

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 08 of 2017

BETWEEN: ANA VAKASAWAQA of Lot 100, Maqbool Road, Nadera, Unemployed.

PLAINTIFF

AND: MALAKAI GUCAKE of Nadi, Commercial Pilot.

1ST DEFENDANT

AND: AIR PACIFIC LIMITED trading as FIJI AIRWAYS and formerly as Air Pacific a limited liability company having its registered office at Air Pacific Maintenance and Administration Centre, Nasoso Road, Nadi Airport.

2ND DEFENDANT

BEFORE: Master Vishwa Datt Sharma

COUNSEL: Mr. Vananalagi. R - for the Plaintiff
Ms. Jackson. L - for the 1st Defendant
Mr. Nilesh Prasad - for the 2nd Defendant

Date of Ruling : 03rd August, 2018 @ 10 am

RULING

[Application by the 2nd Defendant seeking an order to strike out the Plaintiff's Statement of Claim pursuant to Order 18 Rule 18 of the High Court Rules, 1988 AND Section 25 of the Workmen's Compensation Act]

APPLICATION

1. This is the 2nd Defendant's Summons seeking for the following orders:
 - (a) *An order that the Plaintiff's Statement of Claim against the 2nd Defendant be struck out;*
 - (b) *Such further or other order(s) as this Court in the circumstances considers appropriate.*

Upon the following grounds:

- (a) *An order under Order 18 rule 18(1) (a) of the High court Rules that Plaintiff's Claim against the 2nd Defendant be dismissed upon grounds that they disclose no reasonable cause of action;*
 - (b) *Further or in the alternative, an Order under Order 18 Rule 18(1)(b) of the High Court Rules that the Plaintiff's Claim against the 2nd Defendant be dismissed upon the grounds that they are scandalous, frivolous or vexatious;*
 - (c) *Further or in the alternative, an Order under Order 18 Rule 18(1)(d) of the High Court Rules that the Plaintiff's Claim against the 2nd Defendant be dismissed upon the grounds that they are otherwise an abuse of process of the court; and*
 - (d) *Further or in the alternative, an Order under Section 25 of the Workers Compensation Act, and/or pursuant to the Court's inherent jurisdiction that the Plaintiff's claim against the 2nd defendant be dismissed upon the grounds that any claim for workers compensation is now statute barred per section 25 (1) of the Workers Compensation Act.*
2. The application is made pursuant to *Order 18 Rule 18 (a),(b) and (d) and Sections 16 and 25 (1) (c) of the Workers Compensation Act and d the Court's inherent jurisdiction.*
 3. The Plaintiff strongly opposed the 2nd Defendant's Striking out application.
 4. The application was heard in terms of the oral and written submissions made in this proceeding by the Plaintiff and the 2nd Defendant.

THE LAW and PRACTICE

5. 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;*

(Underline mine for deliberation on these grounds)

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).

(e) Further, or in the alternative, an order under section 20 of the Workmen's Compensation Act, and /or pursuant to the Courts inherent jurisdiction that the Plaintiff's claim against the 2nd Defendant be dismissed upon the grounds that any claim for workmen's Compensation is now statute barred per section 25(1) (c) of the Workmen's Compensation Act.

ANALYSIS and DETERMINATION

6. Following are Five (5) issues to be deliberated upon in the 2nd Defendant's Striking Out Summons-

1st issue- *Whether the Defendant's Statement of Defence discloses no reasonable defence to the Plaintiff's Statement of Claim?*

2nd Issue- *Whether the Statement of defence is Scandalous, Frivolous and/or Vexatious?*

3rd Issue- *Whether the statement of defence is otherwise an abuse of the process of the court? AND*

4th issue- *Whether any claim for Workmen's Compensation is now statute barred as per section 25 (1) of the Workers Compensation Act.*

7. The Plaintiff's claim is essentially founded on Tort of Negligence. She claims that she sustained injuries during the plane accident on 18th March, 2014. The Plaintiff in her Statement of Claim filed herein, claims for General Damages to be assessed, Special Damages and Loss in the sum of \$404,785.00 or such further sum under paragraph 7 hereof; Costs of Future Care, Interest on the above Damages pursuant to the Law Reform [Miscellaneous Provisions] [Death and Interest] Act Cap 24; and Damages under the Workmen's Compensation Act.

8. The Defendants contention are that under the Workmen's Compensation Claim lodged by the Plaintiff, a sum of \$17,156.26, and therefore the Plaintiff is precluded from making any further claims for Damages for injuries sustained during the Plane accident including any claims for interim payments and the Plaintiff's Statement of Claim should be Dismissed accordingly.

9. Bearing in mind the above, I will now proceed to deal with the 2nd Defendants Summons seeking an order on various grounds to strike out the Plaintiff's Statement of Claim as follows-

(i) No Cause of Action

10. It is for the Plaintiffs to establish that they have a Cause of Action in this case against the Defendants in terms of the facts and the Pleadings filed herein.

11. On the other hand, the 2nd Defendant must establish that the Plaintiff does not have a Cause of Action in this case against the 2nd Defendant.
12. Reference is made to 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)...."

13. 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"

14. The Plaintiff's substantive claim is based on Tort of Negligence. The Plaintiff is alleging that on 18th March, 2014, whilst in employment with the 2nd Defendant as a flight attendant, she sustained injuries during the Plane accident and is now claiming for damages as per her Statement of Claim.
15. The 2nd Defendant in his Statement of Defence has denied each and every allegation except as expressly admitted therein.
16. I find that the Plaintiff are generally claiming for the personal injuries under several heads Special and General Damages, allegedly sustained during the alleged Plane accident as set out in her Statement of Claim and the prayers therein.
17. In light of above, I find that prima facie, the Plaintiff has a Cause of Action in Tort of Negligence as claimed by her in her Statement of Claim. It is for the Plaintiff to prove her case on the balance of probability at the full hearing.
18. Therefore this ground is obviously dismissed for the aforesaid rational.

Scandalous, Frivolous and Vexatious

19. 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).
20. 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...."

21. **Whether the claim is Scandalous in nature?**

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)."

22. **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**?
23. This Court is aware of the fact that the Plaintiff did make a claim for Workmen's Compensation and paid a sum of \$17,156-26. Whether the Plaintiff is now precluded from making this claim after payment of the workmen's Compensation or not is a question to be decided by this court at a trial.
24. 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.
25. Therefore, the **2nd Defendant** cannot submit that the **Plaintiff's** Summons and the Statement of Claim at this stage of the proceedings is **scandalous in nature**.
26. 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 L.J 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;"

27. *In Devi v. Lal [2014] FJHC 75; HBC 120.2008* (7th 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'.

28. Taking into consideration the above matters together with the **written submissions** and **oral arguments** raised in Court by both Counsels, the 2nd Defendant as the Plaintiff's employer needs to establish that the Plaintiff's Claim **lacks merits**. This Court needs to hear and determine the same in terms of the 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 **Tort of Negligence** claiming Damages for alleged injuries sustained during the alleged Plane accident.

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 of evidence before a court of law accordingly.

29. Therefore, in the given circumstances, the Plaintiff's claim cannot be said to be **frivolous** or **vexatious**.

30. **Accordingly, this ground fails as well.**

Abuse of Court Process

31. 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)

32. 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"

I reiterate that this Court is aware of the fact that the Plaintiff upon making a claim for Workmen's Compensation was paid a sum of \$17,156-26

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 issue 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.

"Whether any claim for Workmen's Compensation is now statute barred as per section 25(1) of the Workers Compensation?"

33. The Plaintiff's Writ of Summons and the Statement of Claim on **Tort of Negligence** was filed on 16th January, 2017. The alleged plane accident occurred on 18th March, 2014. Therefore time calculated from the alleged accident to the filing of the claim is within the 3 years' timeframe as required in law.
34. Therefore, I find that the Plaintiff's claim has been filed within the timeframe and is not statute barred as claimed.
35. Therefore, for above reasons, this final ground seeking to strike out the Plaintiff's Statement of Claim also fails.

IN CONCLUSION

36. For the aforesaid rationale, I do not find that it can be found and ascertained from the Plaintiff's Statement of Claim that it has no reasonable cause of action, is Scandalous, Frivolous, and Vexatious and/or is an abuse of the Court process. Further, the claim for Workmen's Compensation as per section 25 (1) of the Workers Compensation is not statute barred as well. Even if it was out of time and allegedly statute barred, the parties are always at liberty to make an application for leave to seek court's indulgence in allowing the application to proceed on this ground out of time at the court's discretion.
37. Therefore, **2nd Defendant's application seeking an order to strike out the Plaintiff's Statement of Claim against the 2nd Defendant** fails.


38. It is only appropriate for obvious reasons that as a result of my **finding** not to proceed to strike out the Plaintiff's Writ of Summons and the Statement of Claim against the 2nd Defendant that I am inclined to grant costs at this stage of the proceedings in the cause.
39. Accordingly, I proceed to make the following orders-

FINAL ORDERS

- (i) The 2nd Defendant's application to strike out of the Plaintiff's Writ of Summons and the Statement of Claim fails.
- (ii) The Plaintiff's Writ of Summons together with the Statement of Claim against the 2nd Defendant remains intact.
- (iii) Costs against the 2nd Defendant to be in the cause..
- (iv) The matter to proceed between the Plaintiffs and the Defendants and stands adjourned for further directions on the next cause.
- (v) Orders accordingly.

Dated at Suva this 03rd day of August, 2018




.....
MASTER
VISHWA DATT SHARMA

cc: R. Vananalagi Lawyers, Nabua
Jackson Bale Lawyers, Suva
Mitceell Keil & Associates, Suva