

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

**Civil Action No. HBC 228 of 2016**

**BETWEEN:**                    **GOVIND SAMI PADAYACHI**

**First Plaintiff**

**NARSA REDDY**

**Second Plaintiff**

**AND:**                            **DAMENDRA AMAS GOUNDER**

**First Defendant**

**KUMAR SAMI GOUNDER**

**Second Defendant**

**SOM PADAYACHI**

**Third Defendant**

**SAIENDRA KUMAR**

**Fourth Defendant**

**PRAGDISHWARAN GOUNDER**

**Fifth Defendant**

**VIJAY NARAYAN**

**Sixth Defendant**

**MUNI KAMLESH NAIDU**

**Seventh Defendant**

**THEN INDIA SANMARGA IKYA SANGAM**

**Eighth Defendant**

**Before:** **Hon. Justice Kamal Kumar**

**Counsel:** Mr D. Sharma & Ms G. Fatima for Plaintiffs  
Ms S. Naidu for First to Fourth, Sixth, Seventh Defendants  
No Appearance for Fifth Defendant  
Mr R. Naidu and Ms B. Khatri for Eighth Defendant

**Date of Hearing:** 12 June 2018

**Date of Ruling:** 28 September 2018

---

**RULING**

**(Application for Leave to Appeal and Stay of Proceedings)**

---

**1.0 Introduction**

1.1 On 3 April 2018, Eighth Defendant filed Notice of Motion seeking following Orders:-

- “1. *It may be granted leave to appeal to the Fiji Court of Appeal from the interlocutory ruling of his Lordship Justice Kamal Kumar, delivered on 9 March 2018 wherein the Court dismissed the Eighth Defendant’s application to strike out prayers C and D, filed on 11 April 2017 (Striking out Ruling);*
2. *The time for bringing such appeal be extended by 7 days from the date on which the order granting leave may be made and*

3. *That these proceedings be stayed pending the outcome of the appeal;*
4. *The costs of this Motion be costs in the cause and*
5. *As the Court otherwise deems just.”* **(“the Application”)**

1.2 On 25 April 2018, Plaintiffs and Eighth Defendant were directed to file Affidavits and Submissions by 11 June 2018, and the Application was adjourned to 12 June 2018, at 2.30pm for hearing.

1.3 Application was heard on 12 June 2018, when parties made Oral Submissions mostly relying on Submissions filed in Court and the Appeal was adjourned for Ruling on notice.

1.4 Following Affidavits were filed by Eighth Defendant and Plaintiffs:-

#### **Eighth Defendant**

- (i) Affidavit of Sadasivan Naicker sworn and filed on 3 April 2018 (**“Naicker’s 1<sup>st</sup> Affidavit”**);
- (ii) Affidavit of Sadasivan Naicker sworn on 21 May 2018 and filed on 22 May 2018 (**“Naicker’s 2<sup>nd</sup> Affidavit”**).

#### **Plaintiff**

Affidavit in Opposition of Govind Sam Padayachi sworn and filed on 18 May 2018 (**“Padayachi’s Affidavit”**).

## **2.0 Application for Leave to Appeal**

2.1 Section 12(2)(f) of the Court of Appeal Act 1949 provide as follows:-

*“12-(2) No appeal shall lie-*

*(a) ....*

*(b) ....*

*(c) ....*

(d) ....

(e) ....

(f) *without the leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge of the High Court, except in the following cases, namely ....”*

2.2 It is well settled that Striking Out Application is Interlocutory. **Gounder v. Minister for Health** [2008] FJCA 40; ABU0075.2006S (9 July 2008).

2.3 The principle in dealing with Appeals against interlocutory orders has been stated in **Gosai v. Nadi Town Council** [2008] FJCA 1.ABU116.2005 (22 February 2008) as follows:-

“28. *APPEAL ON INTERLOCUTORY DECISION*

*In coming to the decision that the appeal should be refused, the Court has also had reference to the High Court’s decision in **Heffernan v. Byrne and Ors** HCF Civil Action No. HBM 105 of 2007 (19 February 2008). There, in refusing leave to appeal against an interlocutory decision, His Lordship set out a comprehensive collocation of the authorities, referring to **Kelton Investments Limited an Tappoo Limited v. Civil Aviation Authority of Fiji and Motibhai & Company Limited** [1995] FJCA 15, ABU 0034d.95s; **Edmund March & Ors v. Puran Sundarjee & Ors** Civil Appeal ABU 0025 of 2000; and **KR Latchan Brothers Limited v. Transport Control Board and Tui Davuilevu Buses Limited** Civil Appeal No. 12 of 1994 (Full Court).*

29. *As His Lordship observed, in Edmund March & Ors this Court said:-*

*As stated by Sir Moti Tikaram, President Fiji Court of Appeal in **Totis Incorporated, Sport (Fiji) Limited & Richard Evanson v. John Leonard Clark & John Lockwood Sellers** (Civ. App. No. 33 of 1996 p. 15):*

*It has long been settled law and practice that interlocutory orders and decisions will seldom be amenable to appeal. Courts have repeatedly emphasized that appeals against interlocutory orders and decisions will only rarely succeed. The Fiji Court of Appeal has consistently observed the above principle by granting leave only in the most exceptional circumstances.*

30. Further, as His Lordship also noted, in **KR Latchan Brothers Limited** a Full Court of Appeal (Tikaram, Quillam and Savage JJ) said:

*... The control of proceedings is always a matter for the trial Judge. We adopt what was said by the House of Lords in **Ashmore v. Corp. of Lloyd's** [1992] 2 All ER 486-*

*Furthermore, the decision or ruling of the trial judge on an interlocutory matter or any other decision made by him in the course of the trial should be upheld by an appellate court unless his decision was plainly wrong since he was in a far better position to determine the most appropriate method of conducting the proceedings.”*

- 2.4 Before dealing with the Application it is appropriate to deal with Preliminary issue raised by Plaintiffs Senior Counsel in that the Eighth Defendant should have sought leave and filed appeal before the expiration of twenty-one (21) days of Ruling and not file Application for Leave to Appeal on the twenty-first day.

- 2.5 Rule 16 of the Court of Appeal Rules 1949 provide as follows:-

“16. Subject to the provisions of this Rule, every notice of appeal shall be filed and served under Rule 15(4) within the following period (calculated from the date on which the judgment or order of the court below was pronounced), that is to say:-

- (a) in the case of an appeal from an interlocutory order, 21 days;

(b) *in any other case, 6 weeks.*”

- 2.6 This Rule makes it clear that leave must be obtained and appeal filed within twenty-one (21) days.
- 2.7 It is clear that Eighth Defendant failed and/or neglected to file Leave Application prior to expiry of twenty-one (21) days but did on the twenty-first day.
- 2.8 It is therefore held that Eighth Defendant has failed to comply with Rule 16 of Court of Appeal Rules.
- 2.9 Court of Appeal in **Habib Bank Limited v. Ali’s Civil Engineering Ltd & Ors.** Civil Appeal No. ABU 7 of 2014 (20 March 2015) in dealing with Application for Leave to Appeal Out of Time commented that Application for Leave to Appeal must be filed within twenty-one days.
- 2.10 Court of Appeal in **Habib Bank** case commented that Application for Leave to Appeal must be filed within twenty-one days and not on twenty-first day.
- 2.11 To file Application for Leave to Appeal on twenty-first day when Rule 16 of Court of Appeal Rules require the Appellant to file **“Notice of Appeal”** and as such Applicant filing Application for Leave to Appeal on twenty-first day is clear abuse of Court process.
- 2.12 For clarification the High Court Rules in respect to appeal from interlocutory decision of Master clearly provides as follows:-

***Order 59 Rule 8(1)(2):***

*“No appeal shall lie from an interlocutory order or judgment of the Master to a single judge of the High Court without the leave of a single judge of the High Court which may be granted or refused upon the papers filed.”*

***Order 59 Rule 11:***

*“Any application for leave to appeal an interlocutory order or judgment shall be made by summons with a supporting affidavit, filed and served within 14 days of the delivery of the order or judgment.”*

- 2.13 Hence, unless and until Court of Appeal Rules are amended in line with rule for appealing interlocutory decision of Master, Appellants should obtain Leave and file Notice of Appeal within twenty-one days of the interlocutory decision.
- 2.14 Even though this Court is of the view that Application is out of time, this Court will consider the grounds of appeal for sake of completeness and to avoid unnecessary delay.
- 2.15 Eighth Defendant will need to establish that this Court exercised its discretion in respect of striking out the Originating Summons was plainly wrong and there are exceptional circumstances which justify granting of leave.

#### **Grounds 1 and 2**

- 2.16 Eighth Defendant submitted that this Court held that the Originating Summons produced by the Plaintiff during course of the hearing “was unconditionally accepted by Sangam and/or the Sangam accepted that it is now fully particularized.”

Nowhere in the Strike Out Ruling this Court stated that Eighth Defendant “unconditionally” accepted the Originating Summons.

- 2.17 This Court had considered Eighth Defendant’s Submission when it exercised its discretion not to strike out prayers C and D.

- 2.18 Plaintiffs submitted that:-

*“(a) In the said Ruling, at paragraph 3.5, Justice Kumar correctly ruled that the 8<sup>th</sup> Defendant had submitted that the Amended Originating Summons filed by the Plaintiffs did not clearly state the prayers sought under Prayer C and D and grounds for such prayers.*

- (b) *Also in paragraph 3.5, Justice Kumar correctly ruled that Counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup> Defendants supported the 8<sup>th</sup> Defendant’s submission that the Originating Summons did not clearly state the grounds for Prayer C and D.*
- (c) *In paragraph 3.6, the Learned Judge correctly ruled that **by consent of the parties**, the Plaintiffs amended the Originating Summons by filing the Proposed Further Amended Originating Summons and that Counsel for the 8<sup>th</sup> Defendant had conceded that the objection raised in 50(a) above did not arise anymore. What was there to consider after the 8<sup>th</sup> Defendant had agreed to the particulars provided in the latest amendment to the Originating Summons? Leave of the Court was also granted and stated as such on the Amended Application.*
- (d) *The issues giving rise to Prayers C and D are interconnected and disclose reasonable causes of action.”*

There is nothing stopping Eighth Defendant to raise any issues it has in respect to prayers C and D of the Further Amended Originating Summons if it wishes to do so at the substantive hearing.

### **Ground 3**

**“The Learned Judge erred in fact by declaring that the 8<sup>th</sup> Defendant had not adduced any evidence in the Lautoka High Court Action.”**

2.19 Eighth Defendant submits that this was the reason for the Court to conclude that Prayers C to F should not be struck out.

2.20 Plaintiffs submitted as follows:-

- (a) *This ground of appeal is entirely misconceived. The Learned Judge has not stated in the Ruling that the 8<sup>th</sup> Defendant has not adduced any evidence pertaining to the Lautoka High Court Action.*
- (b) *What the Learned Judge has stated is that the 8<sup>th</sup> Defendant, in its Application to strike out Prayer C contends that the issue in Prayer C has*

*been dealt with in the Lautoka High Court Action and if it remains part of the Plaintiff's Originating Summons, then it would burden the 8<sup>th</sup> Defendant to assemble relevant evidence once again and argue again issues which have been dealt with and continue to be dealt with in the on-going Lautoka High Court Action.*

*(c) The Learned Judge in paragraph 3.15 correctly ruled that since the Lautoka High Court action was settled at a very early stage when subject proceedings were commenced, resulting in Consent Orders being filed by parties, what evidence would the 8<sup>th</sup> Defendant have assembled for the action and what issues the 8<sup>th</sup> Defendant have dealt?*

*(d) The Learned Judge correctly analysed the timeframe within which proceedings in the Lautoka High Court were commenced and Consent Orders were filed. Considering this, the Learned Judge has contemplated what evidence would the 8<sup>th</sup> Defendant need to reassemble. Is it substantial evidence that cannot be located or will take time to assemble."*

2.21 This Court accepts Plaintiffs submission that this ground is misconceived as Court is very much aware from previous interlocutory applications filed in Court that Eighth Defendant filed Affidavit in Lautoka Action which it filed as Plaintiff.

2.22 This Court dealt with that matter in holding that prayers in the Further Amended Originating Summons is not frivolous or vexatious.

#### **Ground 4**

**"The Learned Judge erred in law and fact by holding Consent Orders in the Lautoka Court to be ineffective and in holding so, pre-determining part C of the Originating Summons."**

2.23 Eighth Defendant submits that:-

*"18. Ground 4(a) touches on an inaccuracy in the Striking Out Ruling, to the extent that the Court mis-states what is previously said [refer Ground 4(a) for the specifics of this].*

19. *The serious issues arising from Ground 4(b) are summarized at paragraph 4(a) above. Sangam is entitled to ask the Fiji Court of Appeal to set aside the finding in paragraph 3.16 (adopted in paragraph 3.24), so that the Court is required to approach with an open mind the meaning and effect of the Consent Orders.”*

2.24 Plaintiff submits that:-

*“63(a) The Learned Judge has not pre-determined Prayer C of the substantive application. Consent Orders made in Lautoka High Court Action resulting in discontinuance and striking out by the 8<sup>th</sup> Defendant only dealt with pressing issues relating to the 8<sup>th</sup> Defendant’s AGM, i.e. date for AGM, membership approvals, nominations of candidates, prohibition on creating new or amending existing AOA, until successful appointment of office bearers after the AGM.*

*(b) At no time did the Consent Order deal with the validity of the interim committee. This matter was not disposed off by virtue of parties having entered into Consent Orders. There was no Order made by the Court declaring the interim committee null and void.*

*(c) Furthermore, it is evident and undisputed that the AGM which was scheduled to take place on 26<sup>th</sup> August 2016, as per Consent Orders, did not take place, thereby rendering the “Consent Orders ineffective and **resurrecting** issues in respect to [the] interim committee”.*

*(d) The Learned Judge clearly has not pre-determined Prayer C by ruling that by virtue of the Consent Order being ineffective, the issue pertaining to the interim committee has been resurrected. At no place in the Ruling has the Learned Judge decided on the validity of the interim committee, which is what Prayer C is seeking.”*

2.25 That finding has not been appealed and such still stands.

- 2.26 This Court also takes note of the fact that crux of the Consent Order in Lautoka Action was for Eighth Defendant to have its AGM on 26 August 2016 and that its membership for that AGM remains the same as at date of 28 May 2016.
- 2.27 It is undisputed fact that AGM of 26 August 2016, was stopped mid-way by Fiji Police Force and soon after the Consent Order in Lautoka Action, some members who were members as at 28 May 2016, had been suspended.
- 2.28 So, one then asks is what is the effect of the Consent Order?
- 2.29 Also it was the Eighth Defendant who raised the issue of the Consent Order when Striking Out Application was heard.
- 2.30 At paragraph 9 of Damend Amas Gounder's (First Defendant) Affidavit sworn on 7 May 2018, and filed on 8 May 2018, in respect to substantive proceedings it is stated as follows:-

*"9. This Affidavit is made without prejudice to my rights to argue that the issues dealt with and resolved in proceedings in the Lautoka High Court cannot be subject of adjudication before this Honourable Court."*

- 2.31 This paragraph is evident of the fact that Defendants were not shut out from raising the res-judicata issue during the hearing of the substantive matter.

#### **Ground 5 and 6**

**"The Learned Judge erred in law and fact by stating that only prayer C was being re-litigated when the Defendant's had submitted that prayers C, D and E were being litigated.**

**The Learned Judge erred in law and in fact by concluding that it was not I dispute that issues raised in the Lautoka High Court Action had not been determined due to the Consent Order and in having concluded so, failed to apply the principle of res judicata."**

- 2.32 Eighth Defendant, Appellant submits that:-

- “20. This ground raises important issues about Sangam’s arguments that Prayers C-E merely re-litigate issues in the Lautoka Action which are *res judicata*.
21. Sangam argued in its written and oral submissions that prayers C, D and E (as proposed were being re-litigated and should therefore be struck out. However the Court appears to have:
- (a) recorded Sangam [at paragraph 3.22] arguing that this was the case only for Prayer C.
  - (b) accordingly not applied itself to the question of whether prayers D and E were also being re-litigated.

*This is important, given the scant attention paid in the Striking Out Ruling to the issues of res judicata and extended res judicata [refer below].*

22. The question of *res judicata* is fundamental to these proceedings, which is why it was central to the striking out application. If this Court is being asked to decide matters which have been explicitly or implicitly decided in other proceedings, Sangam may be left in the impossible legal position described in paragraph 5(c) above, where it is bound by two different court orders in respect of the same subject matter. It is a fundamental doctrine of all courts that there must be an end of litigation.
23. Extensive submissions were made to the Court by the Defendants on the question of *res judicata* and that *res judicata* applied equally to consent orders as to orders made upon a judgment in contested proceedings. These included reference to the following authorities [not a comprehensive list]:
- (a) *Henderson v Henderson* (1843) Hare 100
  - (b) *Kento (Fiji) Limited v. Naobeka Investment Limited & Anor.* [2017] FJHC 671 (Civil Action No. HBC 100 of 2012) (12 September 2017)
  - (c) *Grenhalgh v. Mallard* [947] 2 ALL ER 255
  - (d) *Bradford & Bingley Building Society v Seddon* [1999] 4 ALL ER 217
  - (e) *Kelly v Fiji Development Bank* [2004] FJHC 526

- (f) *Port of Melbourne Authority v Anshun* [1981] HCA 45; 147 CLR 589
  - (g) *Chief Registrar v Khan* [2010] FJLSC 14
  - (h) *Ledua v Colonial Fiji Life Limited* [2008] FJHC 363
  - (i) *Parker v Lewis* (1873) LR 8 Ch App 1056
  - (j) *Re Trawl Industries of Australia Pty Limited [and others]* [1992] FCA 272
  - (k) *Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand v Kotevich* [2014] NSWSC 1215.
24. *All of these are authorities in support of various propositions in respect of res judicata and extend res judicata, including consent orders and including in circumstances where different parties were involved but were bound by relationships of privity.*
25. *Despite this, the only basis on which the Court found that res judicata did not apply was its statement (at paragraph 3.23) that It is not in dispute that issues raised in Lautoka Action [have] not been determined due to the [Consent Order] when:*
- (a) *that statement is incorrect in fact. The parties argued at length about whether or not consent orders were determinative of the issues;*
  - (b) *even if the meaning of this statement was that the issues raised had not been judicially considered, it is clear on the authorities above that this does not prevent a consent order having effect in the same manner as an order made on contested judgment.*

*No reference was made in the Striking Out Ruling to the above authorities or why they should not be followed. No alternative authorities were cited or discussed which would suggest that the above authorities were not on point. On an issue as fundamental as this, it is respectfully submitted that it would be appropriate, in the Striking Out Ruling, for reasons to be given for not following those authorities - or for the authorities to at least be considered in the ruling.”*

2.33 Plaintiffs at paragraph 64 of their Submission dated 12 June 2018 submit as follows:-

*“64(a) In paragraph 15 of the SN Affidavit in Support on the 8<sup>th</sup> Defendant’s Motion, which has been filed on 3<sup>rd</sup> April 2018, the deponent appears to be misguided as to what exactly was resolved in the Lautoka High Court Action which resulted in Consent Orders being made. The deponent says at paragraph 15 that if indeed the Consent Orders were ineffective, then all issues in the Lautoka High Court Action are re-opened as a result of the Learned Judge’s Ruling.*

*(b) What the deponent does not appear to understand is that when the matter was first instituted by way of the Lautoka High Court Action, the Court had not deliberated upon or decided any issues raised by the parties. The Court had simply entered Consent Orders after parties agreed to enter into Terms of Settlement.*

*(c) The matters raised in Prayers C and D are substantially difference from those raised in the Lautoka High Court Action. Prayers C and D in the Plaintiff’s Originating Summons in these proceedings does not cause any multiplicity of actions.*

*(d) Prayers C and D largely deal with the interests of the members of the 8<sup>th</sup> Defendant’s, enable the 8<sup>th</sup> Defendant to be fully functioning until a proper and procedurally correct AGM has been held and in which office bearers are legitimately and democratically appointed. In addition to this, Prayers C and D also protects the freedom of members to choose their choice of candidate, as well as members who are wrongly suspended to be able to stand for elections.”*

2.34 This Lautoka Action was instituted by Eighth Defendant in respect to the meeting held on 29 May 2016 after the scheduled Annual General Meeting of the Eighth Defendant was called off a day prior to the AGM.

- 2.35 Payers D, E deals with suspension of members and AGM that was to be held on 29 May 2016 which are not subject to Lautoka Action and as such is open for litigation in this proceedings.
- 2.36 In respect to issue of Res-Judicata, this Court did take into consideration Submissions made by Counsel of Eighth Defendant and Counsel for First to Fourth, Sixth and Seventh Defendants in exercise of its discretion as to whether to strike out the Further Amended Originating Summons.
- 2.37 There is nothing stopping the Defendants as is stated in Damendra Gounder's Affidavit and quoted at paragraph 2.31 of this Ruling Defendant from raising the issue of res-judicata at the substantive hearing.

#### **Ground 7**

**The Learned Judge erred in law and fact when it failed to consider that the Plaintiffs intended to resolve the issues in one Court rather than splitting the issues between two Courts, when in fact proceedings continue in Lautoka and are substantially the same as those in the Suva Court.**

- 2.38 Eighth Defendant submits as follows:-

“26. *The Court said (at paragraph 3.25 of the Striking Out Ruling):*

*It is apparent that Plaintiffs intend to have the issues in relation to Eighth Defendant's Annual General Meeting and office bearers which arose after 29 May 2016, be resolved in one Court rather than one Court deciding one issue and the other Court deciding the other issues.*

27. *First, it is unclear why the Court believes, in the face of the principles of res judicata, that what the Plaintiffs intended is relevant.*

28. *Second, there might be some merit to consolidating, into one proceeding, related issues being litigated in two courts. But that cannot be right when one set of issues has already been decided. With respect, this appears to be the law based on the authorities on res judicata cited above, and*

*Sangam can see no judicial consideration of why those authorities do not apply.”*

2.39 Plaintiffs submit as follows:-

*“65(a) Two separate proceedings have been filed in Lautoka and in Suva. The extent of similarity in the proceedings is limited to the fact that they are based on the events of the 8<sup>th</sup> Defendant’s AGMs, in which elections for office bearers remained unsuccessful.*

*(b) At paragraph 3.25, the Learned Judge noted that the Plaintiffs intend to have the all issues pertaining to the 8<sup>th</sup> Defendant’s AGM and election of office bearers determined in one Court rather than having issues split between different Courts.*

*(c) There is no substantial overlap of causes of action or prayers being sought in these proceedings and in the Lautoka High Court Action. The Prayers sought in these proceedings will ensure that all matters in relation to the functioning and management of the 8<sup>th</sup> Defendant are resolved and any and all suspensions and disciplinary actions against members of the 8<sup>th</sup> Defendant including those part of the interim committee, be free to stand for elections and regain their membership free from any encumbrances.”*

2.40 This Court repeats its comments in respect to Grounds 5 and 6.

### **Further Consideration**

2.41 This Court takes judicial notice of following facts which was part of the Interlocutory Rulings delivered in this proceeding.

(i) Lautoka Action was settled in following terms as appears from Court Order:-

“1. THAT the election of the office bearers of the National Executives of the Then India Valibar Sangam Fiji, the Youth Branch of the Then India Sanmarga Ikya Sangam shall be held at 10.00am on the 28<sup>th</sup> August 2016;

2. **THAT the Annual General Meeting of the Then India Sanmarga Ikya Sangam shall be held on 28<sup>th</sup> August 2016 at 12.00pm;**
3. **THAT the membership of the Then India Sanmarga Ikya Sangam for the Annual General Meeting shall be as at the approved register of members on 28<sup>th</sup> May 2016;**
4. THAT there shall be a fresh filling of nominations and said nominations shall be processed in the normal manner in accordance with the Constitution of the Then India Sanmarga Ikya Sangam and Rules and Regulations of the Then India Valibar Sangam Fiji;
5. THAT the nominations committee be appointed by the Council of Management of the Then India Sanmarga Ikya Sangam;
6. THAT the terms of settlement herein shall be put before the Council of management who shall endorse the same;
7. THAT the Council of Management will not bring up new articles, any amendment to articles and any abolition of an article until Then India Sanmarga Ikya Sangam annual General Meeting on 28<sup>th</sup> August 2016;
8. THAT matter shall be withdrawn and discontinued, including all any Summons Applications filed by the Defendant(s), with no Orders as to costs;
9. THAT the party intervene is added as the 2<sup>nd</sup> Defendant;
10. THAT the parties shall act according to the written and signed Terms of Settlement filed of record dated 30<sup>th</sup> June 2016 and filed on 1<sup>st</sup> July 2016;
11. In terms of Notice of Discontinuance, the case is hereby struck out and dismissed against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants with no costs.” ***(emphasis added)***

- (ii) Subsequent to Consent Order being issued certain members including the First, Second, Third Defendants in Lautoka Action were suspended as a result of which their nominations were rejected and could not attend the AGM that was to be held on 28 August 2016;
- (iii) First and Second Defendants in Lautoka Action were approved nominees for position of National President of Eighth Defendant and Third Defendant in Lautoka Action was nominee for the position of General Secretary Operation for Eighth Defendant in respect to election of office bearers of Eighth Defendant that was to take place during 29 May 2016 AGM;
- (iv) First to Third Defendant in Lautoka Action were members of Eighth Defendant and registered as members of First Defendant in Eighth Defendants register as at 28 May 2016;
- (v) Because of their suspension First to Third Defendants in Lautoka Action could not take part in 28 August 2016 AGM or be a nominee for any position of office bearers for Eighth Defendant;
- (vi) Sadasivan Naicker who was not a nominee for any position in respect to 29 May 2016 AGM or 28 August 2016, continues to manage the Affairs of Eighth Defendant as National President with First to Sixth Defendants pursuant to interim Order of Court of Appeal in Civil Appeal No. ABU 122 of 2016;
- (vii) Sadasivan Naicker and First to Sixth Defendants were office bearers of Eighth Defendants and continue to manage the affairs of Eighth Defendant pursuant to the interim order granted by Court of Appeal;
- (viii) Following Interlocutory Application was filed in this Court after the interim order was granted by Court of Appeal:-

**Date**

**Application**

20 October 2016

Application to amend Originating Summons

10 February 2017	Application for Interlocutory Injunction and Application to join as Eighth Defendant
15 February 2017	Application for Recusal
11 April 2017	Application to Strike Out Originating Summons by Eighth Defendant
25 August 2017	Application to Further Amend Originating Summons

(ix) It is Eighth Defendant's being non-government organization interest to have this matter decided expeditiously.

2.42 It is to be made clear that this Court only highlighted the matter listed in paragraph 2.41 and has not taken it into consideration in deciding the Application.

### **3.0 Conclusion**

3.1 Having considered the Submissions and Affidavit evidence, this Court finds that:-

- (i) Eighth Defendant is out of time and since no Application is made to extend time to Appeal with reasons as why such extension should be granted;
- (ii) Also, Application be dismissed on the ground that Eighth Defendant has failed to prove that there are exceptional circumstances that require leave be granted or that the refusal to strike out Further Amended Originating Summons was plainly wrong.

### **4.0 Stay of Proceeding**

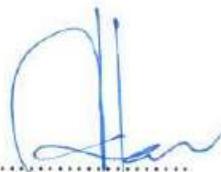
Having considered that the Application for Leave to Appeal is unsuccessful Applications for Stay of Proceeding is dismissed and struck out.

## **5.0 Costs**

This Court takes into consideration parties have filed Affidavits and Submissions in addition to making oral Submissions.

## **6.0 Orders**

- (i) Application for Leave to Appeal this Court's decision delivered on 9 March 2018 and Stay of Proceedings is dismissed and struck out;
- (ii) Eighth Defendant do pay Plaintiff's cost of the Application assessed in the sum of \$1,500.00 within twenty-one (21) days from date of this Ruling.



**K. Kumar**  
**JUDGE**

**At Suva**

**28 September 2018**

**Parshotam Lawyers for the Plaintiffs**

**Samuel K. Ram, Esquire for the first to Fourth, Sixth and Seventh Defendants**

**Munro Leys for Eighth Defendant**