

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

**Civil Appeal No HBC 23 of 2022**

**BETWEEN** : **TIKO NAULUMATUA** of Folesa Street, Samabula, Suva,  
Water-Work Fitter  
**PLAINTIFF/APPELLANT**

**AND** : **JOSAIA SADOLE** Team Leader, Fraud Risk Management  
Unit of Water Authority of Fiji  
**1<sup>st</sup> DEFENDANT/1<sup>st</sup> RESPONDENT**

**AND** : **WATER AUTHORITY OF FIJI** a commercial statutory  
authority established under section 5 of the *Water Authority*  
Act 2005 located at Manohan Building, corner of Caubati  
and Kings Road, Nasinu.  
**2<sup>nd</sup> DEFENDANT/2<sup>nd</sup> RESPONDENT**

**BEFORE** : **Banuve, J**

Appearances : Mr S. Kumar for the Plaintiff/Appellant  
Ms A.Matakaca for 2<sup>nd</sup> Defendant/2<sup>nd</sup> Respondent

Date of Hearing : 6<sup>th</sup> May 2024

Date of Ruling : 20<sup>th</sup> September 2024

# RULING

## A. Introduction

1. The Plaintiff/Appellant (hereinafter the Plaintiff) filed an **Inter Parte Summons** (For leave to appeal) on 28<sup>th</sup> March 2023 pursuant to Order 59, Rule 8(2), 9(a) and 11 of the *High Court* Rules 1988 and the inherent jurisdiction of the Court, for an order that:
  - (i) the Plaintiff be granted leave to appeal to the High Court of Fiji against the decision of the Honorable Acting Master, Ms. V. Lal in Civil Action No. 153 of 2020, which was orally pronounced on 16<sup>th</sup> March 2023 and hard copy of the same being given on the 20<sup>th</sup> day of March 2023, by which the Writ of Summons and Statement of Claim was found to be statute barred pursuant to section 4(1)(a) of the *Limitation* Act [Cap 35], and struck out the same wholly with cost summarily assessed at \$500 to the First Defendant and \$1,000 to the Second Defendant to be paid within 14 days.
  - (ii) there be a stay of execution and all other proceedings including enforcement of costs until the hearing and determination of this application for leave to appeal to the High Court.
  - (iii) the time for seeking such leave to appeal and giving notice of appeal be extended (if required)

AND FURTHER TAKE NOTICE that the grounds for the application for leave to appeal are:

### GROUND 1

That the Leaned Acting Master erred in law and in fact to fully consider and rule upon all the submissions made on behalf of the Plaintiff that has seriously caused prejudice to the Plaintiff.

### GROUND 2

That the learned Acting Master erred in law and fact in accepting the statute of limitation application when the Plaintiff's claim was a roll up claim and pleaded in his Writ of Summons and Statement of Claim, as he was finally cleared by the letter dated 5<sup>th</sup> November 2021 hence his time period begins to accrue after 5<sup>th</sup>

November 2021, relies on the statement of claim from paragraph 48 to 55 inclusive, it was when the Plaintiff wrote the demand letter for which service was accepted by the Defendants but for which they did not reply; *Boot v Boot*-Times Law Report, 9<sup>th</sup> May 1996 CA.

#### GROUND 3

That the learned Acting Master erred in law and fact in failing to act judiciously, by having a closed mind and being biased without reading the Statement of Claim in its entirety, thus the ruling which was delivered in contrary to the pleading filed in court and which has seriously prejudiced the Plaintiff.

#### GROUND 4

That the learned Acting Master erred in law and fact in coming to a decision so unreasonable that no reasonable Master would have delivered in the interest of justice in the given circumstances.

#### GROUND 5

That the learned Acting Master erred in law and fact when she failed to consider that defamation resulting from police and military investigation begins to run when the Plaintiff was cleared on 5<sup>th</sup> November 2021.

### **B. The Master's Ruling**

2. In an Ex-Tempore Ruling delivered on 16<sup>th</sup> March 2023, the Acting Master struck off the Plaintiff's Claim pursuant to Order 18, Rule 18(1)(a) of the *High Court Rules* 1988 for defamation, based on the Plaintiff attributing 3 publications, to the Second Defendant on 12<sup>th</sup> May 2013, 17-18<sup>th</sup> May 2013 and 27<sup>th</sup> May 2023. The Acting Master ruled that the cause of action was not for malicious prosecution, which accrued on 2<sup>nd</sup> November 2021, rather the cause of action was for defamation which accrued on 2013, therefore the Plaintiff's Claim filed on 6<sup>th</sup> May 2022, was statute barred pursuant to section 4(1) of the *Limitation Act* [Cap 35], and accordingly struck off, with costs.

### **C. The Plaintiff's case**

3. The Plaintiff asserts that there were serious errors of law and fact made by the learned Acting Master and the grounds of appeal for which leave is sought, are meritorious and raise serious questions of law which need to be addressed and are bound to succeed.

4. The relevant facts which the Plaintiff deposes in an affidavit filed on 28<sup>th</sup> March 2023 in support of the Summons for Leave to Appeal the Master's ruling, are summarized;
  - (i) The Plaintiff was an employee of the 2<sup>nd</sup> Defendant/Respondent and supervised by the 1<sup>st</sup> Respondent. After the 2<sup>nd</sup> Defendant was privatized and, despite signing a new contract, the Plaintiff was not given any work, necessitating him undertaking private work at Waidamudamu.
  - (ii) The Plaintiff, on behalf of settlers, wrote a letter to the Prime Minister on the difficulty they were facing, however he was taken in for questioning by the Police based at Nakasi Police Station, and later handed over to the Military, based on complaints lodged by the 2<sup>nd</sup> Defendant.
  - (iii) After investigation by the Military the matter reverted to the Police who, on 5<sup>th</sup> November 2021, confirmed that there was not enough evidence to charge the Plaintiff with obtaining financial advantage by deception.
  - (iv) With the assistance of his solicitors the Plaintiff sent a Demand Notice to the Defendants of his "rolled up" claim that despite his holding a valid water work fitter license No 3130 the applications made by his clients were unattended to, and the misleading and deceitful conduct of the 2<sup>nd</sup> Defendant impacted adversely on his personal and family life and that he also had a claim for unlawful death as personal injury.
5. The Plaintiff understands that his case is *akin to malicious prosecution* in that he was prosecuted by the 2<sup>nd</sup> Defendant in not recognizing his license to date and that the publications referred to were part of the *background* to the claim to portray the ill intent the Defendants had for him.
6. The Plaintiff's cause of action did not accrue until he was finally cleared of all allegations on 5<sup>th</sup> November 2021, and not from the date of the publications attributable to the 2<sup>nd</sup> Defendant in 2013, and the fact of defamation was only confirmed by the letter of 5<sup>th</sup> November 2021.

#### **D. The 2<sup>nd</sup> Defendant's Position**

7. The 2<sup>nd</sup> Defendant oppose the issues raised by the Plaintiff in support of the Summons seeking Leave to Appeal on the following grounds;
  - (i) The cause of action is not for defamation, rather he confusingly refers to defamation as similar (akin) to an action for malicious prosecution, with an additional claim for personal injury.
  - (ii) The claim by the Plaintiff against the 2<sup>nd</sup> Defendant is for defamation due to the articles published in the Fiji Sun on the 12<sup>th</sup>, 17 -18<sup>th</sup> and 27<sup>th</sup> of May 2013 and that these articles were not *background*, but rather were the material that the substantive cause of action for defamation was premised on.
  - (iii) The Plaintiff wrote an undated letter around 2015 to the 2<sup>nd</sup> Defendant claiming defamation of character, giving false preference, misleading the public, causing family harm, trauma and stress and seeking compensation of \$500,000. The 2<sup>nd</sup> Defendant in a letter dated 30<sup>th</sup> September 2015 entitled *Defamation of Character* responded to the Plaintiff's undated letter and reconfirmed its position with respect to messages sent out to the public.
  - (iv) The Plaintiff filed the Statement of Claim on 6<sup>th</sup> May 2022 after a lapse of a period of 9 years without seeking leave to file the claim out of time which severely prejudices the 2<sup>nd</sup> Defendant.
  - (v) The Plaintiff seeks damages as compensation for the defamatory information published

#### **E. The Law**

8. Pursuant to Order 59, Rule 8(2), no appeal shall lie from an interlocutory order or judgment of the High Court without the leave of a single judge of the High Court which can be granted or refused upon the papers filed.
9. The Inter Parte Summons for Leave to Appeal the Master's ruling was filed on 28<sup>th</sup> March 2023, in compliance with Order 59, Rule 11 of the *High Court Rules* 1988.

10. The Court affirmed in *Adish Narayan v Public Employees Union* –Civil Action No HBC 161 of 2009<sup>1</sup> that the approach governing interlocutory appeals to the Court of Appeal -*Kelton Investments Ltd v Civil Aviation Authority of Fiji* – Civil Appeal No ABU0034 of 1995,<sup>2</sup> applies also to interlocutory appeals to the High Court, from the ruling of the Master. The pertinent extract from the Court of Appeal ruling on which leave to appeal is granted or refused are well known and need not be recited, other than to summarize relevant parts;

- (i) *The legislature has evinced a policy against bringing interlocutory appeals except where the Court acting **judicially**, finds reason to grant leave (*Décor Corp v. Dart Industries Ltd* 104 ALR 621 at 623-lines 29-31)*
- (ii) *Leave shall not be granted as of course without consideration of the nature and circumstance of the particular case (per High Court in *Ex parte Bucknell* [1936] HCA 67; (1936) 56 CLR 221 at 224)*
- (iii) *There is material difference between an exercise of discretion on a point of practice or procedure and an exercise of discretion which determines substantive rights.*
- (iv) *Even “if the order is seen to be clearly wrong, this is not alone sufficient. It must be shown, in addition, to effect a substantial injustice by its operation” (per Murphy J in the *Niemann* case at page 441)*

11. For completeness, section 4(1)(a) of the *Limitation Act* [Cap 35] states;

4-(1) *The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say-*

*(a) actions founded on simple contract or on tort;*

## F. Pleadings

12. The Court notes that an issue of contention that the Master grappled with was the manner in which the Plaintiff pleaded his case;

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<sup>1</sup> per Inoke J

<sup>2</sup> per Tikaram JA President of the Court of Appeal

*“ The claim by the Plaintiff against the Defendants are for **defamation** due to articles published in the Fiji Sun on 12<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup> and 27<sup>th</sup> May 2023. According to the Plaintiff (see paragraphs 55 (a) in particular) the Defendant was the source of the false information, See also paras 23,29,30,31, 32, 34, 35, 36, 41,42, 49, 50, 51,52 of the claim.*

*The claim by the Plaintiff is not for **malicious prosecution**”*

13. The paragraphs from the Statement of Claim referred to by the Master in her ruling are summarized;

- (i) *The source of false information published in the Fiji Sun on 12<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup> and 27<sup>th</sup> May 2023 entitled “Authority warns of fraud case”, with the Plaintiff’s picture which impute in its ordinary and natural meaning that there was someone obtaining money with false pretense and illegally connecting water supply for customers, for payment.*
- (ii) *The publication further articulate that the Plaintiff was no longer employed by the 2<sup>nd</sup> Defendant and that it would not be liable for any transaction undertaken by the Plaintiff and his company, “Yaro Plumbing Works”, and that the words construed in their natural and ordinary meaning indicate that the Plaintiff was running a company with that name, when his actual company name was Viti Rotuma General Construction, and therefore depicting to the public that;
  - a. *He is a fraudster as he is issuing receipts under a wrong name;*
  - b. *He is deceiving people and obtaining moneys under wrong name ;*
  - c. *Whether he really had a license to operate, and*
  - d. *Whether his job is genuine?**
- (iii) *That the said publication in its natural and ordinary meaning was directed at the Plaintiff and that he was the man working at Waidamudamu Settlement who had been connecting domestic water connections for which he charges a fee and uses his own material, and people ought not give him money. The false publication has crippled the Plaintiff financially as people stopped giving him work, caused division in his family, has defamed him and cause irreparable damage.*

(iv) *The actions of the 2<sup>nd</sup> Defendant has defamed the Plaintiff, tainted his reputation, good name and character, ridiculed him in public and has lost his source of livelihood for which he seeks compensation and damages.*

14. The Plaintiff's cause of action as pleaded in his Statement of Claim is for defamation, or specifically slander affecting official, professional or business reputation, which refers to *words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of the publication.*<sup>3</sup>
15. The Plaintiff asserts that the cause of action for defamation was "**rolled up**"<sup>4</sup> with malicious prosecution, and did not accrue until the 5<sup>th</sup> day of November 2021, when the Police finally cleared the Plaintiff as a subject of criminal investigation. The Master ruled against the Plaintiff on this issue on 16<sup>th</sup> March 2022, and stated that the cause of action pleaded in the Statement of Claim was solely for **defamation**, and not malicious prosecution or presumably a synthesis of sorts. As the alleged defamatory statements were attributable to publications made in 2013, the cause of action was statute barred by section 4(1)(a) of the *Limitation Act* [Cap 35].
16. The Plaintiff seeks leave to appeal the interlocutory ruling of the Master of 16<sup>th</sup> March 2022, specifically challenging the decision of the Master of 16<sup>th</sup> March 2022, *that the Writ of Summons and Statement of Claim was statute barred pursuant to section 4(1)(a) of the Limitation Act [Cap 35] and struck out.* In the *Affidavit in Support of the Summons for Leave to Appeal*, the Plaintiff asserts that his case is *similar to the case of malicious prosecution, maliciously prosecuted indirectly by the 2<sup>nd</sup> Defendant in not recognizing the existence of my license thereby crippling me till date.*<sup>5</sup> *The publications was a part of the background to the claim.*<sup>6</sup>
17. Further, the Plaintiff confirms that as advised by his solicitor *he verily believes it to be true that the time period could not have accrued from the dates of publications at the time there existed a probability that the contents of the articles were true and/or justified which would thereby nullify any claims for defamation.*

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<sup>3</sup> Section 10-Defamation Act [Cap 34]

<sup>4</sup> See *Arora v State SC 2017 –CAV 033 of 2016*

<sup>5</sup> Paragraph 16

<sup>6</sup> Paragraph 17.



## G. Analysis

18. It is clear from the Amended Summons to Strike Out the Statement of Claim filed on 30<sup>th</sup> June 2022, and amplified in submissions that the 2<sup>nd</sup> Defendant construed defamation as the sole cause of action pleaded by the Plaintiff in the Statement of Claim, which ought therefore to have been filed within 6 years, in accordance with section 4(1)(a) of the *Limitation Act* [Cap 35], as the publications in question were issued in 2013. The Writ of Summons, was filed however on 6<sup>th</sup> May 2022, so clearly it fell afoul the statutory bar imposed by section 4(1)(a) of the *Limitation Act*.
19. The learned Master accepted the position expounded by the 2<sup>nd</sup> Defendant and accordingly struck off the Writ of Summons (and Statement of Claim) on 16<sup>th</sup> March 2023.
20. The practice adopted by the Plaintiff of pleading *defamation* in the Statement of Claim, on one hand, and raising *malicious prosecution*, in submissions and in affidavit evidence, on the other hand, prejudices the Defendants. As the Court of Appeal clarified in *The New India Assurance Company v FDB & Brightspot Fashions Ltd* –Civil Appeal No ABU 0075 of 2007S;  
  

*“Pleadings in civil cases are no mere technicality. They are fundamental to the administration of justice in relation to civil causes. They set out the position of the parties. They define the scope of the litigation. Pleadings identify with precision who is making the claim and who is said to be liable.”<sup>7</sup>*
21. The practice of ‘rolling up’ a charge is permitted, for example, under section 70(2) of the *Criminal Procedure Code* 2009, when a person is charged with any offence involving theft, fraud, corruption or abuse of office and the evidence points to many separate acts involving money, property or other advantage, it would be sufficient to specify a gross amount and the dates between which the total of the gross amount was taken or accepted. The offender is the same, the victim is the same and there is one offence, committed over a period of time. The evidence in relation to the elements of the offence would be essentially the same,

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<sup>7</sup> Paragraph 19 (per Hickie, Bruce, Khan JJA)

although committed over time and involving several transactions-*Prasad v State* [2020] FJHC 52; HAA9.2019.

22. The Court finds the Plaintiff's reliance on the practice of rolling up charges in this matter as problematic and is a practice utilized in criminal procedure to save time and effort. Assuming it has some application though, the Plaintiff's pleadings does not support such a practice, as will be illustrated. Further, no criminal charges were ever laid against the Plaintiff to warrant consideration of rolling up the charges, as prescribed in section 70(2) of the *Criminal Procedure Code* 2009.
23. In relation to pleadings the Defendants relied on the facts set out in the Statement of Claim filed, as establishing a cause of action only for defamation. It did not construe the pleadings as raising an alternate cause of action, such as malicious prosecution. The Master endorsed the position taken by the Defendants. The pleadings could not support an alternative cause of action given the manner in which it was drafted. In *Chand v Fiji Times Ltd & Wise* –Civil Appeal No CBV 0005 of 2009, the Supreme Court affirmed;

*“The objective of pleadings is to narrow the issues between parties and to limit the scope of the trial. However it is trite law that pleadings in a defamation case are in a special category and must be prepared with great care and scrutiny. The rationale for this difference of treatment is the recognition that libel and slander are committed primarily with the use of the words ...” A word is not crystal, transparent and unchanged ; it is the skin of a living thought, and may vary greatly in color and content according to the circumstances and the time which it is used”*

24. The Plaintiff did not plead malicious prosecution as a cause of action in the Statement of Claim, indorsed on the Writ of Summons, *rather* it was introduced in submissions and in affidavit evidence. It was **not pleaded**, (or at best not properly pleaded), in the Statement of Claim, and the manner it was introduced, prejudiced the Defendants.

*“A Statement of Claim is the first pleading in actions begun by writ and constitutes the document in which the Plaintiff formulates the factual grounds on which he bases his claim or the relief or remedy*

*which he seeks against the Defendant,”*<sup>8</sup>

25. The Acting Master rejected the approach taken by the Plaintiff and affirmed defamation as the sole cause of action “pleaded,” and struck it off as being time barred under section 4 (a) of the Limitation Act.
26. The Court endorses the finding of the Master that the primary cause of action pleaded by the Plaintiff was for defamation ,and cannot find fault with the decision to strike it off pursuant to Order 18, Rule 18 of the *High Court Rules* 1988.The pleadings were sufficient, to establish defamation and the Master’s ruling in striking off the Claim cannot therefore be faulted, because of the application of section 4(1)(a) of the *Limitation Act* [Cap 35]
27. It is pertinent to note on pleading practice that Defamation and Malicious Prosecution are distinct torts and the manner in which they are pleaded differ. Defamation, whilst pleaded, cannot subsist,<sup>9</sup> because it is statute barred.
28. Malicious Prosecution, as articulated in *Khan v Khan* –Civil Action No HBC 037 of 2011(per Tuilevuka J), has four elements which a plaintiff must establish;
  - (i) *that proceedings of the kind to which the tort applies (generally, as in this case, criminal proceedings) were initiated against the plaintiff by the defendant.*
  - (ii) *that the proceedings terminated in favor of the plaintiff*
  - (iii) *that the defendant, in initiating or maintaining the proceedings acted maliciously*
  - (iv) *that the defendant acted without reasonable and probable cause*
29. The kind of proceedings to which this tort applies are mostly of the kind which are *initiated by the filing of a criminal charge*. In an action for malicious prosecution the plaintiff must show first that he was prosecuted by the defendant, that is to say the law was set in motion against him, on a criminal charge. In *Khan*, a DVRO application was held not to be a criminal charge and the claim for damages based on it was struck off, on that basis.

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<sup>8</sup> Bullen & Leake and Jacobs “*Precedents of Pleadings*” (12<sup>th</sup> ed, at p51}

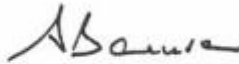
<sup>9</sup> Proving defamation would have been difficult, had it not been struck off, in either the ordinary/technical or innuendo meanings or indeed, if the publications bore the alleged defamatory meaning alleged whether the Plaintiff would have overcome the defence of justification-*Chand v Fiji Times Ltd & Anor* –Civil Action No 45 of 2007 (per Philips J)

30. The Plaintiff has not pleaded a case for malicious prosecution and certainly not satisfied requirement (i), as set out in the extract from the Khan case. No criminal charges were laid against the Defendant, rather investigations only were undertaken by the Military and the Police, and neither lead to the laying of criminal charges. It is doubtful, also, that requirements (iii) and (iv), would have been satisfied on the evidence, even if the tort had been correctly pleaded.
31. The Court finds that malicious prosecution could not subsist on the pleadings as an alternative cause of action to Defamation or 'rolled up' with it, as asserted by the Plaintiff.
32. The 1<sup>st</sup> Defendant did not actively participate in the interlocutory appeal, however no objections were raised by the Plaintiff on this issue. The Court has therefore taken the position that the 1<sup>st</sup> Defendant was acting at all relevant times as an employee of the 2<sup>nd</sup> Defendant and that the submissions made by the 2<sup>nd</sup> Defendant in this interlocutory appeal, was also made on its behalf. .
33. In summary, the Court finds that a claim for malicious prosecution (and indeed for defamation, albeit on different grounds) was unsustainable also, based on the pleadings filed by the Plaintiff and would have been struck off by the Master, as the Court did in Khan, if it had been warranted, on the pleadings.

**Finding:**

1. **The Inter Parte Summons (For Leave to appeal) filed on 28<sup>th</sup> March 2023 is struck off, in its entirety.**
2. **Parties to bear their own costs.**



  
Savenaca Banuve  
Judge

At Suva  
20<sup>th</sup> September, 2024.