

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

Civil Action No. HBC 123 of 2011

**BETWEEN** : **PREM SINGH , RAKESH PRAMOD KUMAR** and **ELLE NARSHEA**  
as lawful Trustees of the Bhartiya Mitra Mandali, the governing body of  
Tilak High School.

**Plaintiffs**

**AND** : **GANGA REDDY, JAGDISH SINGH , SUREND VENKAT, DAYA**  
**NAND, NAVEEN KUMAR, ANIL PRASAD, JANEND SINGH,**  
**RAKESH CHAND, SATYA DASS, KUMAR SAMI NAIKER** and  
**PRAKASH NAIR** as office bearers and members of the Bhartiya Mitra  
Mandali Management Board.

**1st Defendants**

**AND** : **THE ATTORNEY-GENERAL OF FIJI**

**2nd Defendant**

**AND** : **SWAMI KUMAR MAHARAJ**

**Interested Party**

Counsel : Ms Natasha Khan for the Plaintiffs  
Mr. D.S. Naidu for the 1<sup>st</sup> Defendants  
Mrs. Lee for the 2<sup>nd</sup> Defendant  
Interested Party in Person

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

### **BACKGROUND**

1. The background to this case is set out in:

**Singh v Reddy** [2011] FJHC 643; HBC123.2011 (10 August 2011);  
**Singh v Reddy** [2011] FJHC 644; HBC0123.2011 (17 August 2011);  
**Singh v Reddy** [2013] FJHC 486; HBC123.2011 (26 September 2013);  
**Singh v Reddy** [2014] FJHC 724; HBC123.2011 (6 October 2014);  
**Singh v Reddy** [2016] FJHC 850; HBC123.2011 (23 September 2016);  
**Singh v Reddy** [2016] FJHC 960; HBC123.2011 (24 October 2016) &  
**Singh v Reddy** [2016] FJHC 1090; HBC123.2011 (30 November 2016).

2. The TBMM is an unincorporated organisation that runs and manages the Tilak High School. There has been a long-standing rift between the TBMM's Management Committee on the one hand and its Trustees on the other, each, having attracted its fair share of supporters and sympathisers in the wider body of membership, causing the organisation to disintegrate into two squabbling factions.

3. The defendants had filed a summons dated 15 February 2017 supported by an affidavit sworn by Ganga Reddy on 15 February 2017. Reddy deposes the following:

- (i) that he was elected President of TBMM operating as Tilak High School on 18 December 2016 at the SGM which was carried out as per the Orders of this Court.
- (ii) the meeting was carried out under the supervision of the A-G's office.
- (iii) following his election, they have convened two meetings pertaining to the running of Tilak High School.
- (iv) on 01 February 2017, he was handed a letter by the Secretary, Navin Kumar, requesting that a meeting of the TBMM be called within 7 days. The said letter was co-signed by eight other members. The letter outlined the agenda of the proposed meeting.
- (v) a copy of the letter is annexed to his affidavit. The agenda stated therein is as follows:
  - (a) BMM members in regards to the new members recruited for 2017
  - (b) Pending Court case.
  - (c) Bank of Baroda BMM Accounts
  - (d) Building Progress Report
  - (e) Canteen Issue
  - (f) General
- (vi) Ganga Reddy responded by letter urging the members not to make hasty decisions as the matter was still in Court.
- (vii) Reddy says that:

the "members were questioning why we had accepted membership of persons who had become members in 2012 and had removed their membership up to 2016 and who paid their membership for 2017 of their own volition".
- (viii) he goes on to say:

..I explained to the meeting that I was not consulted in regards to the payment nor was there any permission sought as the members made arrangements to pay membership for 2017 as was the case with the 2011 members. Annexed herein and marked GR3 is the copy of the minutes.....  
...the members present passed a vote of no confidence removing me as chair and president though this was not specified in the agenda....Therefore seek an Order of this High Court to declare the said vote of no confidence against me and removal unlawful

...I further ask this Honourable Court to declare that the eleven (11) of the 2012 members who have renewed their membership and who have been financial members from 2012 to 2016 have their membership validated.

4. According to my notes, I did grant leave on 28 February 2017 to the first defendant to withdraw his summons of 15 February 2017.

### **ISSUE**

5. The issue that appears to subsist and for which the parties now seek a ruling is whether or not the Trustees could validly remain in place given that they had purportedly resigned from their position on 08 January 2012 at the court-ordered SGM. The trustees are adamant that they are still validly occupying their respective offices as such.

### **WHY TRUSTEES RESIGNED ON 08 JANUARY 2012?**

6. 08 January 2012 was the date of an SGM which Mr. Justice Fernando had ordered with a view to resolving the issues between the Management Committee on the one hand and the Board of Trustees on the other. Notably, prior to this date, and in the preceding year of 2011, both parties had tried their hand at undermining the other amidst allegations and cross-allegations of impropriety.
7. That said, the trustees attended the said SGM. They did so because they were paid members and because they wanted to vote on any motion on the agenda. A motion of confidence on the Management Committee was moved by the first defendant. The trustees did vote on the said motion. They did so vote by virtue of their position as paid members.
8. The motion, as it turned out, was successful by a very narrow margin, but only after the trustees' votes were discounted when the chair ruled that the trustees had no voting rights. Faced with that, the trustees then tendered in their resignation in the hope that their votes would then be counted, and, if counted, in the hope that the motion would be defeated. All this was to no avail.
9. Following the said meeting, the plaintiffs would then file an application before Fernando J seeking various Orders alleging amongst other things

that the said meeting was not carried out in accordance with the Court Orders. They also instituted contempt proceedings against the defendants.

### **ARE TRUSTEES ALLOWED TO VOTE?**

10. The argument is that Trustees should not be allowed to vote in any AGM or SGM because, to vote, would conflict with their position as trustees. That is a valid argument, but there is no hard and fast rule as such that applies across the board. At the end of the day, it is matter of contract between the members of an unincorporated association as to how their governance and management is to be structured in their governing instrument (i.e. their constitution). In fact, some unincorporated associations, sharing the same concern about a perceived conflict, make very clear provisions in their governing instrument to forbid a trustee from voting at an AGM or in an SGM.
11. In this case, and in my view, since the Trustees are paid members, they are to be allowed to vote in the absence of any specific provision in the TBMM Constitution which forbade them from becoming paid members as well.
12. The TBMM Constitution leaves much to be desired in this regard. If the intention was to not allow Trustees to vote at any SGM or AGM, then it could make such provision as, for example, that the Trustees were not to be allowed to be paid members or, even better, that the Trustees were not to be allowed to vote in any AGM or SGM notwithstanding their being paid members.
13. In the absence of such a provision, in my view, the trustees should be allowed to vote by virtue of their position as paid members.

### **RESOLVING THE ISSUE**

14. An unincorporated association such as the TBMM has no separate legal personality. It is 'unincorporated' but operates by its trustees who will hold land in their names on trust for the trust and who may also enter into a contract for and on behalf of the trust. Hence, there is a sense of "trust" that the law places on trustees.

15. The specific question I have to address at this time is whether or not the Trustees had vacated their offices by virtue of their purported resignation on 08 January 2012.
16. Generally, trustees may resign before the end of their set term. This they may do in writing specifying the date when such resignation shall take effect.
17. The constitution of the TBMM, being the governing instrument, sets out at clause 13 that a trustee shall be deemed to have vacated his office if he shall:
- (i) Resign his office or seat in writing addressed to the management Committee of the Mandali
  - (ii) Be adjudged bankrupt
  - (iii) Is guilty of breach of trust or refuses or neglects to perform his duties.
  - (iv) Is incapacitated due to illness
  - (v) Migrate or being absent from Fiji Islands, without taking prior leave in writing from the Management, for more than three months.
- And thereupon the Management Committee resolves with (sic) declares the office or seat as vacant and which vacancy shall be filled at a General Meeting or Extra-ordinary General Meeting.
18. It is not clear to me whether on 08 January 2012, the trustees did hand up a written resignation as required by clause 13 and whether such written notice was addressed to the Management Committee.
19. There is also no evidence that the Management Committee, upon receipt of such written resignation addressed to it (assuming this was the case), had declared the office(s) or seats vacant, let alone, that the vacant offices or seats had been filled at a GM or an EGM.
20. Section 6 of the Trustee Act provides as follows:

Retirement of trustee without a new appointment

- 6.-(1) This section applies where a trustee declares by instrument in writing that he is desirous of being discharged from all or any of the trusts reposed in him and that after his discharge there will be a trustee corporation or at least two individuals to act as trustees to perform the trust from which that trustee desires to be discharged.
- (2) If the co-trustees and such other person (if any) as is empowered to appoint trustees consent by instrument in writing to the discharge of a trustee and to the

vesting in the co-trustees alone of the trust property, the trustee desirous of being discharged-

(a) shall be deemed to have retired from the trusts from which he has declared he desires to be discharged; and

(b) subject to the provisions of subsection (3), shall, by the writing by which consent is given to his discharge, be discharged from the trusts under the provisions of this Act,

without any new trustee being appointed in his place.

(3) Any conveyance requisite for vesting, in the continuing trustees alone, the property subject to the trusts from which the retiring trustee is to be discharged shall be executed or done; and, in respect of any part of the trust property for the vesting of which, in the continuing trustees, a conveyance is necessary, the retiring trustee shall not be discharged until that part is duly conveyed.

(4) This section shall apply only if, and so far as, a contrary intention is not expressed in the instrument (if any) creating the trust and shall have effect subject to the provisions of such instrument.

21. What then is to be said in this situation when all the trustees purportedly resigned just in order to be able to vote at the 08 January 2012 SGM?
22. The first comment I would make is that it is most undesirable that an entire board of trustees should resign all at once at the same time because to do so puts the trust at an incapacity. Who will run the charity if they resign all at once?
23. In **Land and Agricultural Bank of South Africa v Parker** 2005 (2) SA 77 (SCA) paragraphs 10 and 11, Cameron JA said as follows:

[A trust] is an accumulation of assets and liabilities. These constitute the trust estate, which is a separate entity. But though separate, the accumulation of rights and obligations comprising the trust estate does not have legal personality. It vests in the trustees, and must be administered by them - and it is only through the trustees, specified as in the trust instrument, that the trust can act . . . It follows that a provision requiring that a specified minimum number of trustees must hold office is a capacity-defining condition. It lays down a prerequisite that must be fulfilled before the trust estate can be bound. **When fewer trustees than the number specified are in office, the trust suffers from an incapacity that precludes action on its behalf.**

(my emphasis)

24. The second point I would make is that, because the law places such a trust on trustees, it is hardly the case that a trustee can, rather whimsically, tender their resignation at any given time and expect that the said resignation to be effective immediately upon tender. Who then is to run the charity between the time of their resignation and the time when new trustees are appointed?

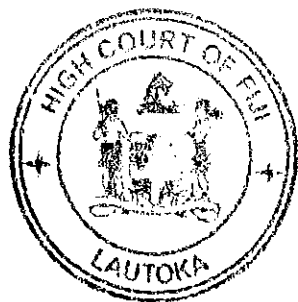
25. In my view, the purported resignation of the trustees was invalid for the following reasons:

- (i) The resignations were made at an SGM. The trustees did so after they were told that they had no voting rights and in order to be able to vote.
- (ii) There is no clear evidence that the Management Committee did at any time declare the seats of the trustees vacant as required under the TBMM Constitution.
- (iii) In any event, it is most undesirable for a trust such as the TBMM to have all its trustees resign all at one time. There must always be trustees in office.
- (iv) For this reason, I interpret the following proviso as it appears in clause 13 of the TBMM Constitution, when read together with clause 13(1), to mean that, whilst a trustee may resign in writing, such resignation shall be complete only (i) upon the declaration of a vacancy by the Management Committee and (ii) upon the appointment, at a General Meeting or at an EGM, of a new trustee in his place.

And thereupon the Management Committee resolves with (sic) declares the office or seat as vacant and which vacancy shall be filled at a General Meeting or Extra-ordinary General Meeting.

- 26. I say all the above bearing in mind the spirit with which Fernando J had expressed the desirability of maintaining the status quo as a means of taking the TBMM Forward. On 7 December 2011, Fernando J did direct that Trustees were to remain as Trustees and that MCs to remain as MCs.
- 27. There are allegations of misconduct against the Trustees. The allegations pertaining to the tampering with the Constitution resulted in the filing of some criminal charges against most of the Trustees.
- 28. If these Trustees are convicted, then of course, that could result in their termination pursuant to clause 13(iii) of the TBMM Constitution.
- 29. Of course, if a trustee should migrate or has been absent from Fiji without taking prior leave in writing from the Management Committee, for more

than three months, he shall be deemed to have vacated his office under clause 13(v).



Anare Tuilevuka  
**JUDGE**  
20 February 2018