

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 228 of 2016

BETWEEN : **GOVIND SAMI PADAYACHI**
First Plaintiff

AND : **NARSA REDDY**
Second Plaintiff

AND : **DAMENDRA AMAS GOUNDER**
First Defendant

AND : **KUMAR SAMI GOUNDER**
Second Defendant

AND : **SOM PADAYACHI**
Third Defendant

AND : **SAILENDRA KUMAR**
Fourth Defendant

AND : **PRAGDISHWARAN GOUNDER**
Fifth Defendant

AND : **VIJAY NARAYAN**
Sixth Defendant

AND : **MUNI KAMLESH NAIDU**
Seventh Defendant

BEFORE : **Hon. Justice Kamal Kumar**

COUNSEL : Mr S. Nandan and Mr V. Singh for Plaintiffs/Applicants
Mr S. Ram for Defendants/Respondents

DATE OF RULING : 2 February 2017

RULING

(Application to Amend Originating Summons)

1.0 Introduction

1.1 On 20 October 2016, Plaintiffs filed Application by way Summons for Leave to amend Originating Summons filed on 8 September 2016. (“**the Application**”)

1.2 Applicants seek to amend the Originating Summons by adding following prayers as appears at paragraph 4(C) and (D) of Govind Sami Padyachi’s Affidavit sworn on 25 October 2016:-

“C. That the Interim Committee appointed by the members who attended the Then India Sanmarga Ikya Sangam AGM on 29 May 2016 at Nadi Special School be hereby allowed to manage the affairs of the Then India Sanmarga Ikya Sangam until a General Meeting is called to elect members to the National Executive.

D. That any decision made by the persons holding themselves out as the National Executive after 29 May 2016 to suspend and disqualify members from standing as candidates for the position of National Executives in TISI be set aside forthwith and a further order that these persons be allowed to contest the elections for the post of National Executives if they duly meet all other requirements to stand as candidates.”

1.3 The Application was called on 2 November 2016, when parties were directed to file Affidavits and the Application was adjourned for hearing on 9 December 2016 at 9.30am and to be called with substantive matter which was adjourned for same date on Defendants Counsel’s application to sort out things for settlement.

1.4 Due to Attorney-General’s Conference on 9 December 2016, the Application was called on 15 December 2016, for hearing.

1.5 Following Affidavits were filed by the Parties:-

For Plaintiff/Applicant

(i) Affidavit of Govind Sami Padayachi sworn and filed on 25 October 2016;

(ii) Affidavit of Narsa Reddy sworn and filed on 1 December 2016.

For First Defendant/Respondent

Affidavit of Damendra Amas Gounder sworn on 23 November 2016.

- 1.6 On 15 December 2016, Counsel for the parties made oral submissions and handed in written submissions.

2.0 Background Facts

- 2.1 Background facts appear from the Affidavits filed.
- 2.2 All parties are members of Then India Sanmarga Ikya Sangam (“**TISI**”).
- 2.3 The objective of TISI is listed in Clause 3 of its Memorandum of Association being Annexure “B” of Sadasivan Naicker’s Affidavit filed in Lautoka Action and annexed to Annexure DAG1 of Damendra Gounder’s Affidavit sworn on 23 November 2016.
- 2.4 The Annual General Meeting of TISI was scheduled to take place on 29 May 2016, in Nadi which meeting was called off by the then President of TISI. The notice of cancellation was publicized on 29 May 2016 being the date of the Annual General Meeting as appears from paragraph 20(b) of Dorsami Naidu’s Affidavit filed in Lautoka Action and annexed to the Affidavit of Narsa Reddy sworn on 1 December 2016.
- 2.5 Some members (approximately 1,000) including the First, Second and Third Defendants in Lautoka Action held meeting and approved interim committee for TISI to hold Annual General Meeting.
- 2.6 TISI on its own right and as parent body of its youth branch Then India Valibor Sangam Fiji (“**TIV**”) filed proceedings in Lautoka High Court being Civil Action No. 98 of 2016 against Dorsami Naidu, Praveen Kumar Bala, Raja Kumaran and Jai Narayan (“**Lautoka Action**”).

- 2.7 Lautoka Action was settled by Terms of Settlement dated 30 June 2016, (Annexure “DAG6” of Damendra Gounder’s Affidavit) and on 1 July 2016, High Court Lautoka made Orders which was in terms of the Terms of Settlement.
- 2.8 Soon after the Court Order was made the First, Second and Third Defendants in Lautoka Action and some other members of TISI were suspended.
- 2.9 Annual General Meeting of TISI was called on 28 August 2016, at 12.00pm but at certain stage of the meeting it was cancelled at the direction of Police Department.

3.0 Application To Amend Originating Summons

3.1 Order 20 Rule 5-(1) (2) and (5) of the High Court Rules provide:-

“5.-(1) Subject to Order 15, rules 6, 8 and 9 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

(2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.

(3)

(4)

(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same

facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.”

- 3.2 The test to be applied when dealing with Application to Amend Pleadings was stated by Full Court of Fiji Court of Appeal in **Sundar v. Prasad** [1998] FJCA19' Abu0022u.97s (15 May 1998) as follows:-

“Generally, it is in the best interest of the administration of justice that the pleadings in an action should state fully and accurately the factual basis of each party’s case. For that reason amendment of pleadings which will have that effect are usually allowed, unless the other party will be seriously prejudiced thereby (G.L. Baker Ltd. v. Medway Building and Supplies Ltd [1958] 1 WLR 1231 (C.A.)). The test to be applied is whether the amendment is necessary in order to determine the real controversy between the parties and does not result in injustice to other parties; if that test is met, leave to amend may be given even at a very late stage of the trial (Elders Pastoral Ltd v. Marr (1987) 2 PRNZ 383 (C.A.)). However, the later the amendment the greater is the chance that it will prejudice other parties or cause significant delays, which are contrary to the interest of the public in the expeditious conduct of trials. When leave to amend is granted, the party seeking the amendment must bear the costs of the other party waster as a result of it.”

- 3.3 In **Ambaram Narsey Properties Ltd v. Khan** [2001] FJHC 306; [2001] 1 FLR 283 (16 August 2001) his Lordship Justice Gates (current Chief Justice) adopted with approval the following principles in **Cropper v. Smith** (1884) 26 Ch. D. 700 p 710 Bowen L.J. said:-

“Now, I think it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other

division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace.”

and his Lordship added at p 711:

“It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right.”

3.4 His Lordship further stated that:-

“Amendment may be allowed “at any stage of the proceedings” which includes during a trial The Duke of Buccleuch [1892] P. 201, at p 211 per Lord Esher MR; G. L. Baker Ltd. v. Medway Building & Supplies Ltd. [1958] 1 WLR 1216. With some reluctance the trial judge was prepared to allow the statement of claim to be amendment in Loutfi v. C Czarniow Ltd. (1952) 2 All ER 823 as late as after close of the case but before judgment.”

3.5 Lord Justice Branwell in Tildesley v. Harper (1878) 10 Ch. D. 393, stated as follows:-

“My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by this blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise.” “However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs” (per Brent M.R. Clarapede v.

Commercial Union Association (1883) 32 WR262, p263.; Weldon v. Neal (1887) 19 QBD394 p.396; Australian Steam Navigation Co. v. Smith (1889) 14 App. Cas. 318 p320; Hunt v. Rice & Sons (1837) 53 TLR931, C.A and see the remarks of Lindley L.J. Indigo Co. v. Ogilvy (1891) 2 Ch. 39; and of Pollock B. Steward v. North Metropolitan Tramways Co. (1886) 16 QBD.178, P. 180, and per Esher M.R. p.558, c.a.). An amendment ought to be allowed if thereby “the real substantial question can be raised between the parties,” and multiplicity of legal proceedings avoided (Kurtz v. Spence (1888) 36 Ch. D. 774; The Alert (1895) 72 L.T. 124). (page 396)”

- 3.6 The amendments sought by the Applicants are stated at paragraph 1.2 of this Ruling.
- 3.7 For the sake of convenience this court will refer the amendment being sought as **“Interim Committee Declaration”** and **“Suspension and Disqualification Declaration”**.

Interim Committee Declaration

- 3.8 Learned Counsel for the Defendants submits that:-
- (i) This declaration was already part of Court proceedings in Lautoka being Civil Action No. 98 of 2016 which was settled pursuant to Terms of Settlement dated 30 June 2016;
 - (ii) There is a committal proceedings arising of Lautoka action which he rightfully agrees with Applicants Counsel that it is not a separate cause of action but enforcement proceedings;
 - (iii) There is no mention of any interim committal in the Terms of Settlement.
- 3.9 Counsel for Respondents also submitted that Plaintiffs in this proceedings are not members of any purported interim committee.
- 3.10 With all due respect to Respondents Counsel this Court finds that Respondents submission have flaws for following reasons as appears in the Affidavits filed herein and Annexure 1 of Damendra Gounder’s Affidavit sworn and filed on 23

November 2016 and Annexure A of Affidavit in Reply of Narsa Reddy sworn and filed on 1st December 2016:-

- (i) Then India Sanmarga Ikya Sangam (“**TISI**”) was to hold its meeting on or about 28 March 2016, which was postponed to 29 May 2016.
- (ii) TISI has youth branch called Then India Valibar Sangam (TIV) and Women’s Wing called Maather Sangam.
- (iii) On 29 May 2016, the First, Second and Third Defendants in Lautoka Action one thousand members of TISI were part of a meeting which they called Annual General Meeting and was chaired by Mr Raja Kumaran the then Vice President of TISI and Third Defendant in the Lautoka Action.
- (iv) In terms of the Resolution of the meeting held on 29 May 2016, an interim committee was appointed for the purpose of holding Annual General Meeting of TISI to elect executives of TISI as appears from paragraph 20(h) and Annexure DSN6 and DSN7 of Dorsami Naidu’s Affidavit filed in Lautoka Action and annexed to Narsa Reddy’s Affidavit sworn on 1 December 2016.
- (v) The national executives of TISI became aware of the said meeting which was attended by about one thousand members of TISI as appears from paragraph 32 to 37 of Sadasivan Naicker’s Affidavit filed in Lautoka Action and annexed to the Affidavit of Damendra Gounder’s sworn on 23 November 2016.
- (vi) On 30 May 2016, TISI filed Lautoka Action to have the resolution reached at the meeting of TISI members on 29 May 2016, be declared invalid and for the then executives of TISI to continue.
- (vii) On 30 June 2016, the parties to Lautoka Action reached Terms of Settlement (“**TOS**”) and an Order in terms of TOS was made which was in following terms:-

“(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 28th August 2016;

- (2) *That the Annual General Meeting of the Then India Sanmarga Ikya Sangam shall be held on 28th 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 21st May 2016;***
- (4) That there shall be a fresh filing 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 28th August 2016;*
- (8) That matter shall be withdrawn and discontinued, including all any Summons Applications filed by the Defendant(s), with no Order as to costs;*
- (9) That the party intervene is added as the 2nd Defendant;*
- (10) That the parties shall act according to the written and signed Terms of Settlement filed of record dated 30th June 2016 and filed on 1st July 2016;*

(11) In terms of Notice of Discontinuance, the case is hereby struck out and dismissed against the 1st, 2nd, 3rd, and 4th Defendants with no costs. *(emphasis added)*

- (viii) Subsequently, the then executive of TISI suspended the First, Second and Third Defendants (Lautoka Action) membership with TISI together with some other members.
 - (ix) As a result of the suspension those members who were members of TISI on 28 May 2016, could not contest for election or take part in Annual General Meeting that was called pursuant to the Consent Order in Lautoka Action.
 - (x) The meeting on 28 August 2016, could not proceed to the end after it was stopped by the Police Department.
- 3.11 In view of what is stated at paragraph 3.10 (ix) and (x) of this Ruling, the consent order to some extent became ineffective.
- 3.12 The issue as to who are the proper persons to manage the affairs of TISI after what transpired on 29 May 2016, had not been fully determined by any Court.
- 3.13 The Plaintiffs are members of TISI and have full right to seek the declaration in respect to interim committee purportedly appointed by almost one thousand (1,000) members.
- 3.14 Applicants Counsel Mr V. Singh submitted that if the Court rules in favour of the Applicant then the question will arise as to who will manage the affairs of TISI until next Annual General Meeting.
- 3.15 The issues that need to be determined for certainty of TISI, a Society which has approximately six thousand members are as follows:-
- (i) Whether Defendants are the executives of TISI as declared by them after 28 August 2016, meeting which was called off before it reached election stage.

- (ii) Whether the interim committee appointed during 29 May 2016 meeting, for them to hold Annual General Meeting is to run the day to day affairs of TISI and call Annual General Meeting.
- (iii) Whether the national committee of TISI prior to 29 May 2016, is to run day to day affairs of TISI until Annual General Meeting of TISI is held and national executives are elected.

3.16 Applicants Counsels' submission in respect to interim committee declaration has merits as it will solve all the issues facing TISI at this moment in time.

3.17 I also see no injustice being caused to the Defendants if amendment is granted.

3.18 This Court therefore grants the application to amend the Originating Summons prayer to include in respect to the interim committee purportedly appointed on 29 May 2016.

Suspension and Disqualification of Members

3.19 It is not disputed that Applicants have not been suspended as members of TISI.

3.20 Some members of TISI including those who were to contest national executive positions on 29 May 2016 Annual General Meeting were suspended after the consent order.

3.21 Counsel for Respondents submitted that it is for the members who were suspended after Consent Order should take action themselves and Applicants have no right to do.

3.22 It is apparent from the amendments sought by Applicants that they intend to resolve all the issues including the action of the national executives after the Consent Order.

3.23 It is quite clear that after the parties in Lautoka Action entered into Terms of Settlement and obtained Consent Order that then executives of TISI who consisted of some of the Defendants herein suspended the First, Second and Third Defendants who were nominated to conduct election to be held during 29 May 2016 Annual General Meeting.

- 3.24 This is despite the fact that Consent Order clearly stated that all members registered in the membership register of TISI as of 28 May 2016 take part in the Annual General Meeting of 28 August 2016.
- 3.25 Applicants as members of TISI have full right to seek Courts assistance in respect to action of national executives after the consent order in Lautoka Action.
- 3.26 The issue raised in this declaration will also solve all the disputes facing TISI at this stage and no injustice will be caused to Respondents as they all serve the Society voluntarily.
- 3.27 This Court also holds that no prejudice will be caused to Respondents if amendments is allowed.

4.0 Costs

- 4.1 This Court takes into consideration that there has not been much delay in filing the Application for Amendment and only reason the Application was adjourned from 25 October 2016 to 9 December 2016, because the Respondents Counsels applied for a later date to ensure parties attempt to settle this matter.

5.0 Orders

- 5.1 Following orders are made:-

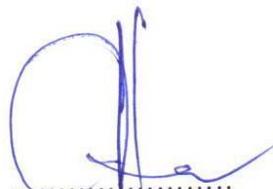
- (i) Leave is granted to Applicants to file Amended Originating Summons by adding following prayers:-

(a) That the Interim Committee appointed by the members who attended the Then India Sanmarga Ikya Sangam AGM on 29 May 2016 at Nadi Special School be hereby allowed to manage the affairs of the Then India Sanmarga Ikya Sangam until a General Meeting is called to elect members to the National Executive.

(b) That any decision made by the persons holding themselves out as the National Executive after 29 May 2016 to suspend and disqualify members from standing as candidates for the position of National Executives in TISI be set aside forthwith and a further order that these persons be allowed to contest the elections for the post of National Executives if they duly meet all other requirements to stand as candidates.

(ii) Costs of the Application to Amend Originating Summons be costs in the cause.




K. Kumar
JUDGE

At Suva

2 February 2017

Parshotam Lawyers for the Plaintiffs

Samuel K. Ram, Esquire for the Defendants