

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. **HBC 146 of 2019**

BETWEEN: **BIJEND PRASAD RAM** a Medical Doctor and Company Director of
361 Waimanu Road, Suva.

1st Plaintiff

JOJI MALANI a Medical Doctor and Company Director of 361
Waimanu Road, Suva.

2nd Plaintiff

TROPICAL HEALTH INCORPORATED LIMITED a Limited
Liability Company of 361 Waimanu Road, Suva (Now in Liquidation).

3rd Plaintiff

AND: **FNPF INVESTMENTS LIMITED** of 33 Ellery Street, Suva.

1st Defendant

BANK OF BARODA a Government of India undertaking,
incorporated in India and carrying on its business in Fiji.

2nd Defendant

FIJI NATIONAL UNIVERSITY a corporate body established under
the Fiji National University Act of Fiji.

3rd Defendant

Appearances:

1st & 2nd Plaintiff: Mr Fa Jnr (Fa & Co).

3rd Plaintiff: No Appearance.

1st Defendant: Mr. Suguturaga (FNPF Legal Services Department).

2nd Defendant: Mr. R. Singh (Parshotam Lawyers).

3rd Defendant: Mr R. Prasad (FNU).

Date of Hearing: 7th October 2024.

Ruling

A. Introduction

[1] The 3rd Defendant filed summons to strike out. They have sought that the Plaintiff's statement of claim be wholly struck out and the action be dismissed on the grounds that:

- (a) It discloses no reasonable cause of action;

- (b) It is scandalous, frivolous and vexatious;
- (c) It is an abuse of the Court process;

The application is filed pursuant to **Order 18 Rule 18 of the High Court Rules 1988**. The summon is supported by an affidavit of Ravneel Chand. An affidavit in opposition of Joji Malani, the 2nd Plaintiff has been filed.

B. Background

- [2] On 16th May 2019 the Plaintiffs filed writ of summons seeking to enforce an unsigned deed of settlement that was discussed by the parties to the proceedings. The 3rd Defendant (FNU) had entered into a sale and purchase agreement with the 2nd Defendant (BOB) for the purchase of a property from the 2nd Defendant pursuant to a Mortgage sale and the 1st (FNPF) and the 2nd (BOB) Defendants would distribute the proceeds of the sale of the property between them pursuant to a Pari passu agreement.
- [3] The Plaintiffs instituted civil action no. 143 of 2014 against FNPF (1st Defendant) and BOB (2nd Defendant). FNU (3rd Defendant) instituted civil action no. HBC 302 of 2014 against the 1st and 2nd Plaintiff. The Fiji Nurses Association lodged a caveat against the said property to prevent any dealings. The parties to facilitate the transfer of the property to FNU (3rd Defendant) agreed to enter into a Deed of Settlement.
- [4] On 22nd February 2023, the Acting Master allocated the matter for trial. On 17th April 2023 the matter was set for trial on 25th and 26th September 2023. On 25th September 2023, which is the first day of trial Justice Amratunga noted “1). *Since all parties agree that there is a winding up order made on 6/12/2016 Section 531 of Companies Act applies to third Plaintiff. Accordingly, all proceedings including these proceedings cannot be continued by 3rd Plaintiff unless provisions in Companies Act are followed/complied. So, the claim of the 3rd Plaintiff is stayed. ...*” On 24th October 2023, Justice Amratunga further noted “*accordingly Section 531 of Companies Act applies to 3rd Plaintiff.*”
- [5] Justice Amratunga later recused himself. I was then allocated this matter.

C. The Law

- [6] **Order 18, Rule 18** of the High Court Rule provides as follows;

“(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that –

- (a) it discloses no reasonable cause of action or defence, as the case may be;*
- (b) it is scandalous, frivolous or vexatious;*
- (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).”

- [7] In **Radrodro v Church of Jesus Christ of Latter-Day Saints [2005] FJHC 694; HBC0204.2005L (11 November 2005)**, Justice Connors eloquently set out the law on Order 18 Rule 18 of the High Court Rules 1988, he said:

“The principles applicable to applications of this type have been considered by the Court on many occasions. Those principles include:

(a) A reasonable cause of action means a caution of action with some chance of success when only the allegations and pleadings are considered – Lord Pearson in Drummond-Jackson v British Medical Association [1970] WLR 688.

(b) Frivolous and vexation is said to mean cases which are obviously frivolous or vexatious or obviously unsustainable – Lindley LJ in Attorney General of Duchy of Lancaster v L.N.W. Ry [1892] UK Law Rep Ch 134; [1892] 3 Ch. 274 at 277.

(c) It is only in plain and obvious cases that a recourse should be had to the summary process under this rule – Lindley MR in Hubbuck v Wilkinson [1898] UK Law Rep Q.B. 176; [1899] 1 Q.B. 86.....”

D. The Submissions

- [8] The written and oral submission of the **3rd Defendant** (FNU) can be briefly summarised as follows:

(a) Plaintiff’s action discloses no reasonable cause of action –

The claim by the Plaintiff is baseless and has no reasonable cause. This is evident from trail of email exchanges between the parties contained in the affidavit in support of the 3rd Defendant filed on 12th April 2024. According to the 3rd Defendant there are no obligations on their part for the proposed payment to the plaintiff’s lawyers pursuant to the unsigned deed of settlement. The condition of the payment by the 3rd Defendant to the Plaintiffs lawyers was subject to the lodgment of the transfer in respect of the Title by the 2nd Defendant in favour of the 1st Defendant.

- [9] According to the 3rd Defendants, the Plaintiff’s lawyers have done nothing to remove the caveat. The caveat was removed by an order of the court and therefore the payment was invalidated. The 3rd Defendant is a bona fide purchaser of the property. Unresolved issues on VAT remained and the Plaintiff’s lawyers indicated withdrawing from the matter. The 1st Defendant had indicated that they would not be part of the discussion of the deed of settlement following the decision of the Board.

- [10] The general essence of the deed was that each party must do all things and execute all further documents necessary to give full effect to the deed. There was nothing done in terms of perfecting the terms of settlement and in particular the removal of the caveat by the court order perfected the transfer from the 2nd Defendant to the 3rd Defendant. There is no signed deed of settlement. No rights arises and no denial of right occurs, as per discussion in **Solanki v. New India assurance Company [2016] FJCA 81; ABU0042.2014**, a party is only bound if the agreement or deed of settlement is signed by the party.

[11] (b) *Scandalous, frivolous and vexatious actions* -

According to the 3rd Defendants the actions of the Plaintiffs are unsustainable and lack merit and therefore are tantamount to scandalous, frivolous and vexatious in nature.

[12] (c) *Abuse of Court Process* -

The 1st and 2nd Plaintiff's through their lawyer's commenced proceedings in their capacity as Directors of the 3rd Plaintiff. The 3rd Plaintiff being wound up. The Plaintiff's did not have locus to institute and commence in the name and on behalf of the 3rd Plaintiff and nor the 1st and 2nd Plaintiff by itself or by its lawyers without seeking leave of the court. That under Section 543 (1) (a) of the Companies Act the liquidator in winding up by the court has power to sanction either of the court or Committee of inspection to bring or defend any actions or other legal proceedings in the name and on behalf of the Company. The 3rd Defendant relied upon **Fiji Daily Post Company Limited v Westpac Banking Corporation [2018] FJHC 589; HBC 600.2005** and **Kartika Construction Plumbing Services PTE Limited v. Fiji National University [2023] FJHC 372; HBC 99.2022** where the court dismissed the Plaintiff's application to proceed with the action as the Provisional Liquidator did not institute the application in accordance with section 543 of the Companies Act 2015.

[13] The 3rd Defendants also submitted that applying Section 531 of the Companies Act to the 3rd Plaintiff did not automatically qualify or mean that the 3rd Plaintiff is struck out from the proceedings. It means that the 3rd Plaintiff's claim is stayed, which halts the action involving the 3rd Defendant unless procedures under the Companies Act are followed. Unless there is an explicit order striking out the 3rd Plaintiff, the stay simply suspends their participation in the proceedings. The failure to comply with Companies Act nullifies the proceedings.

[14] The submissions of the **1st Defendant (FNPF)** in brief are as follows:

They filed written submissions and support the application to strike out. There is no conclusion of the deed of settlement. No signed deed of settlement. No cause of action. Deed was to deal with two cases. Parties did not reach a conclusion. Issues about VAT. If parties willing to discontinue parties can bear own costs. The other civil action can be determined.

[15] The submission for the **2nd Defendant (BOB)** in brief are that:

They support the submission of the 3rd Defendant (FNU). The central question for the court is whether the court has power to enforce a deed in draft form without it being signed by the parties. The Plaintiff's to show that they have power. Support FNU's position. The Plaintiffs do not have leg to stand on. Plaintiffs wanting to enforce a deed of settlement in draft form.

[16] The submission for the **Plaintiff's** in summary is that:

(a) *No Reasonable Cause of Action*

The Plaintiff's cause of action is found in paragraphs 12-20 of the Plaintiff's Statement of Claim and is summarized as follows:

- (i) Whether an agreement was reached between the parties to the Deed of Settlement?
- (ii) Whether the Defendants breached the Agreement by refusing to be bound by the same?

[17] The particulars that gave rise to the agreement between the parties are at Paragraph 14 of the statement of claim. All defendants have filed their statement of defence. Their denials raise further issues for determination by the Court. The 3rd Defendant in paragraphs 10-12 of the defence confirm that the parties had entered into settlement discussions where essential terms of the agreement were agreed upon between the parties. It all needs to be tested in Court and determined by the court.

[18] (b) *Scandalous, frivolous or vexatious* –

The Plaintiff's claim does not fit the bill of being scandalous, frivolous or vexatious and that the Defendant's allegation of this is without merits. There are triable issues for the court to determine.

[19] (c) *Abuse of Court Process* -

The Plaintiffs have established a cause of action which seeks determination, it could therefore not be an abuse of process. It is the 3rd Defendant that is abusing the court process by filing a strike out application when trial was fixed.

E. Determination

[20] The first issue that I wish to address is the status or the locus of the 3rd Plaintiff. This action was commenced on behalf of Three Plaintiffs. The first two are individuals and the 3rd is a Company. The 3rd Plaintiff Company was wound up on 6th December 2016. One of the consequences of a winding up order by a court is that “*no action or proceeding must be proceeded with or commenced against the company, except by leave of the court and subject to leave of the court and subject to such terms as the court may impose.*” - **Section 531 of the Companies Act 2015**. Justice Amratunga on 25th September 2023 and 24th October 23 cited this section. On 25th September 2023, Justice Amratunga noted “*1. Since all parties agree that there is a winding up order made on 6/12/2016 Section 531 of Companies Act applies to Third Plaintiff. Accordingly, all proceedings including these proceedings cannot be continued by 3rd Plaintiff unless provisions in Companies Act are followed/complied. So, the claim of the 3rd Plaintiff is stayed. ...*”.

[21] The 3rd Defendants (FNU) lawyer has pointed out to 2 cases, namely, **Kartika Construction Plumbing Services Pte Ltd v The Fiji National University [2023] FJHC 372; HBC99.2023 (9 June 2023)** and **Fiji Daily Post Co Ltd v Westpac Banking Corporation [2018] FJHC 244; HBC600.2005 (28 March 2018)**. In the **Fiji Daily Post Co Ltd** (supra), Justice Alfred in interpreting Section 531 of the Companies Act stated at Para [9] that:

“I shall take it as Parliament's intention that it is obligatory to obtain the permission, consent or authority of the Court:

(a) To go on or to continue with legal action by the Company.

(b) Or to start legal action against the Company.

(See the Oxford Advanced Dictionary of Current English).”

And further in Para [13], his Lordship stated:

“The winding up order has the effect of dismissing the company’s directors and putting an end to their powers of management (see para 1044, Halsbury’s Laws of England, Fourth Edition Vol.7). It is the Provisional Liquidator who has to make the application to the Court for leave to continue with the instant action.”

[22] I endorse this view. It is the correct interpretation of Section 531 of the Companies Act. In simple terms, once a company is wound up it is the liquidator who must make an application to Court to proceed with or commence action against the company, by leave of the Court and subject to the leave of the Court. In this matter the 3rd Plaintiff has been wound up. Section 531 of the Companies Act requires the Liquidator to seek leave of the Court to commence proceedings. This has not been complied with. Section 531 is a mandatory provision. Failure to comply with a mandatory provision is fatal. The proceedings have been initiated in complete ignorance of Section 531 of the Companies Act.

[23] In **Kartika Construction Plumbing Services Pte Ltd** (Supra), Justice Amratunga dealt with the powers of the liquidator under Section 543 of the Companies Act. I endorse what he said in the following passages:

“9. In terms of said provision it is the liquidator who can institute “any action” on behalf of a company in liquidation, with the sanction of court or with “committee of inspection.”

10. There is no provision to institute an action by any person other than the liquidator in terms of Section 543 of Companies Act 2015 with the sanction of the court....

14. The power to institute any action on behalf of a company in liquidation lies fairly and squarely with the liquidator and cannot be delegated to law firm, and there is no provision in Companies Act 2005, to grant consent to institute action on behalf of company in liquidation to a law firm, by the liquidator.”

[24] The Companies Act gives power to the Liquidator for a company in liquidation to defend or commence a matter in court, for that leave of the court is required to commence proceedings. The liquidator cannot delegate its powers. It also follows that the Directors or a law firm cannot initiate action on behalf of a Company in liquidation.

[25] The 2nd Plaintiff in his affidavit in opposition averred in para 6 and 7 that Justice Amaratunga struck out the 3rd Plaintiff as a party to these proceedings. I have already quoted what Justice Amratunga stated in court. What he stated in court is that *“...all proceedings including these proceedings cannot be continued by 3rd Plaintiff unless provisions in Companies Act are followed/complied. So, the claim of the 3rd Plaintiff is stayed.”* Justice Amratunga did not strike out the 3rd Plaintiff from the proceedings. He stated that the claim of the 3rd Plaintiff is stayed. His Lordship also reminded that the Companies Act need to be followed. The 3rd Plaintiff cannot proceed with the claim unless the Companies Act is followed. This should have been done at the outset. By including the 3rd Plaintiff, the other Plaintiffs and their lawyer did not comply with the Companies Act. They are neither the liquidator nor do they have the powers of the liquidator. Leave of the court is another issue for the liquidator.

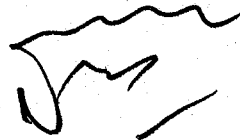
- [26] In **Radrodro v Church of Jesus Christ of Latter-Day Saints (supra)** where Justice Connors succinctly set out the principles of Order 18 Rule 18 as follows “... (d) *The purpose of the Courts jurisdiction to strike out pleading is two-fold. Firstly, is to protect its own processes and scarce resources from being abused by hopeless cases. Second and equally importantly, it is to ensure that it is a matter of justice, defendants are permitted to defend the claim fairly and not subjected to the expense inconvenience in defending an unclear or hopeless case.*”. I am mindful of this dictum and the sparing grant of strike out.
- [27] It is evident from the pleadings that the Plaintiffs initiated the matter seeking the Court to determine on an unsigned or an unexecuted deed. Part 2 of the Property Law Act 1971 provides for Deeds and other Instruments. Section 8 describes various types of Deeds and this includes Deed of Settlement. The formalities of a deed are set out in Section 4 (1) and it provides that “[e]very deed, whether or not affecting property, shall be signed by the party to be bound thereby, and shall also be attested by at least one witness not being a party to the deed, but no particular form of words shall be requisite for the attestation.” The word “shall” in section 4 (1) denote a mandatory action. In other words, the law states that a party that signs the deed is bound by it. An unsigned or unexecuted Deed is not recognized in law.
- [28] Paragraph 6 of the Affidavit in Support of Ravneel Chand states that “...*the claim of the Plaintiff be struck out on the basis that a global agreement to the Deed of Settlement was never reached by all parties and nor the Deed of Settlement was executed by any parties. A copy of the said Deed of Settlement is annexed and marked with the letter “RC2”.*” The response to paragraph 6 of Ravneel Chand’s affidavit is provided in the affidavit in opposition of Joji Malani. Paragraph 7 of Joji Malani’s affidavit states that “*I refer to paragraph 6 of the affidavit and admit the same. I am advised by my Solicitors and verily believe the same to be true that an agreement was reached between the parties and an agreement does not need to be executed to be enforceable. Now shown to me and marked as Annexure “B” is a copy of correspondences from Fa & Company to the Defendants dated 23.08.18 and 12.03.18.*” The affidavit in opposition is confusing and contradictory. The first part admits paragraph 6 of the affidavit in support of Ravneel Chand and then turns to say that an agreement was reached that an agreement does not need to be executed to be enforceable. Such affidavits do not assist the Plaintiff.
- [29] It is clear from the affidavits and the correspondences between the parties/lawyers that the Deed of Settlement was not executed. The Plaintiffs lawyers were adamant in their correspondences (Affidavit in opposition of Joji Malani - Annexure “C” – Letter from Fa & Co dated 23rd August 2018) that settlement discussions took place whereby an agreement had been reached and as a result of which a Deed of Settlement was drawn up and the terms were all agreed to by all parties. The trail of emails between the lawyers contained in the affidavit of Ravneel Chand as annexure “RC3” discussion about the Deed of Settlement and in particular I note that the issue of VAT remained unresolved. The Plaintiff’s assertion that they had reached an agreement is not reflected in the documents. Apart from that the Deed of Settlement was never signed or executed by any party. For the Deed of Settlement to be enforceable it had to be executed by all the relevant parties. An unexecuted Deed is unenforceable.
- [30] The Writ of Summons under the head of Cause of Action in Paragraph 14 refers to the essential terms of the Deed of Settlement. Perusal of these essential terms shows reference to the 3rd Plaintiff, a Company in liquidation. The reference in the claim to the Plaintiffs is reference to the 3rd Plaintiff, a Company in liquidation. A wound-up

Company whose participation in this matter required action of the liquidator and leave from the Court before it could be a party. The email exchanges shows that the parties discussed that the 3rd Plaintiff was in liquidation. Different views on them were exchanged. The unsigned or unexecuted Deed in annexure "RC2" shows the 3rd Plaintiff's references being crossed off.

- [31] On the material that is before me I find that the inclusion of the 3rd Plaintiff by the Plaintiffs is a nullity. They involved themselves in the discussions excluding the liquidator when discussing about a settlement. They completely ignored the Liquidator. The 1st Plaintiff, the 2nd Plaintiff and their lawyers have no authority over the 3rd Plaintiff. The 3rd Plaintiff's authority is vested in the Official Receiver since 6th December 2016. Any discussion involving the 3rd Plaintiff should have included the Official Receiver. I do not see them included in any discussion in the Deed of Settlement.
- [32] In **Solanki v. New India Assurance Company Limited [2016] FJCA 81; ABU 0042 of 2014 (3rd June 2016)**, cause of action is defined as "*...broad concept denoting the factual or legal basis out of which a claim arose. Cause of action has been defined in different ways in several jurisdictions and one of them appealing to me is its definition as the wrong for the prevention or redress of which an action may be brought, including the denial of a right, the refusal to fulfil an obligation, the neglect to perform a duty, and the infliction of an affirmative injury. Similarly, a cause of action arises when one has a right and there is a denial or violation of that right by another. Jurisprudentially, for someone to have a right there must be a corresponding duty or obligation on another.*"
- [33] A reasonable cause of action means a cause of action with some chance of success when only the allegations and pleadings are considered. I am of the view that the Plaintiffs can not bring an action seeking declarations on an unexecuted Deed of Settlement. The formalities of the Deed have not been complied with. Furthermore, the Plaintiffs did not have the powers to file the claim including a wound-up Company in breach of the Companies Act. They simply do not have the locus. The actions of the Plaintiffs and the filing of a claim lacking in merit is tantamount to being scandalous, frivolous and vexatious. It also is an abuse of the court process.
- [34] For the reasons given, I strike out the Plaintiff's Writ of Summons and the Statement of Claim. Each Defendant is entitled to costs which should be paid by the 1st and 2nd Plaintiff, which I summarily assess as \$2500.00. This is to be paid within 21 days.

F. Court Orders

- (a) The Plaintiff's Writ of Summons and the Statement of Claim are struck out.**
(b) The 1st and the 2nd Plaintiff are to pay each Defendant \$2500.00 as costs within 21 days. The costs have been summarily assessed.



Chaitanya S.C.A. Lakshman
Puisne Judge
18th October 2024

