

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 20 of 2012

BETWEEN : Trustee of Nabua Matua Taxis

PLAINTIFF

AND : Lomaca Baleilevuka

DEFENDANT

COUNSEL : Mr. Vakaloloma A for the Plaintiff
: Mr. Valenitabua S for the Defendant

Date of Judgment : 23 September 2013

INTERLOCUTORY JUDGMENT

1. The Plaintiff filed a Writ of Summons dated 24 January 2012 together with ex-parte Notice of Motion, subsequently made inter-partes by court supported by an affidavit of Enele Ratumaitavuki sworn on 7 February 2012.
2. The reliefs prayed for in the ex-parte Notice of Motion dated 14 February are as follows:
 - (i) *An order for the immediate release of the following items inclusive of Company Computers, Tax Invoices, Credit Ledger and Journals, Company Cheques, Radio Telephone Motherboard from the Defendant to the Plaintiff company forthwith;*

- (ii) *An order for the immediate and physical removal of the Defendant from administering and operating the company and from within the company premises until the determination of this substantive action.*
- (iii) *An order restraining the Defendant from interfering with the Plaintiff Company and its quiet enjoyment;*
- (iv) *An order against the Fiji Police Force to assist in the due execution of the order and for the maintenance of peace.*
- (v) *Cost on a full scale indemnity basis.*
- (vi) *Any further orders that this Honourable Court deem just and expedient in the circumstances.*

3. Pursuant to an ex-parte Notice of Motion, the Plaintiff made an interlocutory injunction the affect of which would be inter-alia to restrain the Defendant and its agents/servants or nominees from instituting a Special General Meeting until the determination of the substantive action. The application was made under order 29 of the High Court Rules.

4. On 24 February 2012, I made the following orders ex-parte:

- (i) *“Reliefs as prayed for in the ex-parte motion dated 14 February 2012 is granted till 1st March 2012.*
- (ii) *This order to be served on the Defendant through the Plaintiff.”*

5. The interim relief was granted on the basis that the material before the court established an urgency. The Plaintiff gave necessary undertaking and provided sufficient material to fortify that undertaking.

6. The parties appeared subsequently and directions were given for filling of affidavits in answer to the affidavit filed in support of injunction and affidavit in reply to the affidavit in answer.
7. The hearing of the application was listed before this court and interim injunctions previously granted were extended to that date. Thereafter the hearing of the interlocutory relief was conducted and counsel for both parties made Oral Submissions and filed Written Submissions subsequently.

Facts Briefly

8. The Plaintiff, the Trustees of the Nabua Matua Taxis in accordance with the provisions of the Deed of Trust dated 19 April 2004, were appointed as trustees of the trust together with the Defendant. The trustees were appointed by the members for the period of two years. The trustees were re-appointed by a General Meeting held on 20 January 2007 for a further term by its members.
9. Enele Ratumaitavuki, in his affidavit deposed that the financial members of the trust, being dissatisfied with the action of the Defendant who was the Chairman of the company, made a complaint and reported to the Nabua Police Station about their grievances against the Defendant mainly on the missing and abuse of funds of the Nabua Matua Taxi Company, failure to provide Audit of the company over the years, company cheques being used for payments of personal account of his defacto wife.
10. He further deposed that the Defendant at the Nabua Police Station in the presence of the trustees and members, meeting chaired by the Officer in Charge of the Police Station, voluntarily stepped down from the company.
11. Having stepped down from the office of that company, it was stated that the Defendants together with some others have taken over the Nabua Matua Taxi premises and removed some properties from there.

12. The Defendant had thereafter called for a Special General Meeting to be held on 25 February 2012 as a Chairman of the company and put up a notice on 10 February 2012, in the Fiji Times newspaper. The relevant page of the news paper was annexed to the deponent's affidavit.
13. The basis on which that this court considered the ex-parte injunction was on the premise that the Defendant has no status in calling for a Special General Meeting having agreed to step down from the affairs of the company at the Police Station in the presence of the members and trustees present.
14. The Defendant in his affidavit in answer deposed that:
 - “(i) The appointment of the Plaintiff Trustees under the Deed of Trust [Annexure C of the Enele affidavit had expired or lapsed on 19 April 2006.*
 - (ii) Quo needs to be maintained as the business needs to provide taxi service to the public as well to the Matua programme at Nabua Secondary School.*
 - (iii) I am aware that in the event the Defendant is stopped from operating Matua today then all the taxi drivers and owners who support him numbering 154 will not operate from the base which will drastically affect the business and its customers.*
 - (iv) I fear that in the event the injunction orders are granted to the Plaintiff and its substantive claim is dismissed in further, the i Taukei owned Matua will collapse never to run again as a business.*
 - (v) I know that it will also lead to the collapse of the Matua Programme at Nabua Secondary School which assists school dropouts that aim to finish secondary school. The programme is run in conjunction with the Ministry of Education and the Ministry of Transport that*

enables Matua to cart Matua Programme teachers to and from school every school day from 6pm onwards.

15. The undertaking as to damages disclosed by the Plaintiff in the affidavit is so inadequate and insufficient that the court cannot realistically rely on the proffered vehicles with confidence.
16. Defendant also asserts that the final reliefs sought in the Writ of Summons are similar to the reliefs prayed in the Notice of Motion for injunctive reliefs and therefore this court cannot grant the final relief in an interim injunction application.

Consideration of the Motion and the Determination

17. At the outset, it is important for the court to consider the nature of the Trust in pursuant to the Trust Deed.

The Trust Deed provides:

- (i) *“Whereas the members of the company have appointed the said Trustees as its Trustees;*
- (ii) *And whereas the Trustees have also consented in good faith to perform their duties according to this Deed and contained and expressed in the Trustees Act of Fiji and at the direction of the members of the Company.*
- (iii) *And whereas the members at a meeting agreed to create this Deed of Trust to enable the Trustees to administer and hold discussions to all matters involving the Company for the welfare and development of the current and future members.*

(iv) *As whereas the members of the Company desire to formalize the trust and to define the terms and conditions under which the Trustees are to function.*

18. The Part 1 of the Trust Deed deals with the definitions. The following definitions are also important to ascertain the nature of the entity:

(1). **Company:** *means the Nabua Matua Taxi company that is registered with the Registration companies on 31/3/2004 and issued with a Certificate of Registration pursuant to the Registration of Business Names Act Cap. 249, Section 12.*

(2) **Members:** *means the financial and/or registered members of Nabua Matua Taxi company.*

(3) **Trust:** *means the Nabua Matua Taxis Deed of Trust.*

(4) **Trustees:** *means and includes the Trustees or Trustees for the time being of this Deed and Trustees means anyone of the Trustee.*

(5) **Meeting:** *means a duly constituted meeting that represents and involves over 10% of the financial member with 2/3rd of the Trustees at any specified time.*

19. In pursuant to the above clauses in the Trust Deed, it is clear that members of the company exercise power even to the extent of removing a trustee upon acting contrary to the Deed of Trust or the interest and/or the benefit of the members of the company as may be directed by a majority of the members of the company in a duly constituted meeting. It appears that the members are

the ultimate decision maker in a entity of this nature unless there is a cogent reasons for court to interfere or in an application under Trustee Act.

20. So far as the interim injunction granted by this court is concerned effect of the dissolution or continuation needs to be assessed taking into consideration of the objects of the trust which is of paramount importance for management and administration of the company effectively.
21. The issue before the court is whether an interlocutory injunction granted to the Plaintiff should continued or dissolved.
22. The interim injunction was granted inter-alia to restrain the Special General Meeting summoned by the Defendant. The Plaintiff deposed in his affidavit that, the Defendant at the meeting held at the Police Station agreed to step down from the company and wanted the newly appointed committee to continue. The status of the Defendant in view of the decision to step down, ceased with the date of voluntary stepping down. It appears to me from the advertisement in the 10 February 2012 Fiji Times News Paper, that the Defendant acted as a Chairman of the Company. The advertisement in the news paper is as follows:

“Nabua-Matua Taxis

*Notice is hereby given that a Special General Meeting of Nabua
- Matua Taxis will be held at the Nabua Secondary School Hall
On Saturday 25 February 2012 at 4.00pm.*

Agenda

1. *Prayer and Welcome*
2. *Apologies*
3. *Ratu Lomaca Baleilevuka’s Address*
4. *Balance Sheet & Receipts and Expenditure Statement for the
Year ended 31 December 2011.*
5. *Election of New Trustees.*
6. *General Business*
 - a. *New Office Bearers*

b. New Financial and Registered Members

7. Closing and Prayer.

Sgd

CHAIRMAN”

23. The Defendant deposed as follows:

“In answer to paragraph 17 of the Enele affidavit, I say that the police and Enele together with his followers forced me to sign certain papers and I signed knowing that it will not be enforceable in law because of the Matua Deed of Trust’s concise express provisions in respect of removal of Trustees. I was forcefully removed without being investigated, charged and prosecuted. There was no credible evidence shown to me in respect of Enele’s accusations.”

24. Having considered the material submitted to this court by the Plaintiff and the Defendant in their respective affidavits, there is no pending investigation against the Defendant after the settlement was reached between parties in the presence of the officer in Charge of the Nabua Police Station. I am unable to accept the position advanced by the Defendant that he agreed at the Police Station to step down due to the pressure exerted by the other trustees and members and such undertaking cannot be enforceable.

25. In my view, court does not generally interfere with the affairs of a trust or a company unless there are cogent reasons for doing so or in an application under the Trustee Act. However in the instant case a trustee who was entrusted with the management and administration of the affairs of the company after having stepped down, taking a heavy handed approach to summon a Special General Meeting cannot be permitted under any circumstances. The Act of the Defendant could lead to disunity and seriously

affects the function of the entity which needs the intervention of the court to restrain such activity.

26. In the case of **Mistry v Chandra** [2009] FJHC 236; HBC 149. 2009L (23 October 2009) Inoke J held:

“I think the more helpful authority is the decision of Phillips J cited by Mr Sharma in Kalou & Others as the FPGA v Raikuna & Others [2005] FJHC 55 of 2005L (6 November 2006) and the later decision of Singh J in the sequel to that case, Rokotavaga & Others as the FPGA v Singh & Others [2007] FJHC; HBC 170 of 2007S (3 June 2008). The underlying principle in those decisions is that the remedy to disputes over election of office bearers is to be found in the association’s constitution and not in the Courts.....

Further, this is a matter of private law and not public law. The Articles clearly, in, my view, give absolute authority to the Council and the Board.

They have the power to change the Articles and hence the power to validate any election procedure or result. The Plaintiffs as members of DIAS are bound by the Articles. This Court should be loath to rewrite those Articles which have been adopted by consensus of the members. This Court should also be loath to interfere with the use of any such powers, unless there is a clear case of fraud or abuse and the majority of the members want the Court to interfere.”

The above authority also clearly demonstrates the approach that court should take in similar situations.

27. The test that should be taken in consideration for adjudication of the application is laid down in the **American Cyanamid Co V Ethicon Ltd** [1975] AC 396. Having considered the material submitted to the court, I am of the opinion that the following questions, whether there is a serious issue to be tried

that must be established by the Plaintiff, whether damages would be inadequate to compensate the Plaintiff and whether the balance of convenience favours the Court exercising its discretion in favour of the Plaintiff should be answered in favour of the Plaintiff as explained in my earlier paragraphs.

28. However it should be noted that the term of office of the trustee expires in every two years. There is no evidence of the extension office of the current trustees. This judgment enables the current trustees to continue until the election of new trustees and therefore early election or appointment of new trustees to administer and manage the affairs of the trust and the company in my view, is imminent.

Orders

1. I therefore make the following orders:
 - (i) Special General Meeting is to be conducted and completed within three months from 23 September 2013.
 - (ii) Interim injunction granted by this court on 1 March 2012 is to be continued until the conclusion of the Writ action.
 - (iii) The costs of the application are to be costs in the cause.
 - (iv) Orders accordingly.

Susantha N. Balapatabendi

JUDGE

