IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 220 of 2020

BETWEEN : **SUMAN SHALINI DEVI** formerly of Razak Road, Lautoka, but now of 130 Kerrs Rod, Wiri Auckland, New Zealand, Resource Manager.

PLAINTIFF

A N D : **HAROON ALI SHAH** former Barrister and Solicitor of the High Court, was trading as **HAROON ALI SHAH ESQ** but now at Vuda Point, Lautoka.

DEFENDANT

Before : Master U.L. Mohamed Azhar

Appearance : Ms. V. Nettles for the plaintiff
Mr. S. Lutumailagi for the defendant

Date of Ruling: 18.10. 2023

RULING

01. The defendant brought the current summons pursuant to Order 18 rule 18 (1) (a) of the High Court Rules and inherent jurisdiction of this court and moved the court to strike out the Writ filed by the plaintiff and the statement of claim. The defendant also sought the costs on Solicitor/Client indemnity basis from the plaintiff. This summons does not require evidence and both counsel argued the summons and filed their respective legal submission.

02. 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)

03. 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".

04. 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'.

05. 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. 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 respectively. 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 rational is that, the access to justice should not, merely, be denied by glib use of summery procedure of peremptory striking out.

06. The courts to consider the allegations in the statement of claim to establish that the pleadings disclose no reasonable cause of action. 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".

07. The defendant had acknowledged the writ and the statement of claim of the plaintiff in this matter. However, he did not file the statement of defence, but filed the current summons. The only pleadings before the court is the statement of claim. According to the statement of claim, the plaintiff's late husband and his father namely, Mul Chand were the tenant in common of the Housing Authority Lease No.181198. After the death of the husband, the plaintiff became the tenant in common with her father in law. Certain differences arose between the plaintiff and her father in law – Mul Chand in relation to management of this property. This led the plaintiff to sue her father in law. The defendant in the matter before the court now, was the solicitor for the plaintiff in her suit against her father in law. In the meantime, the plaintiff and her father in law agreed to sell the property privately at a highest offer and finally, it was sold for $ 100,000.00. The remaining issue before the court in that proceedings was how much the plaintiff and her father in law should get from the sale proceeds. Judge Inoke decided that, the father in law of the plaintiff was entitled to $ 50,000.00 and ordered the plaintiff to pay the same to him with the cost of $ 1,000.00 from the sale proceeds held in the Trust Account of the defendant in this case, within 7 days.

08. The plaintiff claims that her share of $ 50,000.00 was also deposited to and held in the Trust Account of the defendant. However, the defendant who held the sale proceeds of the said property in his Trust Account failed and or neglected to release $ 50,000.00 to her, despite her several requests. The plaintiff claims that, the defendant's deliberate failure to release the said amount was fraudulent in nature and breach of the Trustees

Account Act 1996. It appears from the judgment of J. Inoke that, the sale proceeds were held in the Trust Account of the defendant.

09. Some serious allegations are raised in the statement of claim in relation to alleged failure to release the balance amount of the sale proceeds. The defendant, as stated above, did not file the statement of defence. The counsel for the defendant in the legal submission stated how the balance amount that was held in the Trust Account of the defendant was used to defray costs and other incidental expenses pertaining to transfer of the said property. However, the legal submission is not the pleadings. Even the same position is taken up in the Statement of Defence, it is going to be a denial of the plaintiffs claim. Even this position makes the plaintiff's claim weak and unlikely to succeed, still the court cannot strike out the plaintiff's claim.

10. 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.

11. 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."

12. Given the seriousness of allegations pleaded in the statement of claim, I am of the view that, this is not a plain and obvious case where the cause of action is plainly unsustainable. The allegations in the statement of claim warrant the trial of the matter. The court, in this matter, cannot exercise its power to strike out which is ought to be sparingly exercised. The summons filed by the defendant ought to be dismissed.

13. The next question is the costs for this application. The plaintiff claimed in the written submission that, the defendant abused the process by bringing this application. The law on striking out is very clear and the superior courts have clearly settled the law and stated that, the power should sparingly be exercised in plain clear cases where the cause of

action is plainly unsustainable. However, there has been a trend among the parties and their solicitors to file the summons for striking out in almost all cases. The attitude of parties and some solicitors, as it appears, that to file summons to strike out in the first place and to file the defence if the summons fails. This is a clear and blatant abuse of the process of the court. The court cannot condone this abuse which wastes limited resources of the court. This abuse must be deterred by imposing the costs on high scale.

14. In result, I make the following orders,

a. The summons filed by the defendant is dismissed, and

b. The defendant should pay summarily assessed costs in sum of $ 5,000 to the plaintiff within a month from today.

HIGH COURT OF FIJI
LAUTOKA

U.L Mohamed Azhar
Master of the High Court

At Lautoka
18.10.2023