

IN THE HIGH COURT OF FIJI  
AT LAUTOKA  
CIVIL JURISDICTION

Action No. 163 of 2012

**BETWEEN:**            **RAM REDDY** of Waqadra, Nadi retired and **MUTHU NAIDU** of Nacovi, Nadi, Farmer and **RAM LINGAM** of Nacovi, Nadi, Self Employed and **TEG RAJAN PILLAY** of Nacovi, Nadi, Farmer and **RAJESH CHAND RAJU** of Malolo, Nadi, Businessman, and **MAHENDRA NAIR** of 39 Kilau Street, Samabula, Suva and **DALIP KUMAR** of 139 Kula Street, Samabula, Suva, Life Member and **NAND GOPAL GOUNDER** of Wairuku, Rakiraki, Farmer.

**PLAINTIFFS**

**AND:**                **THE THEN INDIA SANMARGA IKYA SANGAM** having its registered office at Nadi.

**1<sup>ST</sup> DEFENDANT**

**AND:**                **SADA SIWAN NAICKER** of Suva, Customs Officer, **THE NATIONAL PRESIDENT OF THE THEN INDIA SANMARGA IKYA SANGAM** having its registered office at Nadi.

**2<sup>ND</sup> DEFENDANT**

**AND:**                **DAMEND GOUNDAR** of Nadi, Businessman, **THE SECRETARY GENERAL OF THE THEN INDIA SANMARGA IKYA SANGAM** having its registered office at Nadi.

**3<sup>RD</sup> DEFENDANT**

**Before:**

Priyantha Nāwāna J.

**Counsel:**

Plaintiffs	:	Mr Janend Sharma
Defendants	:	Mr Shailend Krishna
Date of Hearing	:	11 October 2012
Date of Ruling	:	29 October 2012

## O R D E R

1. The eight plaintiffs abovenamed, by their Originating Summons dated 09 August 2012, instituted action seeking:
  - (i) A declaration that the defendants' decision not to hold the Annual General Meeting of the 1<sup>st</sup> defendant for the year 2012 is null and void and unlawful as it was in contravention of the 1<sup>st</sup> defendant's Memorandum of Articles of Association and the Companies Act; and,
  - (ii) That the defendants be ordered to convene the Annual General Meeting of the 1<sup>st</sup> defendant in accordance with its Memorandum and Articles of Association and the Companies Act within 7 days of an order being made in this case.
2. The Originating Summons was supported by an affidavit by Mr Ram Reddy, the 1<sup>st</sup> plaintiff.
3. Mr Reddy deposed that the Annual General Meeting of the 1<sup>st</sup> defendant should be held once in every year under Article 9 of the Articles of Association. Article 9 reads:

*There shall be an Annual General Meeting of the Association once every year at such place and time as the President in consultation with the council shall decide.*

4. Mr Reddy stated that the Council of Management of the 1<sup>st</sup> defendant, at a meeting chaired by the 2<sup>nd</sup> defendant on 01 July 2012, resolved that the Annual General Meeting scheduled for 2012 should be deferred to 2013.
5. The 1<sup>st</sup> plaintiff-Mr Reddy further deposed that the motion to defer the Annual General Meeting for 2013 was not properly discussed and stated that there was an attempt to delay the Annual General Meeting of 2012 deliberately. He also asserted that the motion to defer the Annual General Meeting should have been first put before the National Executives before being put to the Council of Management held on 01 July 2012.
6. Mr Reddy also relied on a letter by Mr D. S. Naidu addressed to the 2<sup>nd</sup> defendant marked R2 in support of the Originating Summons. Mr Reddy further averred that the decision not to hold the Annual General Meeting of the 1<sup>st</sup> defendant was, in the circumstances, null and void and illegal and sought orders in terms of the Originating Summons.
7. The plaintiffs, in addition, have submitted a supplementary affidavit by the 7<sup>th</sup> plaintiff-Dalip Kumar dated 08 August 2012 in support of the Originating Summons where it was claimed that the Annual General Meetings of the 1<sup>st</sup> defendant were being held from the year 1926

up until 2011 during the Easter Holidays. The 86<sup>th</sup> Annual Convention and the Annual General Meeting were, therefore, due from 06–09 April 2012 but the same was deferred due to the floods in the Western Division.

8. Defendants, in response to the Originating Summons, have caused an affidavit dated 24 September 2012 to be filed by Mr Jagannath Sami, the Chief Executive Officer of the 1<sup>st</sup> defendant.
9. Mr Sami in his affidavit set out the background leading to the establishment of the 1<sup>st</sup> defendant, its structure and the objectives.
10. Mr Sami affirmed that the Annual Convention and the Annual General Meeting were being held once in every year during the Easter Holidays where some 10,000–15,000 people used to attend. The events also marked religious, cultural and sports activities with the participation of some overseas delegates as well. The two events for the current year were to be held from 05–09 April 2012 at Lautoka; but, cancelled due to the floods that devastated particularly the Western Division of Fiji commencing from the end of March 2012.
11. Mr Sami further deposed that the Council of Management met on 01 July 2012 where financial, managerial and administrative matters were considered. On 01 July 2012, in pursuance of a motion, the Annual General Meeting was deferred to be held during the Easter Holidays in 2013 along with the Annual Convention with the view to accommodate the usually participating delegates. Mr Sami also deposed that the annual events due in 1993 were similarly put off for April 1994 due to the cyclone *Kina*. Mr Sami annexed documents marked JS3–JS7, which were supportive of the deferment of the aforesaid annual events of the 1<sup>st</sup> defendant.
12. Eight affidavits dated 24 September 2012 on behalf of eight district branches of the 1<sup>st</sup> defendant, which, too, were supportive of the decision to defer the Annual General Meeting for 2013 for the same reasons as assigned by the defendants, too, were filed.
13. The defendants simultaneously filed summons dated 24 September 2012 for striking-out of the Originating Summons on the basis of non-compliance by the plaintiffs with the High Court Rules, 1988. The defendants specifically relied on the grounds that the plaintiffs had failed to include a statement of questions on which relief was sought; and, that the plaintiffs had failed to particularize and disclose the cause/s of action against the 1<sup>st</sup>, 2<sup>nd</sup> or the 3<sup>rd</sup> defendants individually or jointly.
14. Hearing into the summons to strike-out plaintiffs' Originating Summons was taken-up on 11 October 2012, having the same been fixed on 05 October 2012 with the consent of the parties. At the hearing, both counsel were afforded with opportunities of making oral submissions and filing written-submissions.

15. Mr Krishna submitted that the plaintiffs' Originating Summons was in direct conflict with O 7 r 3 of the High Court Rules in view of their failure to include a statement of questions on which the plaintiffs were seeking determination with sufficient particulars to identify the cause or causes of action.

16. O 7 r 3, which occurs under the heading 'Contents of Summons', states that:

*3 (1) Every Originating Summons must include a statement of the questions on which the plaintiff seeks the determination or direction of the High Court or, as the case may be, a concise statement of the relief or remedy claimed in the proceedings begun by the origination summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy.*

17. Mr Krishna cited ***Reserve Bank of Fiji v Trevor Robert Gallagher and Alan Charles Newham and Another*** [2006] FJCA 37(ABU 30/2005); 14 July 2006, where it was held at paragraph 58 that:

*O 7 r 3 (1) required an Originating Summons to state in addition to the relief sought, sufficient particulars to identify the causes of action on which the plaintiff relies. [That] rule was ignored in the 1999 Originating Summons filed by Mr Newham.*

18. Moreover, Mr Krishna submitted that the originating summons in this case had been made under O 32 4 r 2, which was totally inapplicable. Instead, Mr Krishna submitted, that the plaintiffs should have conformed to the provisions in O 5 r 3, which read:

*Proceedings by which an application is to be made to the High Court or a judge thereof under any Act must be begun by originating summons except where by these rules or by or under any Act the application in question is expressly required or authorized to be made by some other means.*

19. The defendants, in the circumstances, moved that the plaintiffs' originating summons, which had breached the High Court Rules by its failure to disclose cause/s of action against anyone of the defendants, be struck-out under O 18 r 18.

20. O 18 r 18 of the High Court Rules, which empowers a court to strike-out any pleading in an appropriate circumstance, reads thus:

*The court may at any stage of the proceedings order to be struck-out or amend any pleading or indorsement of any writ in the action or anything in any pleading or in the indorsement on the ground that:*

*(a) it discloses no reasonable cause of action or defence as the case may be;*

*(b) ...*

21. There was no challenge from the plaintiffs against the defendants' complaint in regard to the breach of the provisions of O 7 r 3 of the High Court Rules. Instead, Mr Sharma, on behalf of defendants, relied on the fact that the Originating Summons were in 'Expedited Form' and, therefore, O 7 r 3 was inapplicable to the summons in this case. Mr Sharma submitted that the breaches complained of by the defendants should be treated as mere irregularities in terms of O 2 r 1 of the High Court rules resulting in no nullity in the proceedings. It was also submitted that any irregularity should have been raised within reasonable time in terms of O 2 r 2 before any step was taken in line with the decision in **Keshwan v Devi** 2 [2007] FJCA 22. It was contended that nine affidavits had already been filed in defence of the defendants' position in response to the originating summons and therefore objection of the defendants could not be entertained.

22. I have carefully considered the submissions of learned counsel. I am of the view that the objection by the defendants was rightly taken; and, there was no unreasonable delay as the summons to strike-out on the basis of alleged breaches, too, had been filed along with the affidavits in response to the originating summons. That course of action cannot be viewed as a waiver or acquiescence of any potential objection to the summons in the context of the selfsame authority in **Rein v Stein** 66 LT 469 at 471 relied on by the plaintiffs, where it was held that:

*A fresh step for the purpose of this rule is one sufficient to constitute a waiver of the irregularity. In order to establish a waiver, you must show that the party had taken some step which was only necessary or only useful if the objection had been actually waived or had been entertained.*

23. The defendants in this case, on the contrary, gave notice of their intent to file the interlocutory summons for striking-out to the plaintiffs when the case was called on 03 September 2012 for directions of court. I, accordingly, hold that the step of filing the affidavits in opposition by the defendants was only a step to put their case in perspective and such step could not have constituted a waiver of any objection against the breaches of the High Court Rules or against filing of any application for striking-out under O 18 r 18.

24. Plaintiffs themselves admit the fact that the Annual General Meeting scheduled to be held on 08 April 2012 could not be held due to the floods in the Western Division in Fiji. The reasons that necessitated the cancellation of the two important annual events of the 1<sup>st</sup> defendant are explained; and, I find them to be beyond reproach especially in light of the Declaration of Natural Disaster (Western Division) for 31 days from 30 March 2012 by the Government as published in the Gazettes of the 01<sup>st</sup> and the 19<sup>th</sup> April 2012 under the Natural Disaster Management Act No 21 of 1998, which this court can safely take judicial notice of.
25. I am of the view that it was mandatory under O 7 r 3 for the Originating Summons to have included a statement of questions upon which determination from court was sought or sufficient particulars to identify the cause or causes of action against each defendant upon which relief or remedy was sought. The adherence to these rules is particularly essential in this case as it was imperative for the plaintiffs to show that the deferment of the Annual General Meeting was due to *mala fide* or some other reasons but not due to the reason of the devastating catastrophe in April 2012.
26. In *Choy v Kautoga* [2005] FJHC 649, Connors J. adopted the test applied in *Hubbuck and Sons Ltd. v Wilkinson Heywood and Clark Ltd* [1899] 1 QB 86 at 91 that stood the test of time for decades, where it was held that:

*Summary procedure is only appropriate to cases which are plain and obvious, so that any Master or Judge can say at once that the statement of claim as it stands is insufficient even if proved to entitle the plaintiff to what he asks. The use of the expression reasonable cause of action in rule 4 shows that the summary procedure there introduced is only intended to be had recourse to in plain and obvious cases.*

27. It became, therefore, incumbent upon the plaintiffs to show as to why the decision of the 1<sup>st</sup> defendant not to hold the Annual General Meeting was null and void and unlawful and violative of the Articles of Association and/or the Companies Act when they sought the declaratory order under paragraph (1) of the Originating Summons. The order sought in paragraph (2) thereof would follow, if and only if, the above was established because courts are usually hesitant to interfere with the affairs of voluntary organizations such as the 1<sup>st</sup> defendant.
28. The plaintiffs have not *prima facie* established any illegality in the decision of the deferment of the Annual General Meeting in relation to the Articles of Association of the 1<sup>st</sup> defendant or in relation to any provisions under the Companies Act or under the common law in order to found a cause/s of action against a defendant. Instead, the case for the plaintiffs is tainted with a material contradiction when one considers paragraph 10 of the affidavit of Mr Reddy

where it was deposed that ‘*the motion to defer the Annual General Meeting of the 1<sup>st</sup> defendant should have first been put before the National Executives before being put to Council of Management*’, whereas Mr Sharma submitted on behalf of the selfsame plaintiffs that ‘*the Memorandum and the Articles of Association [did] not provide for National Executives and neither [was] there any mention of any role or authority base for the National Executives* (paragraph 2.22 of the written-submissions). Such was the unreliable and fallacious nature of the plaintiffs’ case in addition to there being a total absence of a cause/s of action against the defendants.

29. In this regard, the observations made in ***Burton v. Shire of Bairnsdale*** [1908] 7 C.L.R 76 at 92 are pertinent to be reinforced. They read:

*Prima facie every litigant has a right to have matters of law as well as of fact decided according to the ordinary rules of procedure, which give him full time and opportunity for the presentation of his case to the ordinary tribunals and the inherent jurisdiction of the court to protect its process from abuse by depriving a litigant of these rights and summarily disposing of an action as frivolous and vexatious in point of law will never be exercised unless the plaintiff's claim is so obviously untenable that it cannot possibly succeed.*

30. In the circumstances, I hold that the plaintiffs’ Originating Summons does not disclose any cause of action against the defendants jointly or severally. This is not a case where the breach could be cured by having recourse to O 2 r 1 of the High Court Rules, as urged by Mr Sharma. Applying the principles as set-out in the foregoing authorities, I conclude that this is a fit case for court to act under O 18 r 18 (1) (a) and (b). Accordingly, I strike-out the Originating Summons of the plaintiffs against each of the defendants.
31. The above reasoning would clearly show that the plaintiffs have chosen to abuse the process of court, which warrants the imposition of punitive costs. Though hesitantly, I impose only nominal costs instead. The 1<sup>st</sup> plaintiff and the 7<sup>th</sup> plaintiff each shall, accordingly, pay \$ 600.00 each to the 1<sup>st</sup>, the 2<sup>nd</sup> and the 3<sup>rd</sup> defendant as costs of this action. The 2<sup>nd</sup>- 6<sup>th</sup> plaintiffs and the 8<sup>th</sup> plaintiff individually shall pay \$ 300.00 each to the 1<sup>st</sup>, the 2<sup>nd</sup> and the 3<sup>rd</sup> defendants as costs of this action. Each defendant shall, accordingly, receive a sum of \$ 3000.00, as summarily assessed costs.
32. Orders, accordingly.

Priyantha Nāwāna  
Judge  
High Court  
Lautoka