fair Trial of the action?**

48. The action was filed by the Plaintiff on 22<sup>nd</sup> February, 2016 wherein in summary, the Plaintiff's Substantive Claim is for Defamation and Negligence. The Plaintiff claims that his reputation has been damaged by the 1<sup>st</sup> Defendant who made several imputations concerning the Plaintiff and these imputations particularised are Defamatory of the Plaintiff being an academic and Professor of Finance employed by the Faculty of Business and Economics at USP. The Plaintiff further alleges that he was deprived of fairness, was prejudiced, and discriminated and that USP was in breach of USP review procedures. He now seeks for General Damages for loss of reputation, interest, Post Judgment Interest and costs.
49. The current application before this Court for determination is an **Interlocutory Striking out Application** filed by the Defendants. The substantive issues are yet to be deliberated upon, heard and determined by this Court.
50. Further, matters of this nature cannot just be dealt with on **affidavit evidence summarily** to reach a **just** and **fair** decision. This Court needs to hear the evidence in its entirety and reach a just and fair determination accordingly. This Court is adamant in expediting this case and make further appropriate directions to ensure that the litigation is brought to its conclusion soon.

Therefore, I do not find that the Defendants currently is and will until the final disposition of the substantive action in anyway whatsoever be **prejudiced**, **embarrassed** or that there will be any further **delay** in having a **fair Trial** of the action accordingly.

51. If the Defendants are mindful of the fact that the **statement of claim** has not been properly filed and or it has any short comings in terms of particularization of the claim or needs striking out of certain paragraphs from the Statement of Claim as sought by the Defendants herein, then the Plaintiff is at liberty to seek amendment to the Statement of Claim accordingly, unless the Defendant thinks otherwise or wishes to object since the Defendants have informed Court that the Plaintiff's Counsel was informed and reminded beforehand that he was at liberty to amend certain parts of his Statement of Claim but to no response to the Plaintiff's communication.
52. Having perused and analysed the issues raised by the Defendants couple with the principles dealing with the present application to **Strike out the Plaintiff's Writ of Summons and the Statement of Claim**, this court does not possess all the **requisite material** and **evidence** to reach a definite and certain conclusion to **strike out the Plaintiff's Claim** as sought for, since the **evidence** remains **untested**.
53. Therefore, to determine the aforesaid issues raised herein, investigation and examination of the appropriate witnesses in terms of evidence are of a paramount importance and requirement to reach a **just** and **fair** decision in the circumstances.

**Issue (v) - Whether Court has Jurisdiction to hear this case?**

54. According to the Defendants *all the pleaded claims, including those of negligence and defamation, fall within the exclusive jurisdiction of USP's Visitor, and are outside of the jurisdiction of the Court, because they touch upon USP's internal laws and the administration*



of those laws. The Defendants further submitted *that it is well established law that universality's visitor has exclusive jurisdiction over matters within the visitor's jurisdiction to the exclusion of the courts of law.*

He added that the Claim should be struck out and dismissed because it does not disclose a reasonable cause of action, is frivolous and vexatious, may prejudice, embarrass or delay the fair trial of the action and is otherwise an abuse of the process of the Court.

The Plaintiff submitted *that this matter also involves a claim for defamation, which again the visitor has no jurisdiction to hear.*

55. The question of **Jurisdiction** as to the Court in which this case should be filed. I find that the Courts do not preclude any aggrieved party from bringing a common law claim in employment law or otherwise to be determined in a just and fair manner. It should be remembered that Courts deal with any impending matters before Courts independently, fairly and in a just manner as is required of a Court of Law.
56. The Defendant's action of filing a **striking out application** is asking the Master to **exercise jurisdiction**. If strict arguments are to apply, then surely even the striking out application should not have been brought before the Master to determine, rather let the Judge of the High Court deal with the substantive matter and decide the impending substantive issues in a just and fair manner. This Court then would have been in a position to decide on the jurisdiction, whether this matter ought to be decided by the Court of law and/or by the Visitor of the USP.
57. Overall, I therefore in the above circumstances find that there are both **triable issues** as well as **legal issues** that needs to be investigated and determined in terms of the availability of the evidence before the Court at the trial proper in a **just and fair manner**. These issues to the extreme cannot be determined summarily in one way or to the other.
58. In summary, the **Defendant's application** seeking the **striking out of the Plaintiff's claim** on the following **grounds fail** respectively.
- No cause of action;
  - Scandalous, frivolous and vexatious claim;
  - Prejudice, embarrass or delay the fair trial of the action; and
  - Question of Jurisdiction.
59. Further, considering the nature of the **Plaintiff's substantive action**, this is not the most appropriate stage of proceedings to determine the **success of its claim**.
60. Taking into consideration **oral arguments** and **written submissions** from both parties and bearing in mind the **substantive nature of the claim**, this court is inclined to grant **reasonable costs** to the Plaintiff **summarily assessed** at Court's discretion in the sum of **\$1000 to be paid within 14 days**.

Further I impose an "**unless order**" to ensure that the ordered costs are paid to the Plaintiff within 14 days and upon the Defendants failure to do so will result in the **activation** of the **unless order** eventuating in the **striking out of the Defendant's Defence** accordingly.

61. In Conclusion, following are the final orders of this court-

FINAL ORDERS

- (i) That the Defendant's Summons seeking the Striking Out of the Plaintiff's Writ of Summons and the Statement of Claim is hereby dismissed.
- (ii) That the Defendants to pay the Plaintiff summarily assessed costs of \$1000 of this application within 14 days.
- (iii) The Matter to take its normal cause in terms of the substantive action.
- (iv) Unless Order is imposed and will be activated on the non-compliance of the payment of the cost order resulting in the striking out of the Defendant's Defence.
- (v) Further directions to be made on 24<sup>th</sup> April, 2018.

Dated at Suva this 24<sup>th</sup> day of April, 2018



Master  
VISHWA DATT SHARMA

cc: *Diven Prasad Lawyers, Suva*  
*Munro Leys Solicitors, Suva*