

**IN THE HIGH COURT OF FIJI AT LAUTOKA**

**MISCELLANEOUS JURISDICTION**

**MISCELLANEOUS ACTION NO. HBM 14 OF 2016**

**IN THE MATTER** of **COMMITTAL PROCEEDINGS**  
under Order 52 of the High Court Rules 1988  
against the Respondents for Contempt of Court  
orders made on the 1<sup>st</sup> of July, 2016 in Lautoka  
High Court Civil Action No. 98 of 2016

**BETWEEN** : **DORSAMI NAIDU** of Kennedy Avenue Nadi, Legal  
Practitioner

**1<sup>ST</sup> APPLICANT**

**A N D** : **PARVEEN KUMAR BALA** of Guava Place, Laucala Beach  
Estate, Suva, Vice President North-Western of Then India  
Sanmarga Ikya Sangam

**2<sup>ND</sup> APPLICANT**

**A N D** : **RAJA KUMARAN** of Suva, Vice President Southern of Then  
India Sanmarga Ikya Sangam

**3<sup>RD</sup> APPLICANT**

**A N D** : **AVINESH REDDY** of Nasese, Suva, Legal Practitioner

**4<sup>TH</sup> APPLICANT**

**A N D** : **PARMESH LINGAM** of Lautoka, Vice President of Then  
India Valibar Sangam, Lautoka Branch

**5<sup>TH</sup> APPLICANT**

**A N D** : **SADASIVAN NAICKER** of 112 Church Street, Nadera, Fiji,  
the National President of the Then India Sanmarga Ikya  
Sangam.

**1<sup>ST</sup> RESPONDENT**

**A N D** : **DAMENDRA AMAS GOUNDER** of Martintar, Nadi,  
Secretary General of the Then India Sanmarga Ikya Sangam

**2<sup>ND</sup> RESPONDENT**

**A N D** : **SOM PADIYACHI** of Navakai, Nadi, National Treasurer of the Then India Sanmarga Ikya Sangam.

**3<sup>RD</sup> RESPONDENT**

**A N D** : **GYAN WARDA RAJU** of Malolo, Nadi, General Manager of the Then India Sanmarga Ikya Sangam

**4<sup>TH</sup> RESPONDENT**

**A N D** : **TARUNESH REDDY** of Lautoka the past National President of the Then India Valibar Sangam Fiji

**5<sup>TH</sup> RESPONDENT**

**A N D** : **KUMAR SAMI GOUNDAR** of Suva, General Secretary Operation of the Then India Sanmarga Ikya Sangam

**6<sup>TH</sup> RESPONDENT**

**A N D** : **GYANESHWAR RAO** of Suva, Secretary Administration of the Then India Sanmarga Ikya Sangam

**7<sup>TH</sup> RESPONDENT**

**A N D** : **RAMA** of Labasa National Vice President Northern of the Then India Sanmarga Ikya Sangam

**8<sup>TH</sup> RESPONDENT**

**A N D** : **VIJAY NARAYAN** of Sigatoka, National Vice President South Western of the Then India Sanmarga Ikya Sangam

**9<sup>TH</sup> RESPONDENT**

**A N D** : **WALLIAMMA SWAMY** of Nawaka, Nadi, National President of the Then India Maathar Sangam

**10<sup>TH</sup> RESPONDENT**

**A N D** : **VASU PILLAY** of Waimalika, Sabeto, Legal Practitioner

**11<sup>TH</sup> RESPONDENT**

**A N D** : **SHAIEND RAM KRISHNA** of Lautoka, Legal Advisor of Then India Sanmarga Ikya Sangam

**12<sup>TH</sup> RESPONDENT**

**Appearances:** Mr A.K. Narayan with Mr C.B. Young for the Applicants  
Mr Roopesh Singh for 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> & 6<sup>th</sup> Respondents  
Mr S. K. Ram for 2<sup>nd</sup>, 9<sup>th</sup>, 11<sup>th</sup> & 12<sup>th</sup>

**Date of Hearing :** 03 October 2016

**Date of Ruling :** 10 February 2017

## **R U L I N G**

(On preliminary objection)

### **Introduction**

- [01] This ruling relates to a preliminary issue raised by the respondents.
- [02] Mr Singh (on behalf of 1<sup>st</sup> and 3<sup>rd</sup> – 6<sup>th</sup> respondents) has raised two preliminary issues namely (a) the leave granted to issue committal has lapsed and (b) there is no personal service on the respondents after leave was granted.
- [03] Mr Ram, appearing for 2<sup>nd</sup>, 9<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> respondents, has also taken the similar objections. However, he confined his objection to the issue that the leave granted to issue committal has lapsed. He indicated that he is not pushing for the objection that there was no personal service since he has accepted service on behalf of his clients.
- [04] At the hearing, the parties made oral submissions. I also had the benefit of reading their respective written submissions. I am grateful to all counsel for their effort.

### **Background**

- [05] On 18 August 2016, the applicants file an *ex parte* application for leave to apply for committal proceedings under Order 52 of the High Court Rules 1998 ('HCR'). In that application they also seek an interim injunction to restrain the respondents from passing any resolution

that would restrict the applicants' rights of membership including participating as a candidate in the forthcoming election of office bearers at the next Annual General Meeting of the Then India Sanmarga Ikya Sangam scheduled for 28 August 2016 or any postponement or adjournment thereof. The court on *ex parte* basis granted the interim injunction sought to be valid until 26 August 2016 and at the same time, the court also granted the leave to issue committal proceedings against the respondents. The leave to issue committal proceedings was granted until 26 August 2016. Meanwhile, on 24 August, the applicants applied for a fresh leave to issue committal proceedings, which the court granted. On 26 August, the court refused to extend the interim injunction. Subsequently, the applicants entered their Notice of Motion filed on 25 August (seeking committal of the respondents for allegedly violating a term of the consent judgment delivered on 1 July 2016 in Lautoka High Court Civil Action No.98 of 2016) for hearing on 19 September 2016. The respondents objected and raised preliminary issues on the ground that the leave to issue committal has lapsed.

### **The Law**

[06] The relevant law applicable to this application is Order 52 Rule 3 of HCR, which provides:

#### ***Application for order after leave to apply granted***

*3. – (1) When leave has been granted under rule 2 to apply for an order of committal, the application for the order must be made by motion and, unless the Court granting leave has otherwise directed, there must be at least 8 clear days between the service of the notice of motion and the day named therein for the hearing.*

*(2) Unless within 14 days after such leave was granted the motion is entered for hearing the leave shall lapse.*

*(3) Subject to paragraph (4), the notice of motion, accompanied by a copy of the statement and affidavit in support of the application for leave under rule 2, must be served personally on the person sought to be committed.*

### **The Issue**

[07] The preliminary issue raised by the respondents is that whether the leave granted to the applicants to issue committal proceedings had lapsed and as a result, the application for contempt should be struck out.

### **The Determination**

[08] On 24 August 2016, the court granted leave to the applicants to issue committal proceedings against the respondents. The applicants failed to enter their motion for an order of committal within 14 days after granting leave as required by r.3 (2). They entered their motion on 19 September 2016 for hearing.

[09] O.52, r.3 of the HCR declares that “unless within 14 days after such leave was granted the motion is entered for hearing the leave shall lapse.”

[10] Mr Singh submits that the contempt is when the quasi-criminal jurisdiction of the court in a civil setting is involved and as a person's liberty is at stake and absolute compliance with the rules is required by the mover of the application. He cites **Ram Raji and Ors v Anoop Kumar** (Suva HC Action No. HPP 06 of 2010, **Nasinu TC v Khan** [2012] FJHC 1464; HBC8.2011 (5 December 2012) and **Janardhan v Khan** [2011] FJHC 299; HBM1.2010L.

[11] Mr Ram also expresses the similar sentiment. He submits that the leave to make an application for the committal order has lapsed and the entire proceedings to be struck out with costs on an indemnity basis. He too relies upon **Nasinu Town Council v Khan** (above).

- [12] On the hand, Mr Narayan, counsel for the applicants submits that even if leave had expired the court has powers under O.3, r. (1) and (2) and/or under the inherent jurisdiction to extend the time after the time for compliance has expired. He further submits that there was no fault on the part of the applicants because it was the court that has allowed the date. He cites and relies on the decisions of **Janardhan v. Khan** (above) and **Efficient Ltd. v Edward Eugene Lehman** [2012] HKCI 9270; [2012] 3 HKLRD 671; HCMP 593/2012 (14 June 2012).
- [13] The applicants heavily rely upon the case authority of **Janardhan v. Khan** (above) and **Credit Corporation (Fiji) Ltd. V. Qamer** [2013] FJHC 675.
- [14] In *Janardhan* where leave was granted on 11 February 2011 and Notice of Motion was dated and filed on 29 August 2011, Justice Inoke (as then he was) dealing with operation of the words “entered for hearing” in Order 3, Rule 3 (2) said (at para 5):

*“[5] The preliminary objection rests on the meaning of the words “entered for hearing”. The proper place to start is **Order 52 r 3(2)**. It deals with the time within which the motion must be filled. The motion cannot be entered for hearing unless and until it is filed and when it is filed “the motion is entered for hearing”. The applicant is given 14 days after service of the motion to file the motion otherwise leave will lapse. That is the only way to interpret the provision.”*

- [15] In **Credit Corporation (Fiji) Ltd. V. Qamer** (above), Kotigalage, J. appears to have followed *Janardhan* case.

- [16] The applicants submit that I should follow *Janardhan* case as its decision is not manifestly wrong.
- [17] The question that has arisen in the case is that whether the words “entered for hearing” used in Order 52 Rule 3 (2) needs interpretation.
- [18] Mr Singh contends that the interpretation of the words “entered for hearing” may be in error. The words “*entered for hearing*” mean just that, no interpretation is required. The rules do not require the filing within 14 days but the hearing to be entered within 14 days. He also submits that it would, with respect, be nonsensical if entered for hearing would mean filing within 14 days. A hearing is hearing.
- [19] I agree with the submission that the words “*entered for hearing*” do not require interpretation.
- [20] The filing of an application with the Registry or with the Court and entering the same for hearing are two different concept and two different actions.
- [21] When lodging the Notice of Motion for committal with the Registry, the applicant must obtain a date and enter the motion for hearing. The wording in O.52, r.3 (2) is abundantly clear. The rule states that “unless within 14 days after such leave was granted, the motion is entered for hearing the leave shall lapse”.
- [22] It will be noted that the rule does not state that the motion is filed within 14 days after such leave was granted, but the motion is entered for hearing within 14 days after such leave was granted.
- [23] The text ‘Maxwell’ on the Interpretation of Statutes (12<sup>th</sup> Ed.) at p. 28 states:

*“The first and most elementary rule of construction is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, and otherwise in their ordinary meaning, and the second is that the phrases and sentences are to be construed according to the rules of grammar. “The length and detail of modern legislation,” wrote Lord Evershed M.R. has undoubtedly reinforced the claim of literal construction as the only safe rule. If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences. “The safer and more correct course of dealing with the question of construction is to take the words themselves and arrive if possible at their meaning without, in the first instance reference to cases.”*

- [24] The above text is quoted by his Lordship Amaratunga, JA in ***Four R Electrical & General Contractors Ltd. v. Nilesh William***; ABU 0054 of 2014 (29 Nov. 2016).
- [25] As Maxwell states if there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences.
- [26] The words “entered for hearing” are not technical words. The language is very clear and there is no ambiguity. It must be construed in the ordinary and natural meaning. The words ‘entered for hearing’ should be construed in that sense.
- [27] In ***Nasinu Town Council v Khan*** (above), Balapatabendi, J. (as he then was) concludes:



*"Taking into consideration of the background events and the case record, it is abundantly clear that the leave was granted by Calanchini J on 11 February 2011 and the motion in terms of order 52 Rule 3 was not entered for hearing within 14 days from the date of granting leave. Order 52 Rule 3 (2) states that the effect of the non-compliance of the said provisions of the law which clearly states that leave granted by the court shall lapse if the motion had not been entered."*

- [28] I agree with Balapatabendi J. His conclusions are consistent with the language of the High Court Rules in particular Order 52, Rule 3 (2).
- [29] For the above reasons, I would conclude that the applicants had failed to enter their notice of motion for committal for hearing within 14 days after the leave to issue committal proceedings against the respondents as required in Order 52, Rule 3 (2). The leave was granted to the applicants on 24 August 2016. They should have entered the application for hearing within 14 days of the granting of the leave, i.e. on or before 6 September 2016. Instead, they entered their application for hearing on 19 September 2016, which is clearly 26 days after the leave was granted. The requirement that the notice of motion for committal shall be entered for hearing within 14 days after such leave was granted is mandatory and must be strictly complied with as the liberty of the person is at stake in this situation. The filing of the motion within 14 days after the leave was granted is not sufficient compliance with Rule 3 (2). The mover must obtain a date and enter the motion for hearing within 14 days after granting such leave.
- [30] Mr Narayan submits that even if leave had lapsed the court has powers under Order 3 Rules 4 (1) and (2) of the HCR and under the inherent jurisdiction to extend the time for compliance has expired.

[31] Rule 4 runs:

*"4.-(1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules, or by any judgment, order or direction, to do any act in any proceedings.*

*(2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period."*

[32] The court has the power to extend or abridge any time limit within which a person is required by the HCR or by any judgment, order or direction, to do any act in any proceedings. This is a discretionary power, which should be exercised in appropriate cases.

[33] Hong Kong Court of appeal in *Effiscient Ltd v Edward Eugene Lehman* [2012] HKCFI 927; [2012] 3 HKRD 671; HCMP 593/2012 (14 June 2012) confirmed a decision made by the High Court granting leave to Effiscient to issue and serve a Notice of Appointment to hear the originating summons in contempt proceedings out of time within 7 days of his order. The High Court made the decision in an application for extension of time to issue and serve the originating summons out of time. Hong Kong High Court Rules, O.52 rule 3 (2) (similar to ours) provides that: *"Unless within 14 days after such leave was granted the originating summons is entered for hearing the leave shall expire."*

[34] Reliance is placed upon the above case by the applicants. At para 25 the Hong High Court said:

*"25. I am satisfied that the judge has power to extend time in this situation and there is no basis for the appeal court to interfere with the exercise of his discretion to extend time. No delay has been caused to the progress of the proceedings, as noted by the judge. Mr Allman-Brown has accepted at the hearing on 24 February that no prejudice has been occasioned as a result of the extension*

*of time. He also accepted before us that Mr Lehman had constructive knowledge through his solicitors of the irregularity that a Notice of Appointment was not issued within time when he took various steps in the proceedings between 15 December 2011 and 8 February 2012. Under Order 2 rule 2, proceedings will not be set aside for irregularity unless an application to do so is made within reasonable time, and before the applicant has taken any fresh steps after becoming aware of the irregularity. Constructive knowledge in this situation could constitute waiver of the irregularity (Fabrique Ebel Societe Anonyme, supra at 171 E and H). Last but not least, the judge would have granted fresh leave to commence proceedings if this were required. His exercise of discretion to grant leave to issue a Notice of Appointment out of time is plainly correct. '*

*If failure to issue a Notice of Appointment within time was an oversight."*

[35] There is no application made by the applicants to serve and enter the notice of motion for committal out of time. Mr Narayan advances argument that the court may deem that an application has been filed and grant the extension of time in this situation. There is no explanation for the delay. The failure to enter the motion within 14 days after granting leave to issue committal proceedings was not an oversight. Moreover, the applicants deliberately obtained the date for hearing knowing very well that the date was outside the time limit prescribed by O.52, r. 3 (2), albeit the court, was ready and willing to give a date for hearing within the time limit. Having obtained a convenient date for hearing, the applicants are not entitled to complain, after the objection was raised by the respondents, that it was the Court that had allocated the date. In the circumstances, I decline to grant extension of time to serve and hear the notice of motion for committal.

A deliberate omission of an act required to be done under the High Court Rules cannot be cured by invoking O.2, r.1 of the HCR, which provides:

*“1.-(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.”*

[36] In a situation where the leave granted to issue committal proceedings has lapsed, the applicant might either file an application for fresh leave or apply for extension of time. The new leave can replace that has lapsed.

[37] In any event, if it were necessary for the applicants to make a new application for leave to issue contempt proceedings, I would not have granted fresh leave. This is because it has now been brought to my notice that the contempt proceedings are envisaged for an alleged breach of a term of the consent judgment, which in fact does not form part of the consent judgment.

[38] I would, therefore, find that the leave granted to the applicants for contempt proceedings has lapsed, as a result of the applicants' failure to enter the notice of motion for committal for hearing within 14 days after the grant of the leave as required in O. 52, r. 3 (2). This leads to the striking-out and dismissal of their application for committal. I so do.

[39] The respondents are entitled to costs as costs follow the event. I decline to indemnify costs in this case. This is not a case for indemnity costs.

The respondents appeared by counsel to resist the application. They also filed written submission. Taking all these into my account, I summarily assess the cost at \$350.00. Accordingly, the respondents will be entitled to \$350.00 each (totalling \$3,150.00) as costs of these proceedings.

[40] I need to add that the necessity to consider other points of objection raised by the respondents namely defective service did not arise as I have found that the leave granted to the applicants to issue contempt proceedings and that application could be struck out on that ground alone.

### **The Outcome**

- 1) Preliminary objection upheld.
- 2) Leave granted to issue committal proceedings has lapsed.
- 3) The notice of motion for committal is struck out and dismissed.
- 4) The applicants will pay summarily assessed costs of \$350.00 to each of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 9<sup>th</sup>, 11<sup>th</sup>, and 12<sup>th</sup> respondents (totalling \$3,150.00).

*H.H. Mohamed Ajmeer*  
10/2/17

.....  
**M. H. Mohamed Ajmeer**

**JUDGE**

**At Lautoka**

**10 February 2017**

Solicitors

Messrs AK Lawyers for applicants

Messrs Patel & Sharma, Barristers & Solicitors for 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> respondents.

Messrs Samuel K Ram, Barrister & Solicitors for 2<sup>nd</sup>, 9<sup>th</sup>, 11<sup>th</sup>, and 12<sup>th</sup> respondents

