IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 228 of 2016

BETWEEN : **GOVIND SAMI PADAYACHI**

First Plaintiff/Respondent

AND : **NARSA REDDY**

Second Plaintiff/Respondent

AND : **DAMENDRA AMAS GOUNDER**

First Defendant/ Applicant

AND : **KUMAR SAMI GOUNDER**

Second Defendant/ Applicant

AND : **SOM PADAYACHI**

Third Defendant/ Applicant

AND : **SAILENDRA KUMAR**

Fourth Defendant/ Applicant

AND : **PRAGDISHWARAN GOUNDER**

Fifth Defendant/ Applicant

AND : **VIJAY NARAYAN**

Sixth Defendant/ Applicant

AND : **MUNI KAMLESH NAIDU**

Seventh Defendant/Applicant

AND : **THEN INDIA SANMARGA IKYA SANGAM**

Eighth Defendant/Applicant

BEFORE : **Hon. Justice Kamal Kumar**

COUNSEL : Mr D. Sharma and Mr V. Singh for Plaintiffs/Respondents
Mr S. Ram for First to Seventh Defendants/Applicants
Mr R. Naidu and Mr M. Chand for Eighth Defendant/Applicant

DATE OF HEARING: 4 April 2017

DATE OF RULING: 23 June 2017

RULING

(Application for Recusal)

1.0 Introduction

1.1 On 15 February 2017, an Application was filed allegedly on behalf of First to Seventh Defendant for following Orders:-

> ***"1. The Honourable Justice Kumar recuse himself from hearing and deciding on any applications or to adjudicate over the substantive matter in these proceedings on the grounds of bias and/or apprehended bias;***
>
> ***2. This matter be referred to the Chief Justice and/or the Chief Justice for allocation of another Judge to adjudicate on this matter; and***
>
> ***3. Costs of this application be costs in the cause."***

1.2 The Application was called on 16 March 2017, being the hearing date of substantive matter when:-

(i) Parties were directed to file Affidavit;

(ii) The Application was adjourned to 4 April 2017 at 9.30am, for hearing;

(iii) The substantive matter was adjourned to 20 April 2017, for hearing.

1.3 Following Affidavits were filed:-

For Seventh Defendant/Applicant

(i) Affidavit of Muni Kamlesh Naidu sworn on 15 February 2017, and filed on 16 February 2017 (**"Muni Naidu's 1st Affidavit"**);

(ii) Affidavit of Muni Kamlesh Naidu sworn and filed on 30 March 2017 (**"Muni Naidu's 2nd Affidavit"**).

For Plaintiff/Respondents

Affidavit in Response of Govind Sami Padayachi sworn and filed on 23 March 2017 (**"Padayachi's Affidavit"**).

For Eighth Defendant

(i) Affidavit of Jai Narayan sworn and filed on 25 March 2017 (**"Narayan's Affidavit"**);

(ii) Affidavit of Loraine Alpana Bhan sworn and filed on 23 March 2017 (**"Bhan's Affidavit"**);

(iii) Affidavit of Joseph Subarmani sworn on 22 March 2017 and filed on 23 March 2017 (**"Subarmani's Affidavit"**);

(iv) Affidavit of Munsami Naidu sworn and filed on 23 March 2017 (**"Munsami's Affidavit"**);

(v) Affidavit of Lawrence Paligaru sworn and filed on 23 March 2017 (**"Paligaru's Affidavit"**).

2.0 Application for Recusal

2.1 Before this Court proceeds to deal with the Application it would deal with Bhan's Affidavit filed on behalf of Eighth Defendant.

2.2 This Court notes with concern that the Eighth Defendant through its Solicitors Messrs. Munro Leys has somewhat attempted to politicize the issue before this Court.

2.3 This Court has in no uncertain terms informed Mr Richard Naidu, Counsel for the Eighth Defendant that this Court gives no regard to Annexure "LAB1" being exhibit from textbook titled "The 2006 Military Takeover in Fiji: a coup to end all coups?".

2.4 This Court also fails to take into consideration the other contents of Bhan's Affidavit for reason that the Government Ministers being invited as Chief Guest to Dakshina India Andhra Sangam of Fiji Convention or school activities has no relevance to the dispute before this Court.

2.5 The grounds for recusal as stated in Muni Naidu's 1st Affidavit are as follows:-

(i) The Judge is related to one of the parties;

(ii) The Judge is a life member of Eight Defendant, Then India Sanmarga Ikya Sangam (hereinafter referred to as **"TISI"**);

(iii) The Judge is National President of Dakshina India Andhra Sangam of Fiji (hereinafter referred to as **"DIAS"**);

(iv) The Judge knows Dorsami Naidu and Praveen Bala well.

2.6 After this matter was called on 16 February 2017, the Seventh Defendant withdrew grounds stated in paragraph 2.5 (i) and (ii) of this Ruling. In fact at paragraph 8 of Muni Naidu's 2nd Affidavit he stated as follows:-

"With regards to paragraph 16, the 1st to 7th Defendants have been advised by Samuel Ram that the Honourable Justice Kumar said from the bench that he was not related to either of the Plaintiffs and that he has had no interaction with them. The information I deposed to in my previous affidavit was given to me by someone who is not willing to be named or to go under oath. Therefore, I accept what has been said by the honourable Justice Kumar and we have instructed Mr Samuel Ram to abandon the ground of family relation when making arguments on recusal."

2.7 Learned Counsel for the Applicant also informed Court that my life membership of TISI is also not being pursued as a ground for recusal.

2.8 In fact, Counsel for the Applicant informed the Court that he advised his clients not to pursue with the recusal application but he is bound by his instructions.

2.9 The leading authority in Fiji in respect to recusal application is **Chaudhary v. State** [2010] FJHC 531; HAM 160.2010 (19 November 2010) where his Lordship

Justice D. Gounder analysed the principle applied in various jurisdictions in respect to the common law position in dealing with recusal application. His Lordship stated as follows:-

*"[3] The first legitimate ground for disqualification is when a judge has an interest in the outcome of the case, unless the rule of necessity applies (see **United States v Will**, [1980] USSC 207; 449 US 200 (1980). The applicant does not suggest that I have an interest in the outcome of his case, and therefore, he does not rely on this ground.*

[4] The second ground for disqualification is apparent bias. The applicant relies on this ground to seek my recusal. Disqualification under this ground is approached as how things might appear to an observer.

*[5] The High Court of Australia in **Ebner v. Official Trustee in Bankruptcy** [2000] HCA 63; (2000) 205 CLR 337 at 345 explained the apprehension of bias principle as follows:*

"The apprehension of bias principle may be thought to find its justification in the importance of the basic principle, that the tribunal be independent and impartial. So important is the principle that even the appearance of departure from it is prohibited least the integrity of the judicial system be undermined. There are, however, some other aspects of the apprehension of bias principle which should be recognized. Deciding whether a judicial officer (or juror) might not bring an impartial mind to the resolution of a question that has not been determined requires no prediction about how the judge or juror will in fact approach the matter. The question is one of possibility (real and not remote), not probability."

*[6] In **Antoun v. The Queen** [2006] HCA 2, the High Court of Australia had before it an appeal in a case of alleged apprehended bias on the part of the trial judge in dealing with a submission of no case to answer and with a question of bail. The High Court allowed the appeal and ordered a new trial. Callinan J said (p39):*

"It should be noted that the test as stated emphasizes that a possibility, that is relevantly to say, the appearance of a possibility of an absence of an impartial mind on the part of the judge, may lead to disqualification."

*[7] In Canada, the reasonable apprehension of bias test is well established. In **Wewaykum Indian Band v Canada**, 2003 SCC 45 (CanLII), the Canadian Supreme Court held:*

"Public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so. A judge's impartiality is presumed and a party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified. The criterion of disqualification is the reasonable apprehension of bias. The

question is what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude. Would he think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly?"

*[8] In **Liteky v United States** 510 US 540 at 564 (1994) the United States Supreme Court endorsed the apprehension of bias test for federal law purposes and said:*

"Disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified."

*[9] In Fiji, the Supreme Court in **Amina Koya v State** [1998] FJSC 2, confirmed its agreement with the view stated by the New Zealand Court of Appeal in **Auckland Casino Ltd. v. Casino Control Authority** [1995] 1 NZLR 142, that:*

"There was little if any difference between the Australian test of whether a fair-minded observer might reasonably apprehend or suspect that the judge had prejudged and the English test of whether there is a real danger or real likelihood, in the sense of possibility of bias."

*[10] More recently in **Muir v Commissioner of Inland Revenue and Another** [2007] NZCA 334 (7 August 2007] the New Zealand Court of Appeal reviewed the case authorities on apprehension of bias test in common law jurisdictions and said (p12):*

"In our view, the correct enquiry is a two stage one. First, it is necessary to establish the actual circumstances which have a direct bearing on a suggestion that the judge was or may be seen to be biased. This factual inquiry should be rigorous, in the sense that complainants cannot lightly throw the "bias" ball in the air. The second inquiry is to then ask whether those circumstances as established might lead a fair-minded lay-observer to reasonably apprehend that the judge might not bring an impartial mind to the resolution of the instant case. This standard emphasizes to the challenged judge that a belief in her own purity will not do; she must consider how others would view her conduct."

[11] Later, the Court said (p13):

"It is not possible or desirable to create a catalogue of disqualifiers for judges in which a reasonable apprehension of bias may arise, but some broad principles can be stated. First, a judge should not decide a case on purely personal considerations. Secondly, there should not reasonably be room for a perception that the judge will decide the case on anything but the evidence in front of him or her. Thirdly, a judge must be in a position to consider all potentially relevant arguments. Fourthly, there may

conceivably be a series of events or rulings which reasonably warrant an inference that the challenged judge's perception is warped in some way."

[12] In 2002, the Fiji Judiciary adopted the Guideline Principles for Judicial Officers based on the Bangalore Principles of Judicial Conduct. The Guideline Principles set out the grounds for disqualification as follows:

"A judicial officer should disqualify himself or herself from participating in any proceedings in which he/she is unable to decide the matter impartially or where it would appear to a reasonable informed observer that the judicial officer is unable to decide the matter impartially. Such instances include where:

2.4.1 the judicial officer has actual bias for or against a party or any personal knowledge of disputed evidentiary facts in the proceedings;

2.4.2 the judicial officer previously served as a lawyer or was a material witness in the matter in controversy;

2.4.3 the judicial officer, or a member of his/her family, has a financial or other close personal interest in the outcome of the proceedings.

Provided that disqualification of a judicial officer shall not be required if, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice."

2.10 Before dealing with the grounds for recusal this Court thinks it is appropriate to refer to some of the cases cited by the Applicant and Eighth Defendant.

2.11 In **Porter v. McGill** and **Week v. McGill** [2002] AC 357 the House of Lords reviewed the test for apprehension of bias in R v Gough [1993] AC 646, et 670.

2.12 Upon analysing test in **R v Gough** and what was stated in **In re Medicaments and Related Class of Goods (No. 2)** [2001] 1 WLR 700 which was in line with Strasbourg Jurisprudence Lord Hope of Craighead stated as follows:-

"The question is whether the fair-minded and informed observer having consideration the facts, would conclude there was a real possibility that the tribunal was biased." (para 103, page 494)

2.13 Facts of **Porter v. McGill** in brief are as follows:-

In 1986 the ruling Conservative Party on Westminster City Council of which party P and W were respectively leader and deputy leader developed a policy to sell the council properties in the belief that owners/occupiers of these properties would vote for conservative party in 1990 election.

In 1989 complaint was made in respect to the policy and auditor was appointed under Local Government Finance Act 1982.

Auditor carried out investigation and upon completion of investigation in public via media including his interview with P and W and invited submissions from... Subsequently auditor heard the parties and found Chairman of Housing Committee, Director of Housing, Managing Director of Council, P and W, guilty and fined them.

All of the above appealed auditors verdict to Divisional Court which allowed Chairman, Director and Managing Director's appeal. Divisional Court dismissed P and W's appeal but reduced the fine substantially P and W appealed to Court of Appeal and their appeal was allowed. Auditor then appealed to High Court.

In respect to the allegation that auditor was biased and the recusal application P and W submitted that the auditor was the "investigator, prosecutor and the judge" and relied on the statement given by the auditor to public.

The auditor refused to recuse himself which was upheld by the Divisional Court and House of Lords. Lord Hope of Craighead stated as follows:-

"The auditors conduct must be see in the context of the investigation which he was carrying out, which had generated a great deal of public interest. A statement as to his progress would not have been inappropriate. His error was to make it at a press conference. This created the risk of unfair reporting, but there was nothing in the words he used to indicate that there was a real possibility that he was biased. He was at pains to point out to the press that his findings were provisional. There is no reason to doubt his word on this point, as his subsequent conduct demonstrates. I would hold, looking at the matter objectively, that a real possibility that he was biased has not been demonstrated." [para 105, page 495]

2.14 In **Lawal v. Northern Spirit Ltd.** [2004] 1 ALL ER 187, the House of Lords adopted the test in **Porter v. McGill** (Supra).

2.15 In **Lawal's** case, complaints of racial discrimination was dismissed by the Employment Tribunal. **Lawal** appealed to Employment Appeal Tribunal (EAT) and when his appeal was called, it was discovered that Senior Counsel for the employer sat as a recorder with one of the lay members of EAT. Claimant raised objection and without ruling on the objection, the EAT decided that Appeal be heard by differently constituted EAT. EAT determined that there was no real possibility that EAT was biased when the only objection was that either

one or both of the lay members hearing the appeal had previously sat with a recorder who, as counsel, was appearing for a party on the appeal.

The Court of Appeal affirmed the EAT's decision and the claimant appealed with leave to House of Lords. House of Lords applied the test as to ***"whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."*** [page 193 para (d)]

2.16 In **Livesey v. New South Wales Bar Association** (1983) 151 CLR 288, accused by the name of Stephen Sellers was remanded in custody. Accused was granted bail on the condition that either one surety lodge cash surety of $10,000.00 or two sureties lodge cash surety of $5,000.00 each. Ms Wendy Bacon provided surety in the sum of $10,000.00 when she was driven to the remand centre by Livesey. At the time Ms Bacon gave cash surety she was a law student and Livesey was a member of New South Wales Bar Association.

Subsequently Ms Bacon's application to Barrister Admission Board for admission as a barrister was refused on the ground that she was not fit and proper person which was biased on the part she played in lodging $10,000.00 cash surety. When her application was moved to Court of Appeal, their Honours Reynolds J.A. and Helshaw C.J. presided and determined the application.

New South Wales Bar Association appealed to Supreme Court of New South Wales to strike out Livesey's name from Barristers Roll on the ground that he was involved in unprofessional conduct because of his role in Ms Bacon giving cash surety of $10,000.00 on behalf of the accused.

When the matter came up to Court of Appeal, His Honour Reynolds J.A. sat on one occasion in an interlocutory matter. Prior to matter coming up for hearing on 22 March 1982, Counsel for both parties saw the President and raised the question whether the President and His Honour Reynolds J.A. should sit in the case because given the views expressed by their Honours in Ms Bacon's case.

Their Honours decided that the Court should sit as constituted and the matter was adjourned. When the matter was set down for hearing on 25 May 1982, application for their Honours not to participate in the hearing was renewed but was again refused. Court of Appeal held that Mr Livesey should be disbarred. Mr Livesey appealed to High Court.

The High Court comprising of their Honours Mason, Murphy, Brennan, Deane and Dawson J.J. allowed the appeal. The Court took note that:-

(i) Central issue in the case was whether $10,000.00 lodged by Ms Bacon as surety was her money or not;

(ii) Their Honours Muffet P and Reynolds J. A. had held in Ms Bacon's case that it was not her money and Mr Livesey knew that;

(iii) Ms Bacon was a critical witness for Mr Livesey and was called to give evidence;

(iv) Their Honours Muffet P and Reynolds J.A. in Ms Bacon's case held that she was a witness without credit.

The Court stated as follows:-

"The question which arises is whether, in these circumstances, either the appellant or a fair-minded observer might have entertained a reasonable apprehension that the views which the two members of the Court of Appeal had formed and expressed in the Bacon Case might result in the proceedings against the appellant being affected by bias by reason of prejudgment. With due respect to the members of the Court of Appeal who saw the matter differently, it follows from what we have said that we consider that that question must be answered in in the affirmative."

2.17 Their Honours in **Livesey's** case stated as follows:-

"In a case such as the present where there is no allegation of actual bias, the question whether a judge who is confident of his own ability to determine the case before him fairly and impartially on the evidence should refrain from sitting because of a suggestion that the views which he has expressed in his judgment in some previous case may result in an appearance of pre-judgment can be a difficult one involving matters "of degree and particular circumstances may strike different minds in different ways" (per Ackin J. in Shar (1980) 55 FLJR, pa p 16). If a judge at first instance considers that there is any real possibility that his participation in a case might lead to a reasonable apprehension of pre-judgment or bias, he should, of course, refrain from sitting. On the other hand, it would be an abdication of judicial function and an encouragement of procedural abuse for a judge to adopt the approach that he should automatically disqualify himself whenever he was requested by one party so to do on the grounds of a possible appearance of pre-judgment or bias, regardless of whether the other party desired that the matter be dealt with by him as the judge to whom the hearing of the case had been entrusted by the ordinary procedures and practice of the particular Court."

2.18 In **Ebner v. Official Trustee in Bankruptcy** and **Clenac Pty Ltd. & Ors v. ANZ Banking Group Ltd** [2000] 205 CLR 337:-

Ebner v. Official Trustee

(i) The Trial Judge was a director of a family trust which owned approximately 8000-9000 shares in a bank;

(ii) Trial Judge was a contingent beneficiary of the trust;

(iii) The Bank was not a party to the proceedings but had a pecuniary interest in the outcome of the proceedings;

(iv) The Trial Judge disclosed his contingent interest;

(v) Respondent objected to the Trial Judge hearing the matter;

(vi) The Trial Judge refused to recuse himself;

Clenac v. ANZ Bank

(i) Bank filed action against borrowers of a foreign currency loan and the borrowers counterclaimed alleging negligence and unconscionability;

(ii) After completion of trial and before delivery of judgment the Trial Judge upon his mother's death inherited 2400 shares in the Bank which was the Plaintiff and Defendant by counter-claim in the proceedings;

(iii) The Judge did not disclose his inheritance to the parties and delivered judgment in favour of the Bank;

(iv) After discovering the shareholding, the borrowers appealed to Court of Appeal on the ground that the Trial Judge was disqualified because of his shareholding in the Bank;

(v) No suggestion of actual bias was made in the Appeal.

2.19 Their Honours Gleeson CJ, McHugh, Gummow and Hayne JJ stated as follows:-

"Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), as

here, the governing principle is that, subject to qualifications relating to waiver (which is not presently relevant) or necessity (which may be relevant to the second appeal), a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide (41). That principle gives effect to the requirement that justice should both be done and be seen to be done (42), a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. It is convenient to refer to it as the apprehension of bias principle." [Pages 344, 345 para 6]

2.20 Their Honours at page 345 (paragraph 8) stated as follows:-

"The apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty. Its application requires two steps. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an "interest" in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed."

2.21 On how the principle is to be applied, their Honours at page 348 (paragraph 19) stated as follows:-

"Judges have a duty to exercise their judicial functions when their jurisdictions is regularly invoked and they are assigned to cases in accordance with the practice which prevails in the court to which they belong. They do not select the cases they will hear, and they are not at liberty to decline to hear cases without good cause. Judges do not choose their cases; and litigants do not choose their judges. If one party to a case objects to a particular judge sitting, or continuing to sit, then that objection should not prevail unless it is based upon a substantial ground for contending that the judge is disqualified from hearing and deciding the case.

This is not to say that it is improper for a judge to decline to sit unless the judge has affirmatively concluded that he or she is disqualified. In a case of a real doubt, it will often be prudent for a judge to decide not to sit in order to avoid the inconvenience that could result if an appellate court were to take a different view on the matter of disqualification. However, if the mere making of an insubstantial objection were sufficient to lead a judge to decline to hear or decide a case, the system would soon reach a stage where, for practical purposes, individual

parties could influence the composition of the bench. That would be intolerable." (emphasis added)

2.22 In respect to Judges associations with a party their Honours stated as follows:-

"It is not only association with a party to litigation that may be incompatible with the appearance of impartiality. There may be a disqualifying association with party's lawyer, or a witness, or some other person concerned with the case. In each case, however, the question must be how it is said that the existence of the "association" or "interest" might be thought (by the reasonable observer) possibly to divert the judge from deciding the case on its merits. As has been pointed out earlier, unless that connection is articulated, it cannot be seen whether the apprehension of bias principle applies. Similarly, the bare identification of an "association" will not suffice to answer the relevant question. Having a mortgage with a bank, or knowing a party's lawyer, may (and in many cases will) have no logical connection with the disposition of the case on its merits." (page 350 paragraph 30) (emphasis added)

2.23 In respect to the Trial Judges failure to disclose about his inherited share in the Bank before delivering judgment in **Clenac's** case their Honours stated as follows:-

"As a matter of prudence and professional practice, judges should disclose interests and associations if there is a serious possibility that they are potentially disqualifying. It is common, and proper, practice for a judge who owns shares in a company which is involved in a case in which the judge is sitting to inform the parties of that fact and to give them an opportunity to raise an objection should they wish to be heard. I most cases, the outcome is that no objection is raised and, by reason of waiver, any potential problem disappears. One reason for the practice is that it gives the parties an opportunity to bring to the attention of the judge some aspect of the case, or of its possible consequences, not known to, or fully appreciated by, the judge.

It is, however, neither useful nor necessary to describe this practice in terms of rights and duties. At most, any "duty" to disclose would be a duty of imperfect obligation. A failure to disclose is relevant (if at all) only because it may be said to cast some evidentiary light on the ultimate question of reasonable apprehension of bias (104). A failure to disclose has no other legal significance. In particular it does not, of itself, give a litigant any right to have the judge desist from further hearing the matter or to have the ultimate decision in the matter set aside for want of procedural fairness.

To describe the practice of making a disclosure as a matter of right or duty may distract attention from the fundamental question to be answered which is whether the reasonable apprehension of bias test is established. The fact that the judge did not disclose his shareholding gives no different additional right to the present appellants." [paragraph 69, 70, 71 page 360]

2.24 In **Ebner's** case, Court of Appeal and High Court upheld Trial Judge's decision to not to disqualify himself and in **Clenac's** case the Court of Appeal and High Court of Australia dismissed borrowers contention that the Trial Judge should have disqualified himself because of shares inherited by him in the Bank and for failing to disclose his interest.

2.25 In **Antoun v R** (No.S299/2005) and **Antoun v R** (No.S300/2005) (2006) 224 ALR 51 the Appellants who were brothers were jointly charged with demanding money with menace from the owner of a nightclub in Sydney.

At the close of prosecution case the Counsel for one Appellant informed the Trial Judge (District Court) that there will be an application the next day for no case to answer with counsel for other Appellant indicating that he will join in the application. The Trial Judge in response stated that the application for no case to answer will be refused. After stating that the Trial Judge stated that the he will consider any submission and he is obliged to consider any position Counsels' put.

Next morning, Counsel for Appellant made application for Trial Judge to disqualify himself. After hearing submissions the Trial Judge refused to disqualify himself and gave reason why he said he will refuse no case to answer submissions. Appellants made further application for Trial Judge to disqualify himself which was refused. Another application for Trial Judge to disqualify himself was made when the Trial Judge revoked one of Appellants bail without hearing counsel fully and the application for disqualification was refused.

2.26 The Court of Appeal dismissed the Appeal. The Appellants appealed to High Court of Australia.

2.27 The High Court allowed appeal on the ground that the Trial Judge should not have rejected the no case to answer submission without giving the counsel an opportunity to present the argument and this also applied to the bail application. His Honour Justice Kirby at paragraph 34 page 60 of the Judgment stated as follows:-

"It is true that, in the oft-repeated and oft-applied words of Mason J in Re JRL, Ex-parte CJL, this court has "loudly and clearly" expressed a corrective against

any view that a judge should too readily accept recusal because a party has demanded it. In the administration of justice in Australia, the parties do not (at least normally) have entitlements to choose among the judicial officers who will conduct the trial. This principle has been reasserted and applied in many cases. It was not questioned in this appeal."

2.38 In **Muir v Commonwealth of Inland Revenue** [2007] 3 NZLR 495, Mr Muir was a tax lawyer and originator of 'Trinity Scheme' involving tax deduction on forestry investment. Subsequently the Commissioner fund that the Scheme was designed for tax avoidance and as a result sued various Trinity Investors and the Trial Judge held that Scheme was "entirely artificial and tax driven" which was upheld by High Court.

2.39 In his Judgment the Trial Judge made adverse findings against Mr Muir who was a witness but not a party to the proceedings. The Commissioner applied for costs against the parties and non-party costs against Mr Muir. Mr Muir by his counsel applied for Trial Judge to recuse himself from hearing the non-party cost application on the grounds that:-

(i) The Trial Judge made some comments about Mr Muir's credibility;

(ii) The Trial Judge having an interest in Tohakope Forest Trust Ltd had an association with David Janet and Gregory Hedger, who were shareholders and directors of Southern Forestry Ltd which company prepared a feasibility report and extracts of which were described as "important evidence in the main proceedings;

(iii) The Trial Judge and his co-director and co-shareholder could derive a "learning benefit from the main case".

The Trial Judge refused to recuse "himself from hearing non-party cost application." Mr Muir appealed to Court of Appeal which appeal was dismissed on the grounds there was no evidence that trial Judge derived any benefit from main proceedings; Mr Muir's falling out with Southern Forestry Ltd (SFL) and Trial Judge's relationships with shareholders of SFL was of inconsequential importance; Trial Judges finding based on Mr Muir's evidence were directly related to the issue and his Honour was obliged to give reason for rejecting Mr Muir's evidences.

His Honour Justice Hammond in **Muir's** case in respect to Judge's duty to sit stated as follows:-

"The requirement of independence and impartially of a Judge is counterbalanced by the Judge's duty to sit, at least where grounds for disqualification do not exist

in fact or in law. This duty in itself helps protect judicial independence against manouvering by parties hoping to improve their chances of having a given matter determined by a particular Judge or to gain forensic or strategic advantages through delay or interruption to the proceeding. As Mason J emphasized in Re JRL; ex p CJL (1986) 161 CLR 342 at p 352:

> *"[I] is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour". (page 504 para 35)*

2.40 In respect to the need to establish facts properly by evidence His Honour Justice Hammond in **Muir's** case stated as follows:-

"Once again, we have to observe that there is nothing worse than the murder of a beautiful theory by a gang of brutal facts. That is why we have been at pains in the reformulated test to emphasise that in these claims of bias cases the facts must first be properly established. The suggestion is little more than that Messrs. Janett and Hedges must have voiced (or will possibly voice their antipathy towards Dr Muir, arising out of the events which we have briefly described, to the Judge and that the Judge must have responded to that assessment (or will so respond). This complaint lacks an evidential foundation. We also dismiss it out of hand, on the facts.

We cannot stress too strongly that the apprehension of bias principle requires the identification of whatever it is which might lead a Judge to decide a case other than on its legal and factual merits and, as was said in Ebner at p 345, "an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits".

...The allegation here to a degree shades back into an allegation of actual bias- that the Judge did "listen to scuttlebutt", out of Court. Or that, even if he did not, that is how it would look to a reasonable member of the public.

We reject those propositions. Judges and members of the public alike are bombarded with scuttlebutt, but Judges and juries are formally required to abjure from having any regard to it in their professional role, and do so. It is probably necessary to experience professionally the weight with which this duty falls on a judicial officer to appreciate fully its force. The reply, "well, that is what it might look like" fails to give proper weight to the requirement that something must "reasonably" appear to be so to the informed observer. We agree with Kirby J in Johnson v Johnson (2000) 201 CLR 488 at para [53] that "a reasonable member of public is neither complacent nor unduly sensitive or suspicious". That

statement was approved of by Lord Steyn (for their Lordships) in Lawal v Northern Spirit Ltd [2004] 1 All ER 187 at p 193. The informed observer will not, for instance, lightly accept that a Judge has put aside his or her professional oath, or indeed his or her professional training (for as everybody knows, a vast amount of time in litigation is taken up with sifting and weighing "facts" in evidence).

The proposition that a reasonable member of the community might think that the Judge had acted on, or would act on, scuttlebutt in this instance is untenable. Further, in the context of the case as a whole, this whole argument seems rather trivial. The Judge has already made some severe criticisms of Dr Muir. Against that background, Dr Muir's falling out with SFL and the Judge's rather limited relationship with two people who are associated with that company seems of inconsequential importance." (pages 514, 515)

2.41 In **Gafoor v The Integrity Commissioner** Case No. CV 2012 - 00873, High Court of Justice, Republic of Trinidad and Tobago (11 October 2012) in deciding the application recusal on the grounds that the Judge:

(i) In a parallel Constitutional Motion accused the Applicant of impropriety;

(ii) Was a Presidential Appointee to the Mediation Board to the extent that he be "beholder to his Excellency";

(iii) Mediation Board comes under Attorney General who is a Defendant in the parallel Constitutional Motion;

(iv) Recipients of financial benefit being Board members are required to make declaration to Integrity Commission which was Defendant in the action.

His Lordship refused to recuse himself after stating the principle and citing case authorities on following grounds:-

(i) There was nothing said by him in the parallel Constitution Motion to suggest he has prejudiced issues in the action;

(ii) He could not see how a fair minded observer can come to conclusion that he is "beholden to the President" and that President was not a party to the action.

(iii) Counsel for Applicant could not provide any evidence nor basis in fact or law to show His Lordship's appointment was under purview of Attorney General.

(iv) The allegation of declaration in respect to financial benefit was held to be not a fact but a surmise or speculation. His Lordship stated that:-

> *"....the fact that the sitting Judge is not receipt of a stipend, nor allowance, his sitting on the Board is purely voluntary without reward, no other members is in respect of a stipend or reward, they have been sitting there for the promotion of mediation in this country without benefit, the officious bystanders will ask what does that have to do with this case?"*

His Lordship at paragraph 7, 8 and 9 of his Ruling stated as follows:-

"This tension between the duty to sit and the duty to preserve judicial independence and impartially sets the stage for a recusal process which is open, transparent and fair: where decisions on recusal are made after careful thought and reflection; where the applications themselves are made bona fide, properly formulated, coherent and well-grounded on established principles of law. The fact that it is a challenge going to the fundamental and solemn duty of a judge of the Supreme Court, the occasion should not be scandalized by improper, spurious and baseless requests for recusal which will do nothing to inspire confidence in the administration of justice. Such applications must not in itself be seen as an attempt to excite suspicion and mischief nor an attempt to ferret out information from the judge to make out a case for recusal.

Indeed to lightly treat the duty to sit is the very temptation which must be resisted and which highlights the condemnation of unfounded applications for recusal which will have the unintended consequence of embarrassing a judge rather than genuinely questioning his impartially and integrity in the interest of the administration of justice. The Court of Appeal in Localbail reminds us that it "would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance."

Ultimately therefore there is a presumption of impartially on the part of the sitting judge and any application for recusal is not to be lightly made. It is a fundamental challenge and must be supported by evidence. The application must not be spurious to fanciful, lest the very making of the challenge will in itself do damage to the administration of justice which the very essence of a proper recusal is meant to prevent. Care must be exercised to prevent recusal hearings from being reduced, "into a side show" Archie JA (as he then was) observed in **Panday v Virgil:**

"The proper point of departure is the presumption that judicial officers and other holders of high public office will be faithful to their oath to discharge their duties with impartiality and in accordance with the constitution. The onus of rebutting that presumption and demonstrating bias lies with the person alleging it. Mere suspicion of bias is not enough; a real possibility must be demonstrated on the available evidence."

2.42 Plaintiff by their Counsel relied on **Chaudhary v. State** HAM 160 of 2010 in which his Lordship Justice Gounder analysed the case authorities including **Ebner v. Official Trustee in Bankruptcy** (Supra); **Antoun v. The Queen** (Supra) and **Muir v. Commissioner of Inland Revenue & Anor.** (Supra).

2.43 Mr D. Sharma, the Counsel for the Plaintiffs submitted that the Affidavits filed by the Seventh Defendant (Muni Kamlesh Naidu), the Applicant has breached the provision of Order 41 Rule 5(2) of High Court Rules and in particular paragraph 7, 9, 14.1, 18 and 20 of Muni Naidu's 1st Affidavit.

2.44 Order 41 Rule 5(2) of the High Court Rules (**"HCR"**) provides a follows:-

"(2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof."

2.45 The alleged breach of provision of Order 41 Rule 5(2) of High Court Rules will be dealt with when the particular paragraph of Muni Naidu's 1st Affidavit are dealt with in this Ruling:-

Muni Naidu's 1st Affidavit

2.46 This Court will refer to paragraph 7 to paragraph 20.1 of Muni Naidu's 1st Affidavit being paragraphs which deal with alleged grounds for recusal.

Paragraph 7

At paragraph 7 Muni Kamlesh Naidu states as follows:-

"I am informed that the Honourable Justice Kumar is related to one of the Plaintiffs."

This Court accepts Plaintiff's Counsels' submissions that the deponent has breached the provision of Order 41 Rule 5(2) of HCR by failing to disclose his source.

On 16 February 2017, I informed the Counsel that I have never seen any of the Plaintiffs and will not be in a position to identify them if they appear before me and instructed Counsel to inform Court on what basis deponent has made this allegation.

As rightly pointed out by Plaintiffs' Counsel, Mr Devanesh Sharma the deponent instead of disclosing source and stating on what basis he made the allegation withdrew this allegation at paragraph 8 of Muni Naidu's 2nd Affidavit.

Paragraph 7 of Muni Naidu's Affidavit makes it obvious that the deponent or his advisor made this ground without any regard to its merit and appears to be an attempt to mislead the Court and the parties. This sort of allegation tantamounts to contempt of court.

Paragraph 8

Muni Kamlesh Naidu deposes that:-

"The Plaintiffs are seeking any orders they think fit and I am advised that the current application would undermine the effect of orders given by the Fiji Court of Appeal."

This Court fails to understand as to how this allegation shows any apprehension of bias.

The deponent gives his own opinion on legal issues before this Court and is totally irrelevant to the issue before this Court, which he is not permitted to do. **Ratu Osea Roqica Tuinakelo v. Director of Lands and Ors.** [2003] HBC 0303.2002 1 January 2003

Paragraph 9

This Court accepts Plaintiffs' Counsels' submission that the deponent breached Order 41 Rule 5(2) of HCR by failing to disclose:-

(i) Who are members of Dissident Members;

(ii) If there are members of Dissident members then who has been bragging.

The Court finds that this is a mere speculation without any evidence.

Paragraph 10

The deponent states as follows:-

"I am also aware that the Honourable Justice Kumar knows both Mr. Praveen Bala and Mr Dorsami Naidu well. Both Mr. Praveen Bala and Mr. Dorsami Naidu are the driving force behind these proceedings."

During the course of the hearing and prior to that I informed Counsel for Defendants that I know Dorsami Naidu as well as I know all Counsel appearing in this matter for simple fact that I practiced as Legal Practitioner in Lautoka for thirteen (13) years prior to my appointment to the bench and Mr Dorsami Naidu was fellow Legal Practitioner.

As for Mr Praveen Bala, I informed Counsel that Mr Bala was Mayor/Special Administrator of Ba Town Council and Special Administrator of Lautoka City Council when I was practicing in Lautoka.

Mr Bala is also very well known in our community having been a Minister in the current Government since 2014. Only time we as Judges get to meet the Government Minister including Mr Bala is when there is an official function such as opening of Parliament session, Fiji Day Celebration, Constitution Day Celebration and when invited by His Excellency the President of Fiji for any function at the Government House.

No evidence has been produced to show that I have any relationship with Mr Dorsami Naidu or Mr Praveen Bala and that they are the driving force behind this proceedings.

Even if they are, it does not by itself form ground for recusal.

Paragraph 11

The deponent states as follows:-

"11. The Honourable Justice Kumar is also the National President of Andra Sangam which is was formed by a dissident group of TISI."

It is apparent that deponent is not fully conversant with what he is saying. In fact I am not National President of Andhra Sangam and do not know if any such Society exists.

There is no evidence before this Court that Andhra Sangam is formed by dissident group of TISI, the Eighth Defendant.

In fact I am National President of Dakshina India Andhra Sangam of Fiji which was incorporated as association some seventy-six (76) years ago to promote Tellegu language, culture and tradition in Fiji. Except that some members who founded DIAS were former members of TISI there is no direct relation between TISI and DIAS.

I do not think any of the parties, or their Counsel were born when DIAS was formed.

I became National President of DIAS in the year 2012. This fact that I am the National President of DIAS was well known to Defendants due to the fact on 22 September 2016, Counsel for First to Seventh Defendants Mr Samuel Ram stated to me that he is aware that I am the National President of DIAS. This is just before commencement of First to Seventh Defendant's Application to dissolve Injunction, Strike-Out Originating Summons and to Transfer this matter to Lautoka High Court and almost one (1) month before the Ruling was delivered.

In any event, mere fact that I am the National President of DIAS, a non-government organization which manages five (5) primary schools, two (2) colleges and one (1) temple and is a separate entity with no connection to TISI cannot support any apprehension of bias to an observer who is fully aware of the facts before this Court and my position as National President of a separate entity.

Paragraph 12.1

This Court fails to understand as to how the lawyers for the deponent could advise the deponent as stated at paragraph 12.1 to 12.4 for reasons that:-

(i) Parties to Lautoka Action entered into the Terms of Settlement (**"TOS"**) and the issues about the interim committee was not determined by Court. This Court in its Ruling delivered on 20 October 2016 and 17 February 2017, dealt with the effect of the TOS. Since that Ruling is subject to Appeal to Court of Appeal, I do not make any further comments in that regard.

(ii) Lautoka Miscellaneous Action No. HMP14 of 2016 (**"Contempt Proceedings"**) was dismissed because of failure by Applicants to file Notice of Motion for Committal within fourteen days from grant of leave pursuant to Order 52 Rule 3(2) of HCR and was not determined on merits.

(iii) There is no evidence before Court that whose suspension is being dealt in Lautoka Action.

(iv) The Court of Appeal did not resolve as to who were National Executives of TISI but permitted the National Executives who were in Office which included First, Second, Third and Sixth Defendants prior to 28 August 2016 to continue in office until the hearing of the Application for Stay of Orders made vide Ruling delivered on 20 October 2016.

Paragraph 13

This Court accepts Plaintiffs Counsels' Submission that what is stated at paragraph 13 of deponent's Affidavit is deponent's opinion and not relevant to the recusal application.

Paragraph 14

The deponent states as follows:-

"14. I am aware that the Honourable Justice Kumar (who is adjudicating this matter before this Honourable Court is also a life member. I am advised that, in light of the rulings, this means that the Honourable Justice Kumar would have the same rights to the cause of action that the Plaintiffs have."

No evidence has been produced to show that I have taken any active part in the affairs of TISI including hold any position or attending any Annual General Meeting or any other meeting of TISI. I have made this clear to Applicant's Counsel that apart from becoming life member of TISI more than ten (10) years ago I have not taken any active part in the affairs of TISI and have no interest in TISI.

If being a life member of any society in Fiji which has approximately 6,500 members does mean that a judicial officer cannot hear any case involving members; then the Court will be flooded with application for recusal which will affect the system of justice.

Paragraph 15

The deponent states as follows:-

"15. I am also informed that several of the matters mentioned above were not disclosed to our lawyers at the commencement of the proceedings in this matter."

As stated at paragraph 2.46 of this Ruling under the heading Paragraph 11, Counsel for First to Seventh Defendants on 22 September 2016, prior to hearing of the Application to dismiss Injunction, Strike Out the Originating Summons and Transfer of proceeding informed Court that he is aware that I am the National President of Dakshina India Andhra Sangam of Fiji which as I have said has no connection with TISI the Eighth Defendant.

Paragraph 16

The deponent states as follows:-

"16. When the proceedings began, we had informed our lawyers that the Honourable Justice Kumar was a life member of TISI and his decisions may be influenced by his personal beliefs and convictions in relation to the running of TISI. This was a widely publicised matter and all members had an opinion on the issue."

This paragraph contradicts what Applicant stated at paragraph 15 of his Affidavit. At paragraph 15 he deposes that his lawyer was not aware about my life membership whereas at paragraph 16 he deposes that they informed their lawyers about my life membership when proceedings began.

It is evidently clear that Seventh Defendant and/or his Counsel knew about my life membership of TISI and my role in DIAS from beginning of proceedings and took no objection to me hearing this matter, until such time the First to Third Defendants Application to Dismiss Injunction, Strike Out Originating Summons and Transfer of this proceeding was refused by this Court.

Paragraph 17

The deponent states as follows:-

"17. The Honourable Justice Kumar also knows several of the members well and is well versed with the affairs of TISI. Our lawyers advised us that the life membership of the Honourable Justice Kumar by itself is not sufficient to make an application of this nature and also that such matters ought to be disclosed by the Honourable Justice Kumar himself."

There is no evidence to show that I have taken any active part in the affairs of TISI let alone attending any of its Annual General Meeting or any other meeting. I have made it very clear to the Counsel for the Applicant that apart from paying twenty-five dollars ($25) to TISI being life membership fee [more than ten (10)

years ago] when I was a Legal Practitioner I have not taken any active role in affairs of TISI.

The deponent also failed to disclose who are the members that are known to me.

Paragraph 18

This Court accepts Plaintiffs Counsels' Submission that deponent has breached provision of Order 41 Rule 5(2) of HCR by failing to state that who advised him that "Plaintiffs were seeking to argue a cause of action which rightfully belonged to other parties."

Obviously what is stated in paragraph 18 does not amount to ground for recusal and as rightly stated by Plaintiffs' Counsel it is an opinion by deponent on someones' advise.

Paragraph 19

The deponent states as follows:-

"19. Considering the above, there is an apprehension amongst the defendants, the national executives and members of the Council of Management of TISI that we would not get a fair hearing and that any decision will be based on one or all the above factors."

This Court agrees with the Plaintiffs' Counsel that this allegation is without merit. Counsel for the Applicant Mr Samuel Ram made it very clear that he is not claiming actual bias.

Paragraph 20

The deponent stated as follows:-

"I am also advised that one of the issues initially identified in the ruling delivered on 20 October 2016 was whether the declaration of unopposed nominees had to be made at the AGM itself. This was simply resolved by calling and completing the AGM of 28 August 2016. Subject to any adverse orders made the completion of the AGM is scheduled for the 19 of February 2017."

The deponent once again breached provision of Order 41 Rule 5(2) by failing to disclose who advised him. In any event the contents of this paragraph has no relevance to the recusal application.

2.47 This Court joined TISI as Eighth Defendant for the reason that any declaration or Order that will be made by this Court will affect TISI and its members.

2.48 The Eighth Defendant has supported the Application for Recusal.

This Court notes that TISI insisted of playing a neutral role chose to support Seventh Defendant's Application for Recusal and by its Solicitors attempted to politicize the issue of recusal.

2.49 This Court will look at Affidavits of Jai Narayan, Munsami Naidu, Lawrence Paligaru and Joseph Subarmani filed on behalf of Eighth Defendant.

Affidavit of Jai Narayan

Paragraph 4

As rightly submitted by Plaintiffs' Counsel the deponent has breached provision of Order 41 Rule 5(2) by failing to state who advised him about perception of others about Judges involved in a proceedings is also important.

Paragraph 5

This Court has dealt with matters raised in paragraph 5(a) and (b) when referring to Affidavit of Muni Kamlesh Naidu, the Applicant.

Paragraph 6

The deponent in this paragraph states that this litigation is widely discussed in the community and he has communicated with more than fifty (50) Sangam members and people have conveyed that they are ashamed and embarrassed about this litigation. The deponent again mentions my presidency of DIAS.

The fact that people are ashamed or embarrassed about litigation cannot be ground for recusal.

As to my position in DIAS I have already dealt with this issue in this Ruling.

Paragraph 7

What is raised in paragraph 7 is totally irrelevant as the ruling in respect to Transfer Application was delivered on 20 October 2016, and is subject to Appeal to Court of Appeal.

Paragraph 8

I dealt with issue in respect to my Presidency of DIAS and as such there is no need to make any further comments.

Paragraph 9

The deponent states as follows:-

"9. I am informed and believe that the Andhra Sangam owns and operates at least seven schools in total in Fiji as well as other community assets such as temples, including in or around Ba, where until a few years ago Mr Praveen Bala was the special administrator in place of Ba Town Council. Mr Bala (who comes from Ba) is now a Cabinet Minister and has a direct interest in these proceedings."

DIAS owns and operates a primary school in Ba and a temple in Vaqia, Ba. The school and temple were built more than forty years ago whereas Mr Bala became a Cabinet Minister after 2014 General Election. This Court fails to understand the connection between a school/temple and Mr Bala.

Paragraph 10

This Court agrees with Plaintiffs' Counsels' Submissions the assertion and comment in this paragraph lacks merit.

Paragraph 11

It is quite apparent and that the Solicitors for the Eighth Defendant had attempted to politicize the issue as appears from the Affidavit of Loraine Alpana Bhan.

This Court has made comments about Loraine Alpana Bhan's Affidavit at paragraphs 2.1 to 2.4 of this Ruling.

Paragraph 12

No evidence has been produced to show that I have taken any active part in the affairs of TISI or taken part in any disciplinary committee set-up by TISI.

For reason stated about the contents of Jai Narayan's Affidavit lacks merit and has failed to satisfy test for apprehension of bias.

Affidavit of Joseph Subarmani

Paragraph 4

The deponent deposes that he has spoken to approximately fifty (50) Sangam members who are concerned about my involvement as judge and questioned how this matter is filed in Suva.

This Court accepts Plaintiffs' Counsels' Submission that this paragraph appears to be cut and paste from Jai Narayan's Affidavit with only difference being Jai Narayan says he spoke to "more than 50" Sangam mmbersand Joseph Subarmani says he spoke to "approximately 50 Sangam members".

The fact that deponent is asking as how this case is filed in Suva shows that he is not aware about the process of filing cases. If their lawyers would have advised them properly then they would understand. The civil proceedings are filed in Civil Registry of the High Court and then the case is allocated to a judicial officer who has no say as to who the case is allocated.

Paragraphs 5 and 6

The contents of these paragraphs are not relevant to recusal application as they are deponent's opinion only.

Paragraphs 7 and 8

I informed Counsel for the Applicant at the hearing that I was Appeals Committee Chairman in respect to soccer tournament organized by Then India Valibar Sangam ("TIV"). Mr Subarmani states it was in 2008. Role of Appeals Committee was to hear any appeal against the decision of Protests Committee in respect to a soccer match.

Apart from this there is no evidence that I had any other role to play.

As for TISI, I have not taken part in any of their decision making process or attended any of their Annual General Meeting or any other meeting and no evidence has been produced to the contrary.

Paragraph 9

I have already dealt with my involvement with Dhakshina India Andhra Sangam of Fiji when dealing with Muni Kamlesh Naidu's Affidavit.

Affidavit of Lawrence Paligaru

Paragraph 3

No evidence has been produced to show that I was a member of disciplinary committee of TIV.

Apart from my role as Chairman of Appeals Committee as stated at page 28 of this Ruling under the heading "Paragraphs 7 and 8", I have not taken any part in the affairs of TISI or TIV.

Affidavit of Munsami Naidu

Paragraph 3

The deponent states as follows:-

"3. I can recall between the years 1996 to 1999 Justice Kamal Kumar who is the presiding Judge in this matter was the legal advisor of TIV. Justice Kamal Kumar was an active member of TIV and served as the legal adviser under the Presidency of Mr. Ganga Raju who is now in Canada."

It appears that deponent made his Affidavit without any personal knowledge.

I informed Counsel at the hearing that between 1996 to 1999, I was attending my Bachelor of Law Course in Queensland, Australia and was not residing in Fiji between 1996 to 1999 and I only came back to Fiji in 2000, after completing my Bachelor of Law Degree.

How I could then be legal advisor to TIV or any other society when I was not present in Fiji and not legally qualified is anyone's guess.

Paragraph 4

Deponent states as follows:-

"4. I also wish to say I have spoken to Mr. Ganga Raju on 22 March 2017 at 2.45pm and he has confirmed that during his presidency of TIV, its legal adviser was Justice Kamal Kumar."

No evidence has been provided to Court to show that I was appointed legal advisor of TIV or gave any legal advise to it. As stated here before the period Munsami Naidu says I was legal adviser to TIV, I was not present in Fiji.

2.50 It is apparent from the Affidavit evidence and Submission for and on behalf of the Applicant and Eighth Defendant that Applicant had thrown whatever grounds they could think of for me to disqualify myself from hearing the substantive matter.

2.51 It is apparent that this has only come about after my Ruling in respect to Application for Interlocutory Injunction, Transfer Application and Striking Out Application was delivered.

2.52 If judicial officers are to disqualify themselves merely because they are a life member of society whose members appear before them or judicial officer is an executive of another society with almost similar objectives, then judicial officers will be flooded with application for recusal quite often when judicial officers do sit in cases involving:-

(i) Banks of which judicial officer is a customer;

(ii) Member of religious group like Methodist Church of Fiji or Catholic Church in Fiji of which judicial officer is member of same religious organization or an organisation whose belief differs from those of which a party to proceedings is a member.

2.53 In respect to Bangalore Principle of Judicial Conduct (Paragraph 2.9 of this Ruling):-

(i) Applicants Counsel submitted that Applicant is not claiming actual bias and no evidence has been produced to show that I have any personal knowledge any disputed evidentiary facts in the proceedings;

(ii) There was nothing to suggest that I have served as a lawyer or as a material witness in the matter in controversy;

(iii) There has been no suggestion that myself or member of my family has a financial or other close personal interest in the outcome of the proceedings.

2.54 No evidence was produced to support the grounds for recusal and Applicant attempted to throw whatever he or his so called advisor could think of which were "spurious to fanciful" (**Gafoor's** case).

2.55 Much has been said about my being President of DIAS which is a separate organization and nothing with DIAS.

2.56 **Livesey's** case, **Muir's** case and **Clenac's** case clearly demonstrate that mere association to any organization even being a party to the process as was in **Clenac's** case is not a ground for recusal.

Also there is nothing wrong in a Judge being associated with any organization as is stated by His Lordship Justice Fatiaki (the then Chief Justice) in a Paper in respect to Judicial Code of Conduct which is attached to First Defendant's Submission His Lordship stated as follows:-

> *"4.4 A judicial officer, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights and freedom, a judicial officer should always maintain and preserve the dignity of the judicial office and the impartiality and independence of the judiciary."*

2.57 I note that Defendants have raised issue as how this Court obtained and referred to Affidavit of Sada Siwan Naicker filed in Support of Originating Summons in Lautoka Action in Ruling delivered on 20 October 2015.

2.58 The Lautoka Action was referred to by Damendra Amas Gounder the First Defendant at paragraph 25 and 26 of Damendra Amas Gounder's Affidavit sworn on 14 September 2016.

2.59 This Court then obtained copy of Originating Summons and Affidavit in Support of Originating Summons through the High Court Civil Registry for Court to see what sort of relief are being sought in the Lautoka Action.

2.60 For reasons stated above, the Applicant and Eighth Defendant has failed to provide any substantial evidence to show that a fair-minded observer who is aware of all of the facts of the case and my position would have any apprehension of bias towards me dealing with this case.

3.0 Orders

I make following Orders:-

(i) The Application for Recusal by Summons filed on 15th February 2017, is dismissed and struck out;

(ii) Costs of Application for Recusal be costs in the cause.

K. Kumar
JUDGE

At Suva
23 June 2017

Parshotam Lawyers for the Plaintiffs/Respondents
Samuel K. Ram, Esquire for the First to Seventh Defendants/Applicants
Munro Leys for the Eighth Defendant/Applicant