

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 230 OF 2015

BETWEEN : **HARISH CHAND** trading as **ITAUKEI FOOD INDUSTRIES** of
Level 1 Unit 1/9 Lot 9 Bila Street, Carreras Road, Votualevu, Nadi.

PLAINTIFF

AND : **BULA ISLAND FOOD SUPPLIES** having its registered office at Lot
9 Bila Street, Carreras Road, Votualevu, Nadi.

DEFENDANT

Appearances : Ms M. Sukanaivalu for the plaintiff
Mr S.F. Koya with Ms J. Takali for the defendant
Date of Hearing: 11 April 2019
Date of Ruling : 11 April 2019

R U L I N G

[on amendment of pleading]

Introduction

[01] This is an application supported by an affidavit of Narainsammy Naidu filed by the defendant under O 20, R 5 of the High Court Rules 1988, as amended ('HCR') ('the application'). The defendant seeks to amend the second amended statement of defence and second amended counterclaim. The proposed amendment is intended to add some facts concerning the plaintiff that had emerged subsequently, which is as follows:

1. *The defendant further states in its defence that the plaintiff and Kushbu Sharma have been charged by the Nadi Police as follows:*

Criminal charges against the plaintiff

- a) *Nadi Magistrates Criminal Action No. 297 of 2017*
- b) *Nadi Magistrates Criminal Action No. 350 of 2017*

Criminal Charge against Kushbu Sharma

- a) *Nadi Magistrates Criminal Action No. 052 of 2017*

- 2. *The charges are in relation to the purported lease agreement dated the 24th July 2015 between the plaintiff and the defendant (see paras 12 and 15.8 of the proposed amendment)*

[02] The plaintiff did not file any affidavit in opposition.

[03] At the hearing, both parties orally argued the matter. Only the plaintiff tendered written submission.

The law

[04] The HCR, O 20, R 5, empowers the court to allow amendment of pleading at any stage of the proceedings. That Rule provides:

"Amendment of writ or pleading with leave (O 20, R 5)

5 (1) Subject to Order 15, rules 6, 8 and 9 and the following provisions of this Rule, the Court may at any stage of the proceedings allow the plaintiff to amend his or her writ, or any party to amend his or her pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

(2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.

(3) An amendment to correct the name of a 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.

(4) An amendment to alter the capacity in which a party sues may be allowed under paragraph (2) if the new capacity is one which that party had at the date of the commencement of the proceedings or has since acquired.

(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment." (Emphasis supplied)

The submissions

[05] The plaintiff opposes the application on the ground that it is scandalous, frivolous and vexatious and that these charges are mere allegations and they have not been determined by the Nadi Magistrates Court.

[06] On behalf of the defendant it was argued on the other hand that the proposed amendment is intended to particularise the defence and counterclaim, it does not change the cause of action or there is no substitution or introduction of a new cause of action, there is no prejudice to the plaintiff and the amendment is necessary for determination of real issues between the parties.

Discussion

[07] I have read the proposed amendment and heard the arguments put forward by both counsel.

[08] The proposed amendment simply seeks to add certain facts that had emerged subsequently. It is a fact that the plaintiff and his wife have been charged in respect of the lease agreement entered into between the parties. The plaintiff does not deny the fact that a criminal charge has been filed against him in the Magistrates Court.

- [09] The amendment of the defence and counterclaim has been sought before the commencement of the trial.
- [10] In terms of Rule 5, the court has the discretion to allow amendments of pleadings at any stage of the proceedings, of course before the judgment. Such an amendment may be allowed even to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment (see R 5 (5) of the HCR).
- [11] The principle on amendment of pleadings is that an amendment may be allowed if it is necessary for determination of the real issues between the parties.
- [12] The proposed amendment seeks to add a fact and particularise the defence and the counterclaim. I would, therefore, reject the argument that the proposed amendment is scandalous and vexatious and it is brought to embarrass the plaintiff.
- [13] In my opinion, the proposed amendment is necessary to determine the real issues between the parties. I am convinced that I should exercise my discretion in favour of the amendment. I accordingly grant leave to the defendant to amend their second statement of defence and second counterclaim as proposed. Thus, the defendant shall file and serve the amended statement of defence and counterclaim on the plaintiff within 14 days and the plaintiff will file and serve reply to the amended statement of defence and amended counterclaim within 14 days thereafter. The costs shall be in the cause.

The result

- 1) Leave is granted to the defendant to amend its second statement of defence and second counterclaim as proposed.
- 2) The defendant shall file and serve the amended statement of defence and counterclaim on the plaintiff within 14 days.

- 3) The plaintiff will file and serve reply to the amended statement of defence and amended counterclaim within 14 days thereafter.
- 4) Costs shall be in the cause.
- 5) The matter is adjourned for mention only at 9.30 am on 21 May 2019.

M.H. Mohammed Ajmeer
11/4/19

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M.H. Mohammed Ajmeer
JUDGE



At Lautoka
11 April 2019

Solicitors:

For the plaintiff: M/s Fa & Company, Barristers & Solicitors

For the defendant: M/s Siddiq Koya Lawyers, Barristers & Solicitors