

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

CIVIL CASE NO. HBC 363 OF 2023

BETWEEN : **AK**
Plaintiff

AND : **PAULINE GUCAKE**
First Defendant

JOPE KORODUADUA
Second Defendant

SARAFINA WAINIBULI
Third Defendant

ROBERT LINGHAM
Fourth Defendant

WAINIKITI ROUNDS
Fifth Defendant

THE LEARNING CENTRE
Sixth Defendant

Counsel : **Mr M Saneem for Plaintiff/Respondent**
Mr K Chang for Defendants/Applicants

Hearing : **16 May 2024**

Judgment : **29 August 2024**

JUDGMENT

(Summons to Strike Out Plaintiff's Claim under Order 18 Rule 18)

- [1] I will make an order suppressing the name of the Plaintiff who is a juvenile. He will be referred to as AK in this judgment.
- [2] AK was enrolled with the Sixth Defendant, The Learning Centre, at the material time. He has brought proceedings, through his parents, in respect to his treatment by teachers at The Learning Centre. The causes of action pleaded are mistreatment and breaches of his rights under the Constitution of Fiji 2013.
- [3] The defendants have sought to strike out the claim as an abuse of process and time barred.

Background

- [4] The Learning Centre is a private school. The Plaintiff enrolled with The Learning Centre from 2017, in Year 1, and remained at that institution up until February 2023 when his parents removed him.
- [5] Whilst enrolled at The Learning Centre, the Plaintiff says that in 2020, he asked to go to the bathroom, was declined, and consequently he urinated in his pants. Further, on two occasions in 2022, he asked to go to the toilet and was refused (it is not pleaded that he urinated in his pants on these occasions, but according to a letter from the Plaintiff's solicitor dated 3 October 2023, the solicitor states that the Plaintiff wet his pants on the two occasions in 2022 as well). These three incidents (in 2020 and 2022) are the incidents that are the subject of the pleadings. The causes of action of mistreatment and breach of his rights in the Constitution (being the rights under ss 8, 11 and 41(1)(b)) pertain to the three incidents. It is also pleaded that the defendants compelled the Plaintiff to undergo a psychiatric evaluation in October 2018 and that the defendants arbitrarily expelled the Plaintiff on 16 February 2023 - neither of these events are the subject of the causes of action.

[6] The Plaintiff pleads that he has been humiliated as a result of the conduct of the defendants in 2020 and 2022 and he seeks general damages, pecuniary damages, an apology and costs.

[7] As stated, the Plaintiff pleads that he was expelled from The Learning Centre in February 2023. On 26 June 2023, solicitors acting on instructions from the Plaintiff's parents, wrote to the defendants attaching a letter from the Plaintiff's parents dated 26 June 2023. The three-page letter from the parents whilst referring to the toileting incidents mainly addresses the expulsion, seeking explanations and certain information. The Learning Centre responded on 3 July 2023, declining to provide the said information. A further letter was sent by the solicitors on 2 August 2023, again without success. There followed a letter from the Plaintiff's solicitors dated 3 October 2023, addressed to the defendant's solicitors, placing the defendants on notice that proceedings may be instituted.

Present proceedings

[8] These proceedings were filed by way of a Writ of Summons on 6 December 2023.

[9] The defendants filed an Acknowledgement of Service on 15 January 2024 and filed the present Summons to strike out the Plaintiff's claim on 7 February 2024. Both parties have filed affidavits in support of their respective positions. The defendants filed an affidavit by the First Defendant, the Principal of The Learning Centre, dated 7 February 2024. The Plaintiff filed an affidavit in opposition by the Plaintiff's father dated 21 March 2024. An affidavit in Reply was filed by the First Defendant dated 3 April 2024. Mostly, the evidence addresses the expulsion of the Plaintiff and not the events that are the subject of these proceedings, being the incidents in 2020 and 2022.

[10] The hearing was conducted on 16 May 2024. The defendants filed Further Legal Submissions on 6 June 2024 and the Plaintiff filed an additional authority on the same day.¹

¹ Being, from South Africa; *Mohlomi v Minister of Defence* [1996] (12) BCLR 1559.

Parties Position

[11] The defendant's position is as follows:

- i. The Plaintiff's claim is, fundamentally, for Constitutional Redress. In line with the High Court (Constitutional Redress) Regulations 2015, the Plaintiff should have filed a Notice of Motion and not a Writ of Summons. As such, the claim is defective and an abuse of process.
- ii. Pursuant to Rule 3(1) of the 2015 Regulations the proceeding was required to be filed within 60 days of the event. The events here were in 2020 and 2022 well after the 60 days and, therefore, the claim is time barred.
- iii. Another matter raised by the First Defendant, as well as addressed in the written submissions for the defendants is the concern about the impact of these proceedings on the mental health of the Plaintiff and other children that may be caught up in this proceeding (ie to provide evidence etc). Counsel for the defendant's put the concern in the following terms:

... this case - at its core - relates to young children. If the case proceeds, it is difficult to envisage a hearing occurring without the young Plaintiff and the other children who he assaulted not being called to give evidence. The defendants are concerned that proceeding with this case will be detrimental to the health of the children that will be caught up with this. It is unfortunate that the Plaintiff's parents do not appear concerned with this.

[12] The position of the Plaintiff in response is as follows:

- i. In addition to constitutional breaches of the Plaintiff's rights, the causes of action pleaded are negligence and reckless conduct (ie paragraph 6 of the Statement of Claim) and mistreatment.

- ii. The proceedings were brought by way of a Writ instead of a Motion as affidavit evidence will not suffice to resolve the factual disputes in this case.
- iii. The 60 day requirement under Rule 3(1) of the 2015 Regulations is unlawful. In any event, the Plaintiff is a child and because of his age should not be denied access to the courts.
- iv. Mr. Saneem also argued that the defendants have failed to file their defence within the specified period in the High Court Rules and that the Plaintiff should be entitled to judgment in default.

[13] In Reply, the defendants argued that although the Plaintiff is a child there is a duty on his parents to have brought the proceedings within the prescribed time. This matter is taken up in the Defendant's Further Legal Submissions dated 6 June 2024. With respect to the causes of action of negligence and mistreatment, the defendants suggest that the particulars are deficient.

Decision

[14] The summons to strike out the Plaintiffs' claim is made under O.18, r.18(1)(d) of the High Court Rules 1988. The provision reads:

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)...

...

(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.

- [15] The principles applicable to a strike out application are well settled. In *National NBF Finance (Fiji) Limited v. Buli* [2000] FJCA 28, the Court of Appeal stated:

*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.*²

- [16] Seneviratne J offered the following helpful discussion of the authorities in *South Pacific Metals Ltd v Silikiwai* [2021] FJHC 386 (15 December 2021) at [5]:

In Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 3) [1970] Ch 506 it was held that the power given to strike out any pleading or any Part of a pleading under this rule is not mandatory but permissive, and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending plea.

In Drummond-Jackson v British Medical Association [1970] 1 W.L.R. 688; [1970] 1 All ER 1094 it was held:

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.

In the case of Walters v Sunday Pictorial Newspapers Limited [1961] 2 All ER 761 it was held:

² My emphasis.

It is well established that the drastic remedy of striking out a pleading or, part of a pleading, cannot be resorted to unless it is quite clear that the pleading objected to, discloses no arguable case. Indeed, it has been conceded before us that the Rule is applicable only in plain and obvious cases.

In Narawa v Native Land Trust Board [2003] FJHC 302; HBC0232d.1995s (11 July 2003) the court made the following observations:

In the context of this case I find the following statement of Megarry V.C. in Gleeson v J. Wippell & Co. [1971] 1 W.L.R. 510 at 518 apt:

*"First, there is the well-settled requirement that **the jurisdiction to strike out an endorsement or pleading, whether under the rules or under the inherent jurisdiction, should be exercised with great caution, and only in plain and obvious cases that are clear beyond doubt.** Second, Zeiss No. 3 [1970] Ch. 506 established that, as had previously been assumed, the jurisdiction under the rules is discretionary; even if the matter is or may be res judicata, it may be better not to strike out the pleadings but to leave the matter to be resolved at the trial."³*

[17] Pathik J provided the decision in *Narawa v Native Land Trust Board*.⁴ His Lordship further stated at page 4:

*In considering this application I have also borne in mind the following passage from **Halsbury's Laws of England 4th Ed Vol. 37 para. 434 on 'abuse of process'** which I consider pertinent:*

³ My emphasis.

⁴ [2003] FJHC 302 (11 July 2003).

“An abuse of the 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 indorsement does not offend any of the other specified grounds for striking out, the facts may show that 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 indorsement 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 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.”⁵

[18] The Court’s power to strike out a claim must be sparingly used and only in clear and obvious cases. A party ought not to be denied access to the courts unless the cause of action is so untenable that they cannot succeed. Even where a case appears weak, such that it is unlikely to succeed, this does not suffice to warrant striking out. It is, however, an abuse of the process of the court for a party to bring a case otherwise than in good faith or for proper purposes. A claim may be struck out for disclosing no reasonable cause of action. The facts must be taken as pleaded in the Statement of Claim unless admissions to the contrary by a plaintiff is deposed. An interlocutory application is not the time to resolve factual disputes.

[19] The defendants offer no basis for the Court to strike out the Plaintiff’s pleadings with respect to the causes of action of negligence and mistreatment. Accordingly, these causes of action are not disturbed.

[20] The main thrust of the Defendant’s case is that the allegations pertaining to the breach of the Plaintiff’s rights under the Constitution should have been brought in a Motion for

⁵ My emphasis.

Constitutional Redress under s 44(1) of the Constitution and filed within 60 days of the three incidents in 2020 and 2022.

[21] I am satisfied that the Plaintiff is entitled to bring this part of his claim by way of a Writ of Summons and is not confined to having to file a Motion for Constitutional Redress. This much was accepted by Amaratunga J in *The Proceedings Commissioner v Attorney General of Fiji* [2019] FJHC (11 April 2019). The learned Judge referred to the following passage by Jitoko J in *Makario Anisimai v State* Civil Action 35D of 2004S:

The use by the applicant of Motion or Originating Summons to seek declaration from this Court in which there are clearly disputes as to facts is clearly an abuse of the Court process. This process is usually for the determination of a legal issue without contested evidence. This action should be by Writ of Summons ... But in the end it was obvious that the Applicants efforts through filing of a Motion to establish this breach of his rights cannot be done by Affidavit evidence alone ... I have no alternative but to dismiss this application.

[22] The Court in *Makario Anisimai v State* accepted that a party is not confined to a Motion for Constitutional Redress for breaches of their constitutional rights. That appears to have been the view of Amaratunga J as evidenced in the learned Judge's conclusion that:

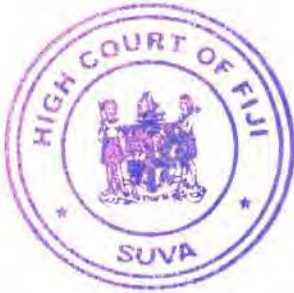
...there is alternate remedy available for damages under tort with proper examination of witnesses and also documents. This will also allow proper appointment of a party to prosecute such an action and also discovery of evidence by parties ...

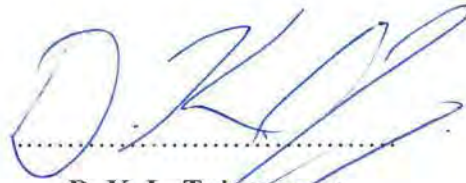
Orders

[23] My orders are as follows:

- i. The Defendant's Summons is dismissed.

- ii. The defendants must file and serve their Statement of Defence by 13 September 2024.
- iii. The Plaintiff is entitled to costs summarily assessed in the amount of \$500 to be paid by the defendants within 21 days.




D. K. L. Tuigeregere
JUDGE

Solicitors:

Saneem Lawyers for the Plaintiff

Howards Lawyers for the Defendants