IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 346 of 2023

BETWEEN:

SHAMMI LATA
PLAINTIFF

AND:

NASESE MEDICAL CENTRE
1ST DEFENDANT

AND:

DR. NAINOCA
2ND DEFENDANT

BEFORE:

Acting Master L. K. Wickramasekara

COUNSELS:
Lazel Lawyers for the Plaintiff
Lajendra Lawyers for the Defendants

Date of Hearing:
By way of Written Submissions

Date of Ruling:
26th March 2025

RULING

01. The Defendants on 18/01/2024 has filed Summons to Strike Out the Writ of Summons and the Statement of Claim filed by the Plaintiff on 21/11/2023. This summons is supported with an Affidavit of Virgilio De Asa and Esala Nainoca sworn on 18/01/2024.

02. The Plaintiff opposed the Summons and filed two Affidavits in Opposition as sworn by the Plaintiff herself. These affidavits have been filed on 07/06/2024 and 11/06/2024 respectively.

03. With directions from the Court, both the parties have filed written submissions on 08/07/2024. The parties thereupon sought leave to file further written submissions in lieu of a hearing and, being allowed to do so, filed further written submissions. Accordingly, the Plaintiff's supplementary submissions were filed on 12/09/2024 and the Defendant's on 25/09/2024.

04. This Court having carefully considered the affidavits in evidence for and against the Summons to Strike Out and having read the supporting written submissions of each party, proceeds to rule on the said application as follows.

05. The Plaintiff's claim is based on alleged medical negligence on the part of the Defendants. Pursuant to the Statement of Claim filed along with the Writ of Summons, the Plaintiff has provided full and complete particulars regarding the alleged medical negligence by the Defendants along with particulars regarding vicarious liability of the Defendants and breach of duty of care as further cause of actions against the Defendants.

06. The said Summons to Strike Out is made pursuant to Order 18 Rule 18 (1) (a) and (b) of the High Court Rules 1988. As per the supporting affidavit of the Defendants, it is submitted that the 1st Defendant, as per the Writ of Summons, is only a 'business name' without having any legal capacity of being sued as it is not a 'legal person'. It is further averred by the Defendants that even this business name is now non-existent. A copy of the business name registration form for the 'Nasese Medical Centre' has been annexed to the Affidavit in Support as proof of this contention. It is therefore the position of the Defendants that the Plaintiff's Writ cannot stand as the 1st Defendant is a non-existent party and the 2nd Defendant is sued in the capacity of an employee of the 1st Defendant, which is a non-existent party.

07. The Plaintiff as averred in her Affidavits in Opposition, has not disputed the fact that the 1st Defendant is only a 'business name' but has submitted that a 'business name'

could be sued in that capacity. It is also averred that the Plaintiff has a valid cause of action against the Defendants and that it is not scandalous, frivolous, or vexatious.

08. In its written submissions, the Defendants have advanced the argument, that since the 1st Defendant is a non-existent party (as it is only a business name), there is no proper cause of action before the Court and that the Plaintiffs claim is therefore scandalous, frivolous, or vexatious.

09. However, it is to be noted that the counsel for the Defendants has failed to refer to any legal provision and or case authority to the effect that the given circumstances are fatal to the claim and render it untenable, necessitating it to be struck out.

10. In contrast, the counsel for the Plaintiff argues that there are exceptional circumstances in law which permits a 'business name' to be duly sued. However, in its written submissions, the counsel for the Plaintiff too has failed to refer to any such legal provisions or case authorities supporting such argument.

11. However, the Plaintiff's counsel, in his supplementary submissions has relied on the legal concept of lifting the corporate veil in support of his position on the maintainability of the claim.

12. The concept of lifting the corporate veil is well articulated in the case authorities citied by the Plaintiff's counsel in his supplementary affidavit. Unfortunately, it is obvious from those cases that the conceptual meaning of the lifting of corporate veil has no application to the current proceedings. The directors and/or shareholders of a company have not been sued in these proceedings. There is not even a proper legal company that has been sued in this cause. As such the submissions on the concept of lifting the corporate veil are completely misconceived and have no application whatsoever in the current application before this Court.

13. The Court shall now consider the legal provisions and the case authorities relevant to an application for striking out. Order 18 Rule 18 (1) of the High Court Rules 1988 provides for striking out of pleadings. It 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–*
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> *(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.

14. Master Azhar, 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 summery 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:*
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> *"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. 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".*

16. 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.*

17. 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 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."*

18. 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:*
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> *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 reaches 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".

19. The Defendants' argument is that the Plaintiff fails to disclose a reasonable cause of action, since the 1st Defendant in the cause is a non-existent party (as it's only a business name and has no legal capacity of being sued of) and that this in turn, makes the Plaintiff's claim scandalous, frivolous or vexatious. Though not relied upon this

argument seems to suggest that the entire proceedings is an abuse of the process of the Court.

20. I shall therefore consider when a pleading shall become scandalous, frivolous or vexatious and thus an abuse of the process of the Court. If the action is filed without serious purpose and having no use, but intended to annoy or harass the other party, it is frivolous and vexatious. Roden J in ***Attorney General v Wentworth (1988) 14 NSWLR 481***, said at 491 that:

> *1. Proceedings are vexatious if they instituted with the intention of annoying or embarrassing the person against whom they are brought.*
>
> *2. They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise.*
>
> *3. They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless.*

21. It would equally be important to understand the legal meaning of the term 'abuse of process'. **Halsbury's Laws of England (4th Ed) Vol. 37** explains the term 'abuse of process' at para 434 which reads to the effect,

> *"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 endorsement 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 endorsement 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."*

22. In deciding an application in this nature, it is pertinent to bear in mind the principal of a fair trial which is a universal legal principal. It requires that a litigant is afforded at a trial, a fair and public hearing within a reasonable time by an independent and impartial court/tribunal established by law. Courts are therefore vested with the power to strike out any such proceeding or claim which is detrimental to or delays a fair trial.

23. Likewise, the rule of law and the principle of natural justice require that, every person has access to the justice and the fundamental right to have their disputes determined by an independent and impartial court or tribunal within a reasonable time.

24. As per the affidavit evidence before this Court, it is not in dispute that the 1st Defendant is a non-existent party since it is only a 'business/trade name' and not a company that has any legal right, which could be considered a legal person.

25. However, that fact alone shall not render the Plaintiff's cause a nullity rendering it necessarily be struck out. As pointed out in the foregoing paragraphs, the counsel for the Defendants has failed to cite any compelling legal literature to that effect.

26. Similarly, the Plaintiff's contention that a 'business/trade name' can be sued in exceptional circumstances has no legal basis either and there's no case authorities cited to support such a contention.

27. In considering the current issue before the Court, I refer to the ruling of the Fiji High Court in ***Palas Auto Services Ltd v Handymans Ltd; HBC128.2008 (2 May 2012)***. The court in this case faced a somewhat similar issue, whereas the Defendant sued in that matter was the wrong company that had no relevance to the Plaintiff's case. The Court dealt with a Summons to Strike Out filed by the Defendant on the above ground pursuant to Order 18 Rule 18 (1) (a) and (d) of the High Court Rules.

28. The Court in that case, having analyzed the facts and circumstances before it, considered the discretionary nature of Order 18 Rule 18 along with the provisions in Order 20 Rule 5 to support the Court's unfettered discretion to allow a Plaintiff to correct the name of a party and thus found that a claim should not be struck out on such ground alone. The Court held in ***Palas Auto Services Ltd v Handymans Ltd*** *(Supra),*

> *"**Analysis***
>
> [17]. *It is undisputed that the plaintiff has sued the wrong party. Further, the plaintiff through Mr. Numanayawa's affidavit also acknowledges that the plaintiff should have sued Handyman's Outlet and not the defendant.*
>
> [18]. *In the said affidavit, it is stated that the court has the power to amend the defendant's name under the slip rule.*
>
> [19]. *The defendant submitted that the plaintiff should have sought the amendment by way of summons and affidavit in support, as required by Order 20 rule 5(3) and Order 32 rule 1.*

Order 20 rule 5(3) *reads:*

'An amendment to correct the name of the 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.'

[20]. *In light of the above section, an amendment to correct the name can be allowed even if the effect of the amendment will be to substitute a new party.* ***Hence, the plaintiff's failure to name the correct defendant in the statement of claim, in my view, is not an incurable defect and therefore should not render the statement of claim untenable. Thus, the plaintiff's action against the defendant shall not be struck out solely on that ground.****"* (Emphasis added)

29. In view of the above findings and conclusions in ***Palas Auto Services Ltd v Handymans Ltd*** *(Supra)* and pursuant to the legal matrix regarding an application for striking out under Order 18 Rule 18 (1) of the High Court Rules, this Court also conclude that the fact that the Plaintiff named a non-existent party, a business/trade name which cannot be legally sued in its name, in the Writ and the Statement of Claim, shall not necessarily mandate the striking out the Plaintiff's entire claim shutting his avenues for access to justice and in breach of the constitutional guarantees for a fair trial.

30. Having carefully considered the Plaintiff's Statement of Claim, I am of the view that the Plaintiff has a valid claim and that it has, in fact, genuinely intended the legal person which owned the business/trade name 'Nasese Medical Centre' to be named as a Defendant in this cause, instead of naming a non-existent party to the cause.

31. Other than the above legal issue, there are no other points argued by the Defendants in support of their application to strike out. Thus, it is the Court's considered view that the Defendants fail in their application to strike out the Plaintiff's claim.

32. Furthermore, the Court finds that the Plaintiff too is unsuccessful in convincing the Court that it can maintain its claim against the Defendants in its current style and form. It is therefore the conclusive finding of the Court that the Plaintiff must be compelled, in the exercise of the discretionary powers of this Court, to amend its Writ of Summons and the Statement of Claim to correct the name of the 1st Defendant to reflect on a duly existent party, i.e., the legal person which owned the business/trade name 'Nasese Medical Centre'.

33. Consequently, the Court makes the following orders,

1. The Summons to Strike Out as filed by the Defendants on 18/01/2024 is hereby refused and struck out subject to the following orders of the Court,

2. The Plaintiff shall, within 14 days from today (That is by 09/04/2025), file and serve an Amended Writ of Summons and Statement of Claim, amending the name of the 1st Defendant to include the correct name of the company which owns the business/trade name 'Nasese Medical Centre' and thereupon to include all ancillary changes to the Statement of Claim therein.

3. The Defendant shall, 14 days after (That is by 23/04/2025), file and serve a Statement of Defence to the Amended Statement of Claim.

4. The Plaintiff shall 07 days thereafter file and serve a Reply to Statement of Defence and the Summons for Directions (That is by 02/05/2025).

5. The Plaintiff shall pay a cost of $ 500.00 to the 2nd Defendant as costs of this application, as summarily assessed by the Court within 28 days from today (That is by 23/04/2025).

6. In failure to comply with the above orders as per orders no. 2 to 5, the defaulting parties pleadings shall stand struck out subject to a cost of $ 3000.00, as summarily assessed by the Court.

HIGH COURT OF FIJI
SUVA

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

At Suva,
26/03/2025.