

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 102 of 2023

BETWEEN:

SARAH FONG
PLAINTIFF

AND:

DOCTOR BASHARAT MUNSHI
1ST DEFENDANT

AND:

PACIFIC SPECIALIST HEALTH CARE
2ND DEFENDANT

BEFORE:

Acting Master L. K. Wickramasekara

COUNSELS:

Raikanikoda & Associates for the Plaintiff
Messrs. Neel Shivam Lawyers for the Defendant

Date of Hearing:

31 October 2024

Date of Ruling:

04 December 2024

RULING

01. Defendants, on 03/05/2023, filed Summons to Strike Out the Writ of Summons and the Statement of Claim filed by the Plaintiff on 30/03/2023. This Summons for Strike Out has been filed pursuant to Order 18 Rule 18 (1) (a) of the High Court Rules 1988.
02. Plaintiff opposed the same and had filed an Affidavit in Response and the Defendants had filed an Affidavit in Reply. Both the parties filed comprehensive written submissions on the matter on 25/07/2023.
03. Hearing on the Summons was held on 31/10/2024 and the Defendants moved that the Affidavits filed by both parties to be struck out as no affidavit evidence shall be admissible in this matter pursuant to Order 18 Rule 18 (2). Accordingly, the Court upheld the position of the Defendant and struck out the Affidavits filed by both parties.
04. Both parties then made oral submissions before the Court in support of their positions. Accordingly, having duly considered all submissions made by the parties, the Court now proceeds to make the Ruling on the Summons to Strike Out as follows.
05. As outlined at paragraph 4.1 of the Defendant's Written Submissions, the Defendants contention in support of the Summons is that the Plaintiff's Statement of Claim does not disclose a reasonable cause of action, as no particulars have been given regarding the following,

“4.1 It is the Defendants position that the Plaintiff's Statement of Claim does not disclose any reasonable cause of action as it lacks pertinent particulars in relation to the following,

- a) Details as to the supposed medical treatment conducted by the First Defendant on 30th March 2020,*
- b) Details of the supposed clinic visits at the Second Defendant's facility that is, the dates and what transpired during these clinical visits,*
- c) Dates on which the First Defendant allegedly failed to treat the Plaintiff as per the medical report dated 25 March 2020,*
- d) Medical treatment that was recommended to the Plaintiff,*
- e) The details of the medical report dated 25th March 2020,*
- f) When and how the First Defendant allegedly failed to treat the Plaintiff and what is meant by 'ultimate medical condition' pleaded in the Claim,*
- g) How the Defendants allegedly breached their duty of care,*
- h) Particulars of the alleged reluctance of the First Defendant to treat the Plaintiff after 30 March 2020,*

i) *Full particulars of the Plaintiff's suffering and loss of the amenities of life, special damages claimed, and future expenses of treatment and well-being claimed.*"

06. Defendants further claim that upon the service of the Statement of Claim, although they had requested in writing the above particulars, the Plaintiff, having requested time to submit the same, failed to submit any particulars until now.
07. The Plaintiff submits that its claim is based on breach of duty of care by the First Defendant, as the doctor of the Plaintiff, and by the Second Defendant vicariously, in failing to properly diagnose the medical condition of the Plaintiff and thus failing to duly treat her, when the Plaintiff visited the Defendants to get treatment for a medical condition she was suffering from at the time.
08. Having considered the entirety of the Statement of Claim, it is clear to this Court that the current Statement of Claim is poorly drafted and the particulars as requested by the Defendants (as listed at paragraph 4.1 of the Defendant's Written Submissions) should mandatorily have been included in the Statement of Claim, to properly elaborate the cause of action relied upon by the Plaintiff.
09. However, the Plaintiff submits that they are willing to amend the Statement of Claim and duly provide all particulars as requested by the Defendants and as such seek from Court not strike out the claim and rather allow the Plaintiff to amend the claim.
10. Defendants on the other hand submit that the Plaintiff should have provided the particulars when requested by the Defendants and should have amended the Statement of Claim at that time. By failing to do so, the Defendants claim that the Plaintiff has displayed that no such particulars are available as requested by the Defendants and as such the claim is unsustainable and does not disclose a reasonable cause of action.
11. As per the Summons for Striking Out, the application has been made pursuant to Order 18 Rule 18 (1) (a) on the following ground.
 - a) It discloses no reasonable cause of action
12. Order 18 Rule 18 (1) of the High Court Rules 1988 reads as follows.

Striking out pleadings and indorsements (O.18, r.18)

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;
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.*

13. I shall now consider the relevant law relating to striking out and as well the statutory provisions referred to by the parties in their respective arguments.

14. Master Azhar (as he then was), in the case of *Veronika Mereoni v Fiji Roads Authority*; HBC 199/2015 (Ruling: 23/10/2017) has succinctly explained the essence of this Rule in the following words.

*“At a glance, this rule gives two basic messages, and both are salutary for the interest of justice and encourage the access to justice which should not be denied by the glib use of summary procedure of pre-emptory striking out. Firstly, the power given under this rule is permissive which is indicated in the word “may” used at the beginning of this rule as opposed to mandatory. It is a “may do” provision contrary to “must do” provision. Secondly, even though the court is satisfied on any of those grounds mentioned in that rule, the proceedings should not necessarily be struck out as the court can, still, order for amendment. 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. MARSACK J.A. giving concurring judgment of the Court of Appeal in *Attorney General v Halka* [1972] FJLawRp 35; [1972] 18 FLR 210 (3 November 1972) 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 19 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”.

15. Pursuant to Order 18 Rule 18 (2), no evidence shall be admissible upon an application under Order 18 Rule 18 (1) (a), to determine if any pleading discloses no reasonable

cause of action or defence. No evidence is admissible for this ground for the obvious reason that the court can conclude absence of a reasonable cause of action or defence merely on the pleadings itself, without any extraneous evidence.

16. His Lordship the 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”.

17. 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.

18. Given the discretionary power the court possesses to strike out under this rule, it cannot strike out an action for the reasons it is weak, or the plaintiff is unlikely to succeed, rather it should obviously be unsustainable. His Lordship the Chief Justice A.H.C.T. Gates (as he then was) 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.”

19. It was held in **Ratumaiyale 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. The principles applicable were succinctly dealt by Justice Kirby in London v Commonwealth [No 2] 70 ALJR 541 at 544 - 545. These are worth repeating in full:

1. It is a serious matter to deprive a person of access to the courts of law for it is there that the rule of law is upheld, including against Government and other powerful

interests. This is why relief, whether under O 26 r 18 or in the inherent jurisdiction of the Court, is rarely and sparingly provided (**General Street Industries Inc v Commissioner for Railways (NSW)** [1964] HCA 69; (1964) 112 CLR 125 at 128f; **Dyson v Attorney-General** [1911] 1 KB 410 at 418).

2. To secure such relief, the party seeking it must show that it is clear, on the face of the opponent's documents, that the opponent lacks a reasonable cause of action (**Munnings v Australian Government Solicitor** (1994) 68 ALJR 169 at 171f, per Dawson J.) or is advancing a claim that is clearly frivolous or vexatious; (**Dey v. Victorian Railways Commissioners** [1949] HCA 1; (1949) 78 CLR 62 at 91).

3. An opinion of the Court that a case appears weak and such that it is unlikely to succeed is not alone, sufficient to warrant summary termination. (**Coe v The Commonwealth** (1979) 53 ALJR 403; (1992) 30 NSWLR 1 at 5-7). Even a weak case is entitled to the time of a court. Experience teaches that the concentration of attention, elaborated evidence and argument and extended time for reflection will sometimes turn an apparently unpromising cause into a successful judgment.

4. Summary relief of the kind provided for by O 26, r 18, for absence of a reasonable cause of action, is not a substitute for proceeding by way of demurrer. (**Coe v The Commonwealth** (1979) 53 ALJR 403 at 409). If there is a serious legal question to be determined, it should ordinarily be determined at a trial for the proof of facts may sometimes assist the judicial mind to understand and apply the law that is invoked and to do so in circumstances more conducive to deciding a real case involving actual litigants rather than one determined on imagined or assumed facts.

5. If notwithstanding the defects of pleadings, it appears that a party may have a reasonable cause of action which it has failed to put in proper form, a court will ordinarily allow that party to reframe its pleadings. (**Church of Scientology v Woodward** [1982] HCA 78; (1980) 154 CLR 25 at 79). A question has arisen as to whether O 26 r 18 applies only part of a pleading. (**Northern Land Council v The Commonwealth** (1986) 161 CLR 1 at 8). However, it is unnecessary in this case to consider that question because the Commonwealth's attack was upon the entirety of Mr. Lindon's statement of claim; and

6. The guiding principle is, as stated in O 26, r 18(2), doing what is just. If it is clear that proceedings within the concept of the pleading under scrutiny are doomed to fail, the Court should dismiss the action to protect the defendant from being further troubled, to save the plaintiff from further costs and disappointment and to relieve the Court of the burden of further wasted time which could be devoted to the determination of claims which have legal merit”.

20. Pursuant to the Fiji Court of Appeal decision in **Abhinesh Singh, Jyoti Singh v Rajesh Singh & Others**; ABU089.2020 (28 July 2023), His Lordship Justice Gunaratne, P, has defined ‘a cause of action’ in the following terms,

“What is “a cause of action?”
-the essential two elements

52. *The first is “a right” claimed by a party and the second is the “denial of that alleged right”.*”

21. The Plaintiff alleges in the Statement of Claim that she had consulted the Defendants for treatment of a medical condition she was suffering at the time and the Defendants although treated her, failed to properly diagnose her medical condition and to provide due treatments.
22. In the above context, the two elements of a cause of action, as expounded in the case of *Abhinesh Singh, Jyoti Singh v Rajesh Singh & Others* (*Supra*), could be identified as firstly, the right, the Plaintiff has claimed, as per the Statement of Claim, to be the ‘duty of care’ expected from the Defendants as her doctor and a medical institute and, secondly, the denial of such right, to be the alleged conduct of the Defendants in failing to properly diagnose the medical condition and provide due treatment to the Plaintiff.
23. In the Court’s considered view, Plaintiff has disclosed a reasonable cause of action in this matter. However, the poor drafting of the Statement of Claim and the lack of particulars have made the Statement of Claim unanswerable by the Defendants. The Plaintiff had also ignored and/or failed to provide the necessary particulars even when the Defendants had duly requested for the same.
24. However, when carefully considering this situation, the Court finds that striking out the claim over the above deficiencies in the Statement of Claim is not warranted. If done so, the Court is of the view that the Plaintiff shall be highly prejudiced and that she will be unjustly shut out from access to justice through judicial process. This, in my view, shall undoubtedly result in the breach of the constitutional rights of the Plaintiff guaranteed under Sec. 15 (2) of the Constitution of Fiji.
25. Moreover, pursuant to Order 18 Rule 18 (1), the Court is vested with the power to order amendment of any pleading as opposed to striking out the same, in its judicial discretion. I find that circumstances of this case are such that the issue of failure to particularize the claim against the Defendants can be adequately remedied by way of ordering an amendment to the Statement of Claim rather than striking out the whole claim against the Defendants.
26. However, the Plaintiff had been duly put on notice of the deficiencies (as discussed above) by the Defendants, but the Plaintiff had failed to take prompt action to remedy the same. By failing to remedy the situation, the Plaintiff has caused an unnecessary delay in these proceedings which could be prejudicial towards the Defendants. This issue, in Court’s view, can be compensated by way of an award for costs in favour of the Defendants.

27. In overall consideration of the Statement of Claim, this Court is of the considered view that there is a reasonable cause of action disclosed in the Statement of Claim which raises triable issues between the Plaintiff and the Defendants in these proceedings. The Plaintiffs Statement of Claim necessarily lack certain particulars as discussed in the foregoing paragraphs and such deficiencies, in Courts considered view, can be adequately addressed and remedied by way of an amendment to the Statement of Claim.
28. The Court, accordingly, concludes that the Defendants had failed to pass the threshold for allowing an application to strike out the Writ of Summons and/or the Statement of Claim pursuant to Order 18 Rule 18 (1) (a) of the High Court Rules 1988 and that this application should, therefore, necessarily fail.
29. In its final outcome, the Court makes the following orders.
1. The Summons to Strike Out as filed by the Defendants on 03/05/2023 is hereby refused and struck out subject to the following orders of the Court,
 2. Plaintiff shall pay a cost of \$ 2000.00 to the Defendants, as summarily assessed by the Court, as costs of these proceedings within 14 days from the date of this Ruling. (That is on or before the 18/12/2024)
 3. 14 days thereafter, the Plaintiff shall file and serve an Amended Statement of Claim, duly particularizing the claim against the Defendants by providing all requested particulars as submitted at paragraph 4.1 of the Written Submissions of the Defendants filed on 25/07/2023 (That is by 02/01/2025).
 4. In failure to comply with the above order 2 and 3 by the Plaintiff, the Plaintiff's Writ of Summons and the Statement of Claim shall stand struck out subject to a further cost of \$ 4000.00 to be paid to the Defendants by the Plaintiff, as summarily assessed by the Court.
 5. Having complied with the costs order at order no. 2 above and the due service of the Amended Statement of Claim by the Plaintiff, Defendants shall file and serve their Statement of Defence to the Amended Statement of Claim 14 days thereafter (That is by 16/01/2025).
 6. Plaintiff shall, thereupon, file and serve a Reply to Statement of Defence 14 days thereafter (That is by 30/01/2025).

7. Plaintiffs Summons for Directions to be filed and served 07 days thereafter (That is by 10/02/2025).
8. In failure to comply with any of the above orders, from order no. 5 to 7 above, the defaulting parties' pleadings shall be struck out subject to a cost of \$ 2000.00, as summarily assessed by the Court, payable to the other party.
9. Matter to be Mentioned in Court on 18/02/2025.



**L. K. Wickramasekara,
Acting Master of the High Court.**

**At Suva
04/12/2024**
