

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 28 of 2020

BETWEEN : **NAULU BALEILEVUKA** of Namaka Nadi, Retired.

PLAINTIFF

AND : **HASRAT BEGG T/A HRF INVESTMENT CO** of Nadi Back Road,
Developer.

DEFENDANT

Before : Master U.L. Mohamed Azhar

Counsels : Mr. N. Vakacakau for the Plaintiff
Ms. J. Lagonilakeba for the Defendant

Date of Ruling: 17.06.2022

RULING

01. The plaintiff entered into an agreement with the defendant to purchase five lots of lands. The agreement was conditional upon the consent of the Director of Lands. It was an implied term of the agreement that, the defendant would obtain five separate Leases for all five lots. The plaintiff in accordance with their agreement paid a sum of \$ 75,000 to the defendant. The plaintiff alleged that, the defendant breached the said agreement and sued him for damages including refund of the deposit, as provided in the said agreement.
02. The defendant filed the statement of defence and denied the alleged breach and made counter claim for the legal expenses incurred by the defendant as the result of the plaintiff's claim. The parties completed the pleadings and the summons for directions was filed by the plaintiff. The court then made the orders on the summons for directions and directed the parties to file their respective Affidavit Verifying List of Documents. The defendant instead of filling the Affidavit Verifying List of Documents, filed the current summons pursuant to Order 18 rule 18 (1) (a) of the High Court's Rules seeking

to strike out the plaintiff 's claim on the basis it does not disclose reasonable cause of action. The counsels tendered their legal submission in addition to their oral submission

03. The law on striking out of pleadings is well settled. The Order 18 rule 18 of the High Court Rule gives the discretionary power to strike out the proceedings for the reasons mentioned therein. The said rule reads:

18 (1) The Court **may** at any stage of the proceedings **order to be struck out or amend** 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 (emphasis added)

04. The unambiguous wording of the above rule makes its effect very clear that, the power to strike out the pleadings is permissive and not mandatory. Even though the court is satisfied on any of those grounds mentioned in the above rule, the pleadings should not necessarily be struck out as the court can, still, order for amendment. The underlying rationale is that, the access to justice should not, merely, be denied by glib use of summary procedure of pre-emptory striking out.

05. Lord Pearson in **Drummond-Jackson v British Medical Association** [1970] 1 All ER 1094 held at page 1101 that;

“Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases. The authorities are collected in The Supreme Court Practice 1970 Vol 1, p 284, para 18/19/3, under the heading ‘Exercise of Powers under this Rule’ in the notes under Ord 18, r 19. One which might be added is *Nagle v Feilden* [1966] 1 All ER 689 at 695, 697; [1966] 2 QB 633 at 648, 651. Reference has been made to four Recent cases: *Rondel v Worsley* [1967] 3 All ER 993, [1969] 1 AC 191, *Wiseman v Borneman* [1969] 3 All ER 275, [1969] 3 WLR 706, *Roy v Prior* [1969] 3 All ER 1153, [1969] 3 WLR 635, and *Schmidt v Secretary of State for Home Affairs* [1969] 1 All ER 904, [1969] 2 Ch 149.There was no departure from the principle that the order for striking out should only be made if it becomes plain and obvious that the claim or defence cannot succeed, but the procedural method was unusual in that there was a relatively long and elaborate instead of a short and summary hearing. It must be within the discretion of the courts to adopt this unusual procedural method in special cases where it is seen to be advantageous. But I do not think that there has been or should be any general change in the practice with regard to applications under the rule”.

06. Marsack J.A. in his concurring judgment in *Attorney General v Halka* [1972] 18 FLR 210, explained how the discretionary power to strike out should be exercised by the courts and held that:

“Following the decisions cited in the judgments of the Vice President and of the Judge of the Court below I think it is definitely established that the jurisdiction to strike out proceedings under Order 18 Rule 18 should be very sparingly exercised, and only in exceptional cases. It should not be so exercised where legal questions of importance and difficulty are raised”.

07. Every person has access to justice and has fundamental right to have his or her disputes determined by an independent and impartial court or tribunal. This fundamental right, guaranteed by the supreme law of the country, should not lightly be taken away unless the case is unarguable. Salmon LJ said in *Nagle v Feilden* [1966] 1 All ER 689 at 697:

‘It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable’.

08. Accordingly, the general principle is that the order for striking out should only be made if it becomes plain and obvious that the claim or defence cannot succeed. The courts cannot

strike out an action for the reason that, it is weak or the plaintiff or the defendant is unlikely to succeed in his or her claim or defence.

09. The instant summons was filed by the defendant pursuant to paragraph (1) (a) of the Order 18 rule 18. No evidence shall be admissible in an application filed under that paragraph. The court has to examine the allegations in the pleadings to come to a conclusion on reasonable cause of action. His Lordship the former Chief Justice A.H.C.T. Gates (as His Lordship then was) in **Razak v. Fiji Sugar Corporation Ltd** [2005] FJHC 720; HBC208.1998L (23 February 2005) held that:

“To establish that the pleadings disclose no reasonable cause of action, regard cannot be had to any affidavit material [Order 18 r.18 (2)]. It is the allegations in the pleadings alone that are to be examined: Republic of Peru v Peruvian Guano Company (1887) 36 Ch.D 489 at p.498”.

10. The counsel for the defendant based her legal submission on two grounds, namely, (a) breach of section 13 of the State Lands Act as the plaintiff failed to obtain consent from Director of Lands before commencing this proceeding; and (b) pleadings do not disclose reasonable cause of action.
11. The subject land in this matter is a state land and the lease is a protected lease in terms of section 13 (1) of the State Lands Act. It is well known that, this section requires consent of the Director of Lands before dealing with any land which falls under purview of that section. There is nothing in the express wording of Section 13(1) which makes it necessary to obtain the consent of the Director of Lands before an action concerning a Protected Lease is commenced. The consent could be obtained at any time before the land is actually dealt with by the court. There is line of authorities [**Rasul v Singh** 10 FLR 16 (21 January 1964); **Australia and New Zealand Banking Group Ltd v Chand** [1992] 38 FLR 61 (17 March 1992)] which supports this proposition. In fact, the counsel for the defendant too admitted this position of law in her submission and cited the above mentioned authorities too. The counsel further admitted that, the plaintiff had managed to obtain the consent of Director of Lands after the current summons for striking out was filed on 14.10.2020. Accordingly, the first ground is insufficient, as admitted by the counsel for the defendant, to strike out the plaintiff’s claim.
12. In support of the second ground, the counsel submitted that, there was no breach of agreement for the plaintiff to commence this proceeding, because the defendant has continuously been carrying out his obligation under the Sale and Purchase Agreement. In fact this is the disputed area as per the pleadings in this matter. The plaintiff in paragraphs 9, 10, 17 and 18 of his statement of claim alleged breach by the defendant and particularized the alleged breach and the damages caused to him. The defendant on the other hand denied all these statements and put the plaintiff to strictly prove the same. The

first question to be decided by the court in this matter is whether there was breach by the defendant as alleged in the statement of claim of the plaintiff. So long the pleading discloses or raises a question fit to be decided by the court, there is a cause of action and such pleadings or cause cannot be struck out and dismissed under this rule. Mere fact that the case is weak or plaintiff is not likely to succeed is not the ground for striking out under this rule.

13. Citing several authorities, Halsbury's Laws of England (4th Edition) in volume 37 at para 18 and page 24, defines the reasonable cause of action as follows:

"A reasonable cause of action means a cause of action with some chance of success, when only the allegations in the statement of case are considered" Drummond-Jackson v British Medical Association [1970] 1 ALL ER 1094 at 1101, [1970] 1 WLR 688 at 696, CA, per Lord Pearson. See also Republic of Peru v Peruvian Guano Co. (1887) 36 ChD 489 at 495 per Chitty J; Hubbuck & Sons Ltd v Wilkinson, Heywood and Clark Ltd [1899] 1 QB 86 at 90,91, CA, per Lindley MR; Hanratty v Lord Butler of Saffron Walden (1971) 115 Sol Jo 386, CA.

14. It was held in **Ratumaivale v Native Land Trust Board** [2000] FJLawRp 66; [2000] 1 FLR 284 (17 November 2000) that:

"It is clear from the authorities that the Court's jurisdiction to strike out on the grounds of no reasonable cause of action is to be used sparingly and only where a cause of action is obviously unsustainable. It was not enough to argue that a case is weak and unlikely to succeed, it must be shown that no cause of action exists (**A-G v Shiu Prasad Halka** [1972] 18 FLR 210; **Bavadra v Attorney-General** [1987] 3 PLR 95.

15. His Lordship the former Chief Justice A.H.C.T. Gates in **Razak v. Fiji Sugar Corporation Ltd** (supra) held that:

"The power to strike out is a summary power "which should be exercised only in plain and obvious cases", where the cause of action was "plainly unsustainable"; Drummond-Jackson at p.1101b; A-G of the Duchy of Lancaster v London and NW Railway Company [1892] 3 Ch. 274 at p.277."

16. For the reasons mentioned above, I am of the view that, the statement of claim filed by the plaintiff discloses a reasonable cause of action against the defendant. The court therefore cannot exercise the discretion under Order 18 rule 18 and strike out this matter.

17. In result, I make the following orders,

- a. The summons filed by the defendant is dismissed, and
- b. The defendant should pay a summarily assessed cost of \$ 1,500 to the plaintiff within a month from today.

At Lautoka
17.06.2022




U.L Mohamed Azhar
Master of the High Court