

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

HBC No. 101 of 2014

BETWEEN : FIJI PEACEKEEPING & ACTION TRUSTEE ASSOCIATION an organisation that is registered under the Charitable Trust Act, Cap 67 of the Laws of Fiji to look after the welfare of former peacekeepers and soldiers.

PLAINTIFF

AND : MINISTER FOR HOME AFFAIRS or MINISTER OF DEFENCE AND SECURITY of 1st Floor New Wing, Government Buildings, Suva.

1ST DEFENDANT

AND : THE COMMANDER RELPUBLIC OF FIJI MILITARY FORCES of Queen Elizabeth Barracks, Nabua, Suva.

2ND DEFENDANT

AND : THE ATTORNEY GENERAL OF FIJI of 7th Floor, Suvavou House, Victoria Parade, Suva.

3RD DEFENDANT

BEFORE: Master Vishwa Datt Sharma
COUNSELS: Mr. Tevita V. Q. Bukrarau for the Plaintiff
Mr. Green for the Defendant.

Date of Hearing: 19th February, 2015
Date of Decision: 8th February, 2016

RULING

(Summons to Strike out the Plaintiff's Claim)
Res Judicata and Statute Barred

(A) INTRODUCTION

1. The Defendant filed and served a "Summons to strike out" the Plaintiff's Writ of Summons and the Statement of Claim on the following grounds that it-
 - (a) *Discloses no reasonable cause of action;*
 - (b) *Is scandalous, frivolous and vexatious; and*

(c) *It is otherwise an abuse of the process of the court.*

2. The application is made pursuant to *Order 18 Rule 18 (1), (a), (b) and (d) of the High Court Rules, 1988 and the Inherent Jurisdiction* of this Honourable Court.
The Defendant states that the matter is now statute barred and relies on *Section 4 of the Limitation Act*.
3. The Plaintiff opposed the Defendant's application and defended that the *Law of Res Judicata* does not apply in the within action and therefore the proceeding is not affected by the *Res Judicata Rule*.
4. Written submissions were filed by both Counsels to the proceedings and the matter was heard on 19th February, 2015.

(B) **BACKGROUND FACTS**

5. The predecessor of these proceedings is *Fiji Peace Keepers & Action Trust Association & Venasio M Komai & Others -v- Commander RFMF, Minister of Defence & Security & Attorney General, Civil Action No. HBC 0157 of 2002*.
6. This Action was filed on 11th April, 2002.
7. The Plaintiff's claim is based on a UN Security Council Resolution that encapsulates the agreement between the UN and the Government of Fiji. This agreement sets out the terms and conditions of Fiji's engagement in international peace keeping under the UNIFIL banner.
8. Upon this agreement the Government of Fiji Committed troops as part of the UNIFIL from June 1978 to March 2002. As part of the agreement the Plaintiff was supposed to be paid the following-
 - (a) Local allowance @ \$35 per day; and
 - (b) Field allowance of US \$1.28 per soldier per day.
9. The Plaintiff alleges that its members were under paid by the State.
10. A Notice to Show Cause was issued by the High Court Registry pursuant to *Order 25 Rule 9 of the High Court Rules, 1988* on the Plaintiff returnable on 25th August, 2010.
11. The Plaintiff's Counsel was not in attendance and the Court struck out the matter accordingly.
12. Subsequently, the Plaintiff chose to re-file the same claim (*Civil Action No. HBC 0157 of 2002*) on 07th April, 2014 as now pursued in this current action (*Civil Action No. 101 of 2014*), which is now the subject of this **Summons to Strike out the Plaintiff's Claim**.

(C) LAW

13. **Order 18 Rule 18(1) (a), (b) and (c) of the High Court Rules 1988** provides for as follows-

"18(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; 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."*

(D) DETERMINATION

14. The application before this court is filed by the Defendants seeking courts order to **Strike Out the Plaintiff's Writ of Summons and the Statement of Claim** pursuant to **Order 18 Rule 18(1) (a),(b) and (d) of the High Court Rules, 1988 and the Inherent Jurisdiction** of this Honourable Court.
15. The issues that need to be determined are as follows-
- (i) **Whether this proceeding discloses no reasonable cause of action, is scandalous, frivolous or vexatious and or otherwise an abuse of the process of the court?**
 - (ii) **Whether this proceeding is affected by the Res-Judicata Rule? AND**
 - (iii) **Whether this proceeding is now Statute Barred in Law?**
16. It is well established that jurisdiction to **strike out claim or pleadings** should be used very sparingly and only in exceptional case **Timber Resource Management Limited v. Minister for Information and Others** [2001] FJHC 219; HBC 212/2000 (25 July 2001).
17. In **National MBF Finance (Fiji) Ltd v. Buli** Civil Appeal No. 57 of 1998 (6 July 2000) the Court stated as follows:-

"The Law with regard to striking out pleadings is not in dispute. Apart from truly exceptional cases the approach to such applications is to assume that the factual basis on which the allegations contained in the pleadings are raised will be proved. If a legal issue can be raised on the facts as pleaded then the Courts will not strike out a pleading and will certainly not do so on a contention that the facts cannot be proved unless the situation is so strong that judicial notice can be taken of the falsity of a factual contention. It follows that an application of this kind must be determined on the pleadings as they appear before the Court...."

Reasonable Cause of Action

18. In **Razak v. Fiji Sugar Corporation Ltd** [2005] FJHC 720; HBC 208. 1998L (23 February 2005) his Lordship Justice Gates (current Chief Justice) stated as follows:-

"A reasonable cause of action means a cause of action with "some chance of success" per Lord Pearson in **Drummond-Jackson v British Medical Association** [1970] 1 All ER 1094 at p.1101f. 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.

Further in **Ratumaiale v Native Land Trust Board and Pacific Octopus Ltd** [2000] FJHC 250; [2000]1 FLR 287 the court stated that:

"It is clear from the authorities that the court's jurisdiction to strike out on the ground 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"

19. The Plaintiff's Claim is based on breach of the agreement by the Defendants that was executed between the UN and the Government of Fiji setting out the terms and conditions of Fiji's engagement in international peace keeping under the UNIFIL banner. Further, the Plaintiffs allege fraud and compulsory Acquisition of property by the Government at the expense of the members, which is unconstitutional.

20. The Plaintiff's Statement of Claim does plead a reasonable cause of action.

Frivolous or Vexatious

21. Frivolous and vexation is said to mean cases which are obviously frivolous or obviously unsustainable. The court will strike out a pleading on this ground if the claim, if known in law, is factually weak, worthless or futile. Reference is made to the Supreme Court Practice 1993, Vol. 1 (White Book) at paragraph 18/19/15 which states -

"By these words are meant cases which are obviously frivolous or vexatious or obviously unsustainable per Lindley LJ in **Attorney General of Duchy of Lancaster v. L. & N.W.Ry** [1892] 3 Ch. 274, 277;.... The Pleading must be "so clearly frivolous that to put it forward would be an abuse of the Court" (per Juene P. in **Young v. Halloway** [1895] P 87, p.90;"

22. The Plaintiff states that an agreement was executed between the UN and the Government of Fiji. They also allege fraud and compulsory Acquisition of property by the Government at the expense of the members, which is unconstitutional. This is yet to be determined by the court. The allegation that the plaintiff's claim is frivolous or vexatious is doomed to fail.

Scandalous

22. Reference is made to the Supreme Court Practice 1993, Vol. 1 (White Book) at paragraph 8/19/14 which states -

"The Court has a general jurisdiction to expunge scandalous matter in any record or proceeding (even in bills of costs, **Re Miller** (1884) 54 L.J.Ch. 205). As to scandal in affidavits, see O.41, r.6.

Further, the white Book Volume 1, 1987 Edition states as follows:

*"Allegations of dishonesty and outrageous conduct, etc., are not **scandalous**, it relevant to issue (Everett v Prythergch (1841) 12 Sim. 363; Rubery v Grant (1872) L.R 13 Eq. 443). 'The mere fact that these paragraphs state a **scandalous** fact does not make them **scandalous** ' (per Brett L.J. in Millington v Loring (1881) 6 Q.B.D 190, p. 196). But degrading charges be made which irrelevant, or if, though the charge be relevant, unnecessary details are given, the pleading becomes **scandalous** (Blake v Albion Assurance Society (1876) 45 L.J. CP 663)"*

23. This court is yet to determine whether the Plaintiff's Writ of Summons coupled with the Statement of Claim plead any dishonesty, bad faith, misconduct or outrageous conduct on the part of the defendant. Therefore it is too early and therefore cannot be said that the Plaintiffs Statement of Claim is **scandalous**. The allegation that the plaintiff's claim is **scandalous** is doomed to fail.

Abuse of Court Process

24. It is well settled that this Court has inherent jurisdiction to strike out the claim or pleadings for abuse of Court process, paragraph 18/19/18 of Supreme Court Practice 1993 Vol. 1. At paragraphs 18/19/17 and 18/19/18 of Supreme Court Practice 1993 (White Book) Vol. 1 it is stated as follows:-

"Abuse of Process of the Court"- Para. (1) (d) confers upon the Court in express terms powers which the Court has hitherto exercised under its inherent jurisdiction where there appeared to be "an abuse of the process of the Court." This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation (see Castro v. Murray (1875) 10 P. 59, per Bowen L.J. p.63). See also "Inherent jurisdiction," para.18/19/18."

"It is an abuse of the process of the Court and contrary to justice and public policy for a party to re-litigate the issue of fraud after the self-same issue has been tried and decided by the Irish Court (House of Spring Gardens Ltd. v. Waite [1990] 2 E.R. 990, C.A)."

"Inherent Jurisdiction - Apart from all rules and Orders and notwithstanding the addition of para.(1)(d) the Court has an inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of its process (see Reichel v. Magrath (1889) 14 App.Cas. 665). (para 18/19/18).

Res Judicata

25. Apart from the Defendant's **Striking out of the Plaintiff's Statement of Claim application**, the Defendant's in their written submissions have submitted that the Plaintiff has re- filed the same claim in order to re-litigate the issues arising out of the breach of the Agreement which was the subject matter of the **High Court Civil Action No. HBC 0157 of 2002** and relies on the principles of **res-judicata Rule** and that the **statement of claim** is now **statute barred**.
26. Therefore, apart from the Defendant's Summons to Striking out the Plaintiff's Writ and the Statement of Claim, the application also calls for the consideration of the principles of **estoppel** and **res-judicata** coupled with **section 4 of the Limitation Act**.

27. These doctrines are founded on a wider public interest aptly described in the Latin maxim; "*Nemo bebet big vexam pro una et eadem causa*" (No one ought to be twice vexed for one and the same cause') and "*Interest rei publicae ut sit finis litium*," (it is for common good that there be an end to litigation). The primary function of a court from its inception is to resolve disputes of parties which cannot be resolved by the parties mutually. On the functions of the court, I refer to *Niko John Wilson -v- Housing Authority & Ors Suva High Court Civil Action No. 412/2004*, in which His Lordship Mr Justice Winter at page 3 of the judgment aptly said :

"The rule of law requires the existence of courts for the determination of disputes and that litigants have a right to use the court for this purpose. Courts must also however, in my view, be alert to their processes being used in a way that results if oppression or injustice to any party. The court's authority possessed of neither the purse nor the sword ultimately rests on a sustained public confidence in its moral sanction. Anything that attacks confidence in that moral sanction is accordingly an abuse of process of the court's function. It is difficult for parties to maintain confidence in court rulings if those rulings are indirectly attacked in a court of concurrent jurisdiction".

28. The principle of **Res Judicata** as quoted in the case of **Nagan Engineering (Fiji) Ltd v. Raj** [2010] FJHC 47 stated-

*"A party who wishes to set up res judicata by way of estoppel must establish six ingredients according to *Spencer-Bower & Turner: The Doctrine of Res Judicata*, 2nd Edn., 1969, pp. 18,19-*

- (i) *"that the alleged judicial decision was what in law is deemed such.*
- (ii) *that the particular judicial decision relied upon was in fact pronounced, as alleged.*
- (iii) *that the judicial tribunal pronouncing the decision had competent jurisdiction in that behalf.*
- (iv) *that the judicial decision was final (my emphasis).*
- (iv) *that the judicial decision was or involved, a determination of the same question as that sought to be controverted in the litigation in which the estoppels is raised.*
- (vi) *that the parties to the judicial decision, or their privies, were the same persons as the parties to the proceeding in which the estoppels is raised, or their privies, or that the decision as conclusive in rem"*

29. The Plaintiff in their written submissions at paragraph 19 has answered the requirements of the abovementioned **six ingredients** as follows-

- (i) *'Yes, the Plaintiff in this action acknowledges the decision to strike out the Civil Action No. HBC 0157 of 2002 a judicial decision;*
- (ii) *Yes, the Plaintiff in this action acknowledges the decision relied upon was in fact pronounced on 25th August, 2010;*
- (iii) *Yes, the Plaintiff in this action acknowledges the decision is of a court exercising competent jurisdiction of the High Court;*

- (iv) The Plaintiff herein asserts that the decision was not final because the merits were not argued at that interlocutory stage;
- (v) The Plaintiff herein asserts that the decision where Civil Action No. HBC 0157 of 2002 involved the same questions as the one now before the court in this action. We further say that the matter was struck out for the non- appearance of the counsel for the Plaintiff in a Show Cause application moved by the court under Order 25 Rule 9. No arguments on the merits was hence ever made before the High Court. The same questions which were not determined in Civil Action No. HBC 0157 of 2002 are now re-filed in the present proceedings before the court; and
- (vi) The Plaintiff herein asserts that the decision involved the same parties albeit 1st and 2nd Defendants have exchanged places in the current proceedings.'

30. I make reference to the case of **Henderson v Henderson**(1843) 3 Hare 100 at 114-115[1843] EngR 917; , (1843) 67 ER 313 at 319 wherein Sir James Wigram V-C said :

'... I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of **res judicata** applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'

31. The scope of this doctrine, and its relationship to, and point of departure from, the doctrine of **res judicata** , was set out succinctly and with clarity by Lord Millet in **Johnson v Gore Wood & Co (a firm)** [2000] UKHL 65; [2001] 1 All ER 481 at 525-526, [2002] 2 AC 1 at 58-59:

'Sir James Wigram V C did not consider that he was laying down a new principle, but rather that he was explaining the true extent of the existing plea of **res judicata** ... Later decisions have doubted the correctness of treating the principle as an application of the doctrine of **res judicata** , while describing it as an extension of the doctrine or analogous to it. In *Barrow v Bankside Members Agency Ltd* [1996] 1 All ER 981, [1996] 1 WLR 257, Sir Thomas Bingham MR explained that it is not based on the doctrine in a narrow sense, nor on the strict doctrines of issue or cause of action estoppel. As May LJ observed in *Manson v Vooght* [1999] BPIR 376 at 387, it is not concerned with cases where a court has decided the matter, but rather cases where the court has not decided the matter. But these various defences are all designed to serve the same purpose: to bring finality to litigation and avoid the oppression of subjecting a defendant unnecessarily to successive actions ... the difference to which I have drawn attention is of critical importance. It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter (though not the former) is *prima facie* a denial of the citizen's right of access to the court conferred by the common law and guaranteed by art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969). While, therefore, the doctrine of **res judicata** in all its branches may properly be regarded as a rule of substantive law, applicable in all save exceptional circumstances, the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the court from abuse and the defendant from oppression. In

Brisbane City Council v A G for Queensland [1978] 3 All ER 30 at 36, [1979] AC 411 at 425 Lord Wilberforce, giving the advice of the Judicial Committee of the Privy Council, explained that the true basis of the rule in Henderson v Henderson is abuse of process and observed that it –

"ought only to be applied when the facts are such as to amount to an abuse, otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation."

'In so far as the so called rule in Henderson v Henderson suggests that there is a presumption against the bringing of successive actions, I consider that it is a distortion of the true position. The burden should always rest upon the defendant to establish that it is oppressive or an abuse of process for him to be subjected to the second action.'

32. As stated in Henderson's case (supra), the plea of **res judicata** applies, except in **special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation.** In the previous action brought by the plaintiff the court did not form an opinion and pronounce a judgment on pending substantive issues raised in the matter. The matter was struck out on an interlocutory application (Order 25 Rule 9 HCT Rules, 1988) and subsequently, the application to reinstate the case to list was withdrawn by the Plaintiff's Counsel since he chose to re-file the same case.
33. The **res judicata** related abuse of process does not provide an automatic bar to a successive action provided that it would not be abusive or oppressive to take that cause of action. The burden is on the party asserting abuse of process to establish it. The principles of **res judicata** will not apply to the current action before this court brought by the plaintiff. It would not be abusive or oppressive to bring this successive action against the defendant on the issues which were not already decided by the court.

Section 4 of the Limitation Act

34. **Section 4 of the Limitations Act (Cap 35) states as follows:**

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;*
 - (b) *actions to enforce a recognizance;*
 - (c) *actions to enforce an award, where the submission is not by an instrument under seal;*
 - (d) *actions to recover any sum recoverable by virtue of any Act, other than a penalty or forfeiture or sum by way of penalty or forfeiture;*

Provided that-

- (i) *in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under any Act or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years; and*
- (ii) *nothing in this subsection shall be taken to refer to any action to which section 6 applies.*

(2) An action for an account shall not be brought in respect of any matter which arose more than six years before the commencement of the action.

(3) An action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued:

Provided that this subsection shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.

(4) An action shall not be brought upon any judgment after the expiration of twelve years from the date on which the judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

(5) An action to recover any penalty or forfeiture, or sum by way of penalty or forfeiture, recoverable by virtue of any Act or imperial enactment shall not be brought after the expiration of two years from the date on which the cause of action accrued:

Provided that for the purposes of this subsection the expression "penalty" shall not include a fine to which any person is liable on conviction of a criminal offence.

(6) Subsection (1) shall apply to an action to recover seamen's wages, but save as aforesaid this section shall not apply to any cause of action within the Admiralty jurisdiction of the Supreme Court which is enforceable in rem.

(7) This section shall not apply to any claim for specific performance of a contract or for any injunction or for other equitable relief, except in so far as any provision thereof may be applied by the court by analogy in like manner as has, prior to the commencement of this Act, been applied.

35. Reference is made to the English Court of Appeal case of **Riches v. Director of Public Prosecutions [1973] 2 All ER 935** applies on its fours in this matter. In that case the Court held that:

When the statement of claim discloses that the cause of action arose outside the current period of limitation and it is clear that the defendant intends to rely on the limitation act and there is nothing before that Court to suggest that the plaintiff could escape from that defense, the claim will be struck out as being frivolous, vexation and an abuse of the process of the court."

"I do not want to state definitely that, in a case where it is merely alleged that the statement of claim discloses no cause of action, the limitation objection should or could prevail. In principle I cannot see why not. If there is any room for an escape from the statute, well and good, if it can be shown. But in the absence of that, it is difficult to see why a defendant should be called on to pay large sums of money and a plaintiff be permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which has already been barred by the statute of limitation and must fail ..."

The object of RSC Ord 18, r 19 (which is equivalent to our O.18, r 18) is to ensure that defendants shall not be troubled by claims against them which are bound to fail having regard to the uncontested facts. One of the uncontested set of facts which arises from time to time is when on the statement of claim it is clear that the cause of action is state barred and the defendant tells the court that he proposes to plead the statute and, on the uncontested facts, that is no reason to think that the plaintiff can bring himself within the exceptions set out in the Limitation Act 1939. In those circumstances it is pointless for the case to go on so that the defendant can deliver a defense. The delivery of the defense occupies time and wastes money; and even more useless and time-consuming from the point of view of the proper administration of justice is that there should then have to be a

36. In the present case, the Cause arose between **June 1978 and March 2002**. The Writ of Summons together with the Statement of Claim was filed on **07th April, 2014**; twelve (12) years after the cause of action arose.
37. This court does not have the **jurisdiction** to determine this case in terms of *section 4 of the Limitation Act Cap 35* since it has been filed outside the Limitation period and is therefore **statute barred in law**.
38. I make the following Orders.

ORDERS

- A. The principles of res judicata will not apply to the current action.
- B. The Plaintiffs Claim is now Statute Barred in terms of the Limitation Act Cap 35 and struck out accordingly.
- C. Defendants Summons seeking an order to strike out the Plaintiffs Writ of Summons together with the Statement of Claim is hereby struck out.
- D. The Plaintiff to pay the Defendants a sum of \$1000 costs within 28 days.

Dated at Suva this 8th day of February, 2016




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MR VISHWA DATT SHARMA
Master of High Court, Suva