

**IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION**

CIVIL ACTION NO.: HBC 256 of 2017

BETWEEN : ALEEM'S INVESTMENT LIMITED
FIRST PLAINTIFF

: KENNEDY LAUNDRY & DRY CLEANING
SERVICES LIMITED
SECOND PLAINTIFF

AND : MERCHANT FINANCE LIMITED
DEFENDANT

APPEARANCES/REPRESENTATION

PLAINTIFFS : Mr S Raikanikoda [Raikanikoda & Associates]

DEFENDANT : Mr R Singh [Sherani & Co]

RULING BY : Acting Master Ms Vandhana Lal

DELIVERED ON : 18 March 2022

INTERLOCUTORY RULING

Application

1. The Defendant via its summons dated 05th October 2018 seeks to have the Plaintiffs claim struck out on the grounds that it is an abuse of the court process and that it is frivolous and vexatious.
2. This application is supported by an affidavit sworn by Dineshwar Lal and is made pursuant to Order 18 Rule 18(1)(b)(c) and (d) of the High Court Rules.

3. The Plaintiffs who are opposing the application filed an affidavit sworn by Krishna Sami Naidu on 26th October 2018.
4. The Defendant filed a response to the said affidavit on 26th November 2018.

The Claim by the Plaintiffs

5. According to the Plaintiffs, they had paid off all their debt with the Defendant in sum of \$500,000 as full and final settlement.

The sum of \$500,000 was paid off by Mahijibhai & Company Limited on behalf of the Plaintiffs in exchange for the discharge of all securities for the loan transaction.

The discharge documents were prepared by R. Patel & Co.

It is claimed that the Defendant went ahead and issued a demand notice dated 26th July 2017 claiming a sum of \$500,000.

According to the Plaintiffs, this demand is *“ill-founded, mischievous, malicious and baseless”*.

The Plaintiffs claim that they with their new director Krishna Sami Naidu have been *“badly injured by the false allegation which has damaged his reputation creating defamatory accusation, which has drastic impact on him personally on his company as well”*.

Hence the Plaintiffs are claiming a sum of *“\$500,000 for the false claim for the debts which has been paid off”*.

The Defendant's Contention

6. The Defendant states that it had financed the Plaintiffs company by taking mortgage over the properties on Certificate of Title 12662, and 11662, as securities.

As at 27th August 2013, the Plaintiffs owed \$731,102.

The Plaintiffs offered to pay \$500,000 and requested for discharge of the mortgage as they had made a deal to sell the two properties to Mahijihai & Company Limited.

Via its letter of 05th September 2013, the Defendant accepted this offer but claim the acceptance of \$500,000 was not a full settlement figure as their letter did not state so.

Balance of \$231,102 was outstanding.

The Defendant states, it had allowed a rebate of \$72,246.46 bringing the sum owed by the Plaintiffs down to \$155,855.58.

The Plaintiffs failed to pay this sum hence the Defendant issued a demand letter dated 26th July 2017 to the Guarantors Aleem Khan and Mohammed Sharf Sahim.

The Defendant also issued a statutory demand Notice to the Plaintiff under section 513 of the Companies Act.

7. According to the Defendant, the Plaintiffs have failed to particularize their claim as to how they arrived to a figure of \$500,000.

The claim does not show reasonable cause of action of defamation and the Plaintiffs have failed to state the elements of defamation.

According to the Defendant, the letter of 26th July 2017 was neither published nor circulated to any third party to cause the Plaintiffs injuries or defamation in any manner.

The Defendant has discharged its security over the two land and it can pursue to claim the balance unsecured sum.

Thus, the Plaintiffs claim is frivolous and vexatious amounting to an abuse of the court process.

The Plaintiffs' Argument

8. The Plaintiffs maintain that the payment of \$500,000 was as fall and final payment of the debt owed to the Defendant.

The sum of \$500,000 claimed by the Plaintiffs are for the Defendant falsely claiming debt which according to them was paid off.

The Plaintiffs sue the Defendant for "*character defamation and reputation for both personal and company name and false accusation*".

On paragraph 10, the deponent agrees that the demand notices dated 26th July 2017 has not been published or circulated to third parties.

According to the Plaintiffs, they have a meritorious cause against the Defendant.

Law

9. Order 18 Rule 18(1) (b)(c) and (d) of the High Court Rules states:

The court may at any stage of proceeding order to be struck out or amended any pleadings or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –

- (a): or*
- (b) It is scandalous, frivolous or vexations; or*
- (c) It may prejudice, embarrass or delay the fair trial of the action; or*
- (d) It is otherwise an abuse of 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.

10. Master Sanderson in **Propel Accountants & Advisors Pty Ltd as Trustee for the WP Tax Unit Trust v Kazzag Pty Ltd as Trustee for The Kazzag Trust**, [2021] WASC 401, summarised the principles that are applicable when dealing with an application under O 20 r 19 RSC [the Rules of Supreme Court (WA) for striking out]:

- a. *The rule is intended to apply only to cases which are really not arguable and not cases where under the previous practice demurrer would have been the proper course;*
- b. *On the application, not only must all the facts alleged in the statement of claim be accepted as true, but it must be taken for granted that on all other points the pleading is unassailable;*
- c. *Great care must be exercised to ensure that a plaintiff is not improperly deprived of his opportunity for trial of his case by the appointed tribunal;*
- d. *The rule should not be reserved for those cases where argument is unnecessary to show the futility of the plaintiff's claim;*
- e. *As a general rule, the plaintiff is entitled to have his case heard and to have the facts found. It is only cases in which it can be seen from the outset that, however the facts be found, there is no basis for the legal conclusion contended for by the plaintiff; and*
- f. *A court at first instance should be careful not to risk stifling the development of the law by summarily rejecting a claim where there is a reasonable possibility that, as the law develops, it will be found that a cause of action will lie.*

11. In **Meckiff v Simpson** [1968] VicRep 8, the Full Court of the Victorian Supreme Court said of a previous rule of the Court that authorised the Court to strike out pleadings:

It is important at the outset to stress that the order appealed against was made on an application under O. XIX, r. 27, which authorizes a judge to strike out any matter in any pleading which may tend to prejudice, embarrass or delay the fair trial of the action. As is shown by numerous authorities on this rule, which takes its place in an order dealing with

pleadings generally, matter in a pleading will be struck out under this rule only where there is some defect in the pleading attacked, e.g. where the pleading is unintelligible, ambiguous, vague or too general, so as to embarrass the opposite party who does not know what is alleged against him. The rule is one to ensure compliance with the rules of pleading and nothing else.

12. In *Wheelahan & Anor v City of Casey & Ors (No 12) [2013] VSC 316* John Dixon J summarised the relevant principles to be applied are:

- (a) Order 13 of the Rules set out the relevant requirements of a sufficient pleading, while r 23.02 provides the grounds on which the sufficiency of a pleading may be impugned;*
- (b) the function of a pleading in civil proceedings is to alert the other party to the case they need to meet (and hence satisfy basic requirements of procedural fairness) and further, to define the precise issues for determination so that the court may conduct a fair trial;*
- (c) the cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action (or defence). The expression 'material facts' is not synonymous with providing all the circumstances. Material facts are only those relied on to establish the essential elements of the cause of action;*
- (d) as a corollary, the pleading must be presented in an intelligible form – it must not be vague or ambiguous or inconsistent. Thus a pleading is 'embarrassing' within the meaning of r 23.02 when it places the opposite party in the position of not knowing what is alleged;*

- (e) *the fact that a proceeding arises from a complex factual matrix does not detract from the pleading requirements. To the contrary, the requirements become more poignant;*
- (f) *pleadings, when well-drawn, serve the overarching purpose of the Civil Procedure Act 2010 (Vic);*
- (g) *a pleading which contains unnecessary or irrelevant allegations may be embarrassing – for example, if it contains a body of material by way of background factual matrix which does not lead to the making out of any defined cause of action (or defence), particularly if the offending paragraphs tend to obfuscate the issues to be determined;*
- (h) *it is not sufficient to simply plead a conclusion from unstated facts. In this instance, the pleading is embarrassing;*
- (i) *every pleading must contain in a summary form a statement of all material facts upon which the party relies, but not the evidence by which the facts are to be proved (r 13.02(1)(a));*
- (j) *the effect of any document or purport of any conversation, if material, must be pleaded as briefly as possible, and the precise words of the document or the conversation must not be pleaded unless the words are themselves material (r 13.03);*
- (k) *particulars are not intended to fill gaps in a deficient pleading. Rather, they are intended to meet a separate requirement – namely, to fill in the picture of the plaintiff's cause of action (or defendant's defence) with information sufficiently detailed to put the other party on guard as to the case that must be met. An object and*

function of particulars is to limit the generality of a pleading and thereby limit and define the issues to be tried;

- (l) a pleading should not be so prolix that the opposite party is unable to ascertain with precision the causes of action and the material facts that are alleged against it;*
- (m) extensive cross-referencing of facts in a pleading may render parts of the pleading unintelligible;*
- (n) in an application under r 23.02, the court will only look at the pleading itself and the documents referred to in the pleading;*
- (o) the power to strike out a pleading is discretionary. As a rule, the power will be exercised only when there is some substantial objection to the pleading complained of or some real embarrassment is shown; and*
- (p) if the objectionable part of the pleading is so intertwined with the rest of the pleading so as to make separation difficult, the appropriate course is to strike out the whole of the pleading.*

Determination

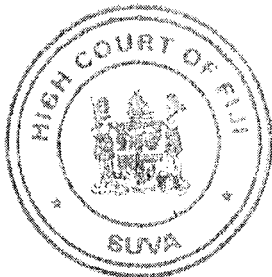
13. The statutory demand notice dated 26th July 2017 is for a sum of \$158,855.58 and not \$500,000 as claimed by Plaintiff. This was issued pursuant to Section 515 of the Companies Act to Kennedy Laundry & Dry Cleaning Limited.
14. In their statement of claim the Plaintiffs have failed to outline how the first named Plaintiff Aleem's Investment Limited is affected by the said demand notice.
15. Section 515 of the Companies Act allows a creditor to issue statutory demand for debt exceeding \$10,000 owed to it by a company.

16. The deponent of the Plaintiffs' affidavit on paragraph 10 agrees that the said demand was not circulated or published to third parties.
17. There is no claim by Plaintiffs that any further action was taken by the Defendant after the issuance of the said demand i.e. a winding up action was initiated against the Second Plaintiff and that a notice was published causing alarm to the Second Plaintiff's business partners thus affecting the business of the Second Plaintiff.
18. Defamation typically means false statement made about a person/s which is published as a statement of fact thus harming the other persons' reputation causing damages.
19. As highlighted by the Defendant's counsel case law requires for the plaintiff "*to prove publication of and concerning them of the libellous matter*" in order to succeed in a case of defamation.
20. The Defendant had issued a statutory demand letter under the provision of a law to collect balance debt it claims is outstanding. It had every right to do so if it believes debt is still outstanding.
21. Any question regarding the issuance of the said demand could be raised in the Court via an application for setting aside the demand and later in an application for winding up.
22. The Plaintiffs have failed to provide such particulars as are necessary for the Defendant to know the case it has to meet.
23. With the Plaintiffs agreeing that there was no publication of the letter, I do not find the Plaintiffs have a case against the Defendant for "character defamation".
24. "*A defamatory publication is not actionable unless it is established to have been published of and concerning the Plaintiff*" – *Lee v Wilson (1934) 51 CLR 276 @ 288* per Dixon J.

25. With there being no publication of the demand letter, it is only proper in the interests of both the parties to dismiss the claim instead of allowing them to incur completely useless expense.
26. I do not find the said demand was issued to lower the reputation of the Plaintiffs (the Second Plaintiff in particular).
27. Hence, I uphold the Defendant's application that the Plaintiffs' claim is indeed frivolous, vexatious and an abuse of the court process.

Orders

28. The Plaintiff's writ of summon and statement of claim filed on 06th September 2017 is struck out entirely with cost against the Plaintiffs summarily assessed at \$1,500 and to be paid within 14 days from delivery of this ruling.




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Vandhana Lal [Ms]
Acting Master
At Suva.

TO:

1. **Suva High Court Civil Action No. HBC 256 of 2017;**
2. **Raikanikoda & Associates, Solicitors for the Plaintiffs;**
3. **Sherani & Co, Solicitors for the Defendant.**