

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 228 of 2016

BETWEEN: **GOVIND SAMI PADAYACHI**

First Plaintiff

NARSA REDDY

Second Plaintiff

AND: **DAMENDRA AMAS GOUNDER**

First Defendant

KUMAR SAMI GOUNDER

Second Defendant

SOM PADAYACHI

Third Defendant

SAILENDRA KUMAR

Fourth Defendant

PRAGDISHWARAN GOUNDER

Fifth Defendant

VIJAY NARAYAN

Sixth Defendant

MUNI KAMLESH NAIDU

Seventh Defendant

THEN INDIA SANMARGA IKYA SANGAM

Eighth Defendant

Before: **Hon. Justice Kamal Kumar**

Counsel: Mr D. Sharma & Ms G. Fatima for Plaintiffs
Ms S. Naidu for First to Fourth, Sixth, Seventh Defendants
No Appearance for Fifth Defendant
Mr R. Naidu and Ms B. Khatri for Eighth Defendant

Date of Ruling: 28 September 2018

RULING
(Application to Strike Out Evidence)

1.0 Introduction

1.1 On 15 May 2018, Eighth Defendant (hereinafter referred to as the “**Applicant**”) filed Application by Summons seeking following Orders:-

- “1. *The Affidavit of Govind Sami Padayachi dated 6 April 2018 (Affidavit) be struck out in its entirety; or alternatively that those parts of the Affidavit listed in Column A of the Schedule to this Summons be struck out;*
2. *All proceedings herein be stayed pending the determination of the issues in this Summons.*

3. *The Plaintiffs pay the Eighth Defendant the costs of this application;*
4. *Any further orders the Court considers just.*

pursuant to Order 41 Rule 5 and 6 of the High Court Rules and inherent jurisdiction of this Court.”

(“the Application”)

- 1.2 On 23 May 2018, being returnable date of the Application, parties were directed to file Affidavits and the Application was adjourned to 12 June 2018 at 2.30pm, for hearing.
- 1.3 On 12 June 2018, Counsel for Applicant and Plaintiffs (hereinafter referred to as **“the Respondents”**) handed written Submissions and made oral Submissions which was substantively from written Submissions and after hearing Counsel for Applicant and Respondent the Application was adjourned for Ruling on Notice.
- 1.4 Following Affidavits were filed:-

For Applicant

- (i) Affidavit of Sadasivan Naicker sworn on 14 May 2015, and filed on 15 May 2015 (**“Naicker’s Affidavit”**);
- (ii) Affidavit of Sadasivan Naicker sworn and filed on 7 June 2018 (**“Naicker’s Reply Affidavit”**).

For Respondents

Affidavit of Govind Sami Padayachi sworn on 30 May 2018, and filed on 31 May 2018 (**“Padayachi’s Affidavit”**).

2.0 Application to Strike Out Evidence

- 2.1 Order 41 Rule 5 and 6 of the High Court Rules provide as follows:-

“5.-(1) Subject to Order 14, rules 2(2) and 4(2), to Order 86, rule 2(1), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.

(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.

6. The Court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive.”

2.2 His Lordship Justice Calanchini the President of Court of Appeal in **Dawasamu Transport Ltd v. Tebara Transport Ltd** FJCA: Civil Appeal No. ABU 26 of 2014 stated as follows:-

“In the Oxford Dictionary of Law an affidavit is defined as:

“A sworn written statement used mainly to support certain applications and, in some circumstances, as evidence in court proceedings. The person who makes the affidavit must swear or affirm that the contents are true before a person authorized to take oaths in respect of the particular kind of affidavit.

10. Order 41 of the High Court Rules makes provision for both the formal requirements of an affidavit and for the contents of an affidavit. To the extent that there is any irregularity in the form of an affidavit, it may with the leave of the Court be filed or used in evidence notwithstanding that irregularity under Order 41 Rule 4.

11. Although it may be argued that the use of an affidavit entitled in the High Court proceedings is an irregularity in contravention of Order 41 Rule 1(1), its purpose was clearly explained in what may be termed as a “covering affidavit” that was correctly entitled in this Court’s proceedings. It would be an unnecessary expense to now insist that the initial affidavit should be re-drafted, re-sworn and filed and served again under those circumstances. On the basis

that if there is any irregularity in form, leave is granted for the affidavit sworn on 20 Mach 2014 by Arvind Deo Maharaj which is filed as an exhibit to the affidavit sworn on 29 August 2014 by Josua Ligica to be used in evidence opposing the application for an enlargement of time.

12. *The objection that the Appellant relies upon is that the affidavit in question is an abuse of process. The Appellant submitted in his written submissions that the affidavit is not bona fide. It is submitted that the Respondent's affidavit should have answered the issues raised by the Appellant's affidavit filed in support of the application for an enlargement of time. It is submitted at paragraph 2.4 of the Appellant's submission that in doing so the Respondent has disregarded and abused the Court machinery. The submission urges the Court to "summarily prevent its machinery from being used as a means of vexatious and oppression in the process of litigation." The Appellant urges the Court to strike out the affidavit under Order 18 Rule 18 of the High Court Rules.*
13. *In my judgment the application is misconceived in the sense that the Appellant seeks to have requirements that are relevant to pleadings applied to affidavits. Affidavits can be used in the trial of an action to adduce evidence that may not be in dispute and which provide the formal proof of facts that have been pleaded. In interlocutory applications affidavits are filed to adduce the facts that form the basis for supporting or for opposing the application. As evidence two issues arise. First, is the evidence in the affidavit admissible and secondly, if admissible, what weight should be given to the evidence. When parties file affidavits in interlocutory proceedings, they are not filing pleadings. There is no requirement, although it has become a practice, for an answering affidavit to take the form of a defence. An answering affidavit need only refer to the deponent's version of the evidence or facts upon which there is disagreement with the version in the supporting affidavit. In the*

event that the answering affidavit sets out irrelevant evidence then that evidence will be disregarded.

14. *Apart from satisfying the test of relevancy, the contents of an affidavit must comply with Order 41 Rule 5 and should not contain material that is disallowed under Order 41 Rule 1. Under Order 41 Rule 5(2) an affidavit sworn by the deponent for use in interlocutory proceedings may contain statements of information or belief provided that the sources of information or the grounds of the belief are stated. Failure to comply with that requirement will usually affect the question of weight rather than admissibility. Under Order 41 Rule 6 a court may order to be struck out of any affidavit material which is scandalous, irrelevant or otherwise oppressive. In his submissions the Appellant has not pointed to any material that would fall within Order 41 Rule 6. Generally affidavits should contain only admissible evidence except where the Rules (as in Order 41 Rule 5) make provision for the conditional admission of what may be otherwise inadmissible evidence.*
15. *To the extent that the Appellant objects to the practice of exhibiting an affidavit to an affidavit, there was no authority submitted by the Appellant to support the objection. In **Chandrika Prasad v. Republic of Fiji and Attorney-General (No. 4)** [2000] 2 FLR 89 at page 93, the High Court considered an interlocutory application in which the Respondents' affidavit was considered in the following terms:*

“Leaving aside the irregularities of that affidavit, there were two affidavits exhibited to it, which had been filed in a separate but similar constitutional case. These no doubt were exhibited to show the evidence that the Respondents would have adduced in this case.”

The Court (Gates J as he then was) was prepared to consider the affidavits to the extent that the facts and evidence set out in those affidavits were relevant to the application before the Court. The

Court did not make any specific adverse comment as to the practice of exhibiting affidavits to affidavits. In this case it was always open to the Appellant to challenge any material in the exhibited affidavit when drafting the affidavit in reply. Needless to say the exhibited affidavit will be considered in the context of relevancy and weight.”

2.3 In view of the comprehensive analysis of Affidavit evidence by his Lordship Justice Calanchini in **Dawasamu** case there is no need for this Court to go anywhere else.

2.4 This Court will now analyse the submission in respect to paragraphs stated in Padayachi’s Affidavit:-

(i) **Paragraph 11**

“11. The Annual General Meeting of TISI Sangam scheduled for 29 May 2016 was called off by some of the National Executives at that time because through the elections held of the Then India Valibar Sangam (“TIV”), the youth division of the TISI Sangam, on 28 May 2016 they had become aware that their faction lacked support and would be ousted from the leadership of TISI Sangam. However, the Maather Sangam AGM (the women’s division of TISI Sangam) was held without any problem in the afternoon of 28 May 2016.”

Eighth Defendant’s Ground/Submission

“The words some of the National Executives...had become aware that their faction lacked support and would be ousted from the leadership of TISI Sangam breach O.41, r.5 and r.6 of the High Court Rules (Rules) because they:-

- do not comprise facts that the deponent is able of his own knowledge to prove;*
- are scandalous in suggesting (without foundation) that the Defendants were driven by improper motives;*
- are oppressive in failing to identify those National Executives against whom the allegations are made.*

“This is simply not a statement that Mr Padayachi is able of his own knowledge to make. He could not even make that statement on information and belief.

It is not a ground of the Originating Summons. It adds nothing to the relevant issues.

*The **relevant issue** is whether or not those whom the Plaintiff support had the right to proceed with their purported meeting; and whether the outcomes of that meeting had the “sanction” of members.”*

Plaintiffs Response

“The Deponent is entitled to hold a belief as to why the AGM was cancelled.

It is a fact that it was cancelled.

It was a decision made by some persons within Sangam.

The 8th Defendant has a right to refute whatever GSP has deposed. There is no prejudice suffered by the 8th Defendant.

The Sangam Constitution provides for how an AGM can be adjourned. This was not followed.

It is entirely up to the Court to draw its own inference on this issue and give whatever weight it wants to on any belief expressed by GSP.”

This Court does not find the contents of the paragraph 11 to be scandalous or oppressive.

Eighth Defendant is the body whose Annual General meeting that was to be held on 29 May 2016, but was cancelled and Eighth Defendant should be able to respond to what is expressed by Mr Padayachi at this paragraph.

This Court also takes note of the fact that at point two of the Eighth Defendant’s ground it is stated as follows:-

“Are scandalous in suggesting (without foundation) that the **Defendants** were driven by improper motive” *(emphasis added)*

There is nothing in paragraph 11 of Padayachi’s Affidavit which says:-

“**Defendants** were driven by improper motive.” *(emphasis added)*

The question that needs to be asked is whether Eighth Defendant is saying that First to Fourth, Sixth and Seventh Defendants formed part of the persons referred to in Padayachi’s Affidavit.

If that is so, this Court cannot see as why Eighth Defendant is taking reservation when those Defendants have no issue.

This Court also fails to understand as to whether Eighth Defendant by its Counsel is attempting to protect its interest or that of the other Defendants.

If Eighth Defendant is of the view that what is said by Padayachi in his Affidavit is not correct that it should say so with reason.

It will then be upto this Court to weigh the evidence.

(ii) **Paragraph 13** (Second and Third paragraphs and Annexure B)

“13. A true copy (2nd and 3rd paragraphs) of an affidavit sworn by Mr Parveen Kumar Bala in the Lautoka proceedings (Lautoka High Court Civil Action No. HBC 98 of 2016) on 6 June 2016 and filed on 7 June 2016 where he discussed his appointment as the Chair of the Interim Committee and the role of the committee is annexed hereto marked “B”.

I am informed by Mr Bala and verily believe that the contents of the affidavit are true. I was also present at the meeting on 29 May 2016 which appointed the Interim Committee and am able to verify the facts deposed to by Mr Bala relating to that meeting.”

Eighth Defendant’s Ground/Submission

These paragraphs breach O.41, r.5 and r.6 of the Rules. They refer to the affidavit of Mr Praveen Bala sworn in other proceedings and which refers to facts which are:-

- *irrelevant*
- *in any event not facts which the deponent is able of his own knowledge to prove.*

“Paragraphs 1-10 appear to be sworn to justice an application to intervene in the Lautoka Action. How is this relevant in this case?”

Paragraph 11 may be relevant.

Paragraphs 12-18 [ignoring 17, which is scandalous] relate to the “duties” Mr Bala claims to have to perform. There are on such “duties” at this point.”

Plaintiffs Response

A large part of the paragraph is factual in content.

Affidavits in other matters can be used if they are relevant to any issue that is before the Court.

The weight and probative value that will be given to the affidavits is entirely up to the Court.

The Defendants have a right to refute anything that is contained in the affidavits.

The material that has been exhibited is relevant to the issues before the Court.

There is nothing wrong in annexing Affidavit of Praveen Bala that was filed in Lautoka Action as long as it is relevant before the Court. This Court finds that the matter referred in Praveen Bala’s Affidavit is relevant to issues before this Court.

It is also noted that Padayachi stated that he was present at the meeting held on 29 May 2016 and hence is privy to what is stated in Praveen Bala’s Affidavit.

(iii) **Paragraph 16 and Annexure C** (other than paragraph 69 - 93)

“16. Mr Raja Kumaran, who was the National Vice President Southern of TISI Sangam and one of the members suspended and also one of the Defendants in the Lautoka proceedings (as explained later in my affidavit) has provided to me a true copy of his affidavit that he swore on 16 June 2016 and that was filed on 17 June 2016. In his affidavit Mr Kumaran discusses in detail the circumstances leading to the meeting held on 29 May 2016 and the appointment of the Interim Committee. I also verify the facts deposed to by Mr Kumaran relating to the meeting of 29 May 2016 due to my presence there.”

Eighth Defendant’s Ground/Submission

These paragraphs breach Order 41 Rules 5 and 6 of the HCR. It references the Affidavit of Raja Kumaran sworn in other proceedings, which allegedly discusses in detail the circumstances leading to the meeting held on 29th May 2016 and the appointment of the Interim Committee but which facts are:-

- *Irrelevant*
- *In any event [other than, arguably, paras 69 - 93] not facts which the deponent is able of his own knowledge to prove*

and is oppressive in that paras 94 - 139 are sworn in reply to an affidavit in other proceedings that is not before the Court in these proceedings.

“Paragraphs 1-3 can be ignored.

Paragraphs 4-13 purport to set out Kumaran’s view of Sangam’s “structures”. All of that is available from Sangam’s M&A.

Paragraphs 14-18 are irrelevant. Kumaran’s involvement in Sangam is not an issue here.

*Paragraphs 9-68 are irrelevant. The issues in this case are not about what occurred at the TIV meeting. What is **relevant** is whether or not the 29 May 2016 AGM was properly cancelled [or conversely whether the meeting that took place was properly held].*

Paragraph 68 is irrelevant. Who “convinced” who in March 2016 about holding a meeting is not an issue here.

The admissibility of Paragraphs 69 - 93 is not contested, since Mr Padayachi says he was present [no concession is made as to what weight should be given to this evidence].

It cannot be possible that Paragraphs 94-136 be read, since there is no record of the affidavit these paragraphs purport to answer.”

Plaintiff's Response

The Affidavit of Raja Kumaran is relevant to the issue before the Court. Raja Kumaran was one of the persons who was suspended.

Both Raja Kumaran and GSP were present at the meeting held on 29th May 2016.

There is already independent evidence before the Court about the Interim Committee.

It is relevant and once again it is up to the Court to give it whatever weight or probative the Court wants to give to it.

Paragraphs 1 to 18 of Raja Kumaran's Affidavit (Annexure C) deals with formation of Eighth Defendant as a body corporate and his involvement with Eighth Defendant. There is nothing prejudicial to Eight Defendant in these paragraphs and if Eighth Defendant disputes what is stated then it can do so in Response.

Paragraph 19 to 67 deals with Annual General Meeting of TIV Sangam consisting of members of Eighth Defendant who are under the age of 45 years whose meeting was held a day before the AGM scheduled for Eighth Defendant.

*At paragraph 16 of Padayachi's Affidavit he stated as follows:- **"Mr Kumaran discusses in detail the circumstances leading to the meeting held on 29 May 2016 and the appointment of the Interim Committee. I also verify the facts deposed to by Mr Kumaran relating to the meeting of 29 May 2016 due to my presence there."***

This Court holds that in Kumaran's Affidavit there is nothing to say that how TIV Sangam meeting held on 28 May 2016, is relevant to holding of 29 May 2016, meeting during which Interim Committee was appointed.

This Court holds that only paragraph 68 to 93 of Raja Kumaran's Affidavit is relevant to the issues before this Court.

As to paragraph 94 to 134 of Raja Kumaran's Affidavit (Annexure C) is inadmissible for now as there is no Affidavit from Sadasivan Naicker before this Court. Hence, that evidence for now is inadmissible.

There is no need to remove Annexure "C". All that will happen is the Court will not consider paragraphs 94 to 134 of Annexure C in dealing with the issue before this Court. PROVIDED However, if any Affidavit filed by any of the Defendants deals with any matter that is reflected at paragraph 19 to 67 and paragraph 94 to 139 of Raja Kumaran's Affidavit then Plaintiffs can refer to relevant paragraph in Annexure C in their Reply to any Affidavit filed by Defendants.

(iv) **Paragraph 17 and Annexure D**

"Mr Dorsami Naidu who has also provided his affidavit that was sworn on 6 June 2016 and filed on the same date in the Lautoka proceedings. In his affidavit Mr Naidu also discusses the appointment of the Interim Committee on 29 May 2016. Once again, verify the facts deposed to by Mr Naidu relating to the meeting of 29 May 2016 due to my presence there."

Eighth Defendant's Ground/Submission

This paragraph breaches O.41 r.5 and r.6 of the Rules. It references the affidavit of Mr Dorsami Naidu, allegedly sworn in other proceedings (although Annexure D as annexed offers no evidence that it was sworn), which allegedly also discusses the appointment of the Interim Committee on 29 May 2016 but which:-

- is oppressive in that it is, in its entirety, sworn in reply to an affidavit in other proceedings that is not before the Court in these proceedings;*
- is in any event (so far as can be determined) irrelevant;*
- in any event (other than sub-paragraphs (g) and (h) of the second “paragraph 20” of the affidavit) refers to facts which the deponent is not able of his own knowledge to prove.*

“Again - this affidavit is sworn [if it was sworn at all] entirely in reply to an affidavit which is not on the record (but for paragraphs 1-3). It is impossible to put in context what the deponent admits and what the deponent disputes.

Even if any sense can be made of it:

Paragraphs 1-6 add nothing to these proceedings.

Paragraphs 8-12 appear to be rambling commentary o the past practice of meetings.

Paragraphs 13-23 appear to relate the 28 May meeting. They dispute the contents of an affidavit not in evidence here and are a mixture of factual allegations, opinion and speculation.

Paragraphs 24-30 are irrelevant.

Plaintiffs Response

Is relevant to the issue before the Court. Dorsami Naidu was one of the persons who was suspended.

Both Dorsami and GSP were present at the meeting held on 29th May 2016.

There is already independent evidence before the Court about the Interim Committee.

It explains what happened on 29th May 2016 and how the Interim Committee was appointed.

It is relevant and once again it is up to the Court to give it whatever weight or probative the Court wants to give to it.

This Court accepts Eighth Defendant's submission that Dorsami Naidu's Affidavit is in its entirety in response to Affidavit that is not before this Court as such is struck out.

(v) **Paragraph 19 and Annexures E, F and G**

On 30 May 2016 the TISI Sangam filed proceedings against four of the persons who were part of the Interim Committee in the High Court at Lautoka. These proceedings were Lautoka High Court Action No. HBC 98 of 2016. These proceedings were settled and consent orders were entered at the Lautoka High Court in those proceedings on 1 July 2016. The Defendants in those proceedings had agreed to the consent order on the basis that no disciplinary action would be taken against them.

A copy of the Originating Summons filed by TISI Sangam in the Lautoka proceedings is annexed hereto marked "E". A true copy of the Judge's notes of 1 July 2016 is annexed hereto marked "F". A true copy of the Court orders of 1 July 2016 is annexed hereto marked "G".

Eighth Defendant's Ground/Submission

These paragraphs breach Order 41 Rule 5 of the HCR. It refers to court proceedings and annexes court documents in respect of which the deponent asserts no personal knowledge or involvement. It is accordingly material which the deponent is not able of his own knowledge to prove.

“Mr Padayachi gives evidence about the Lautoka Action without stating the source of his information. He goes on to say - without any attribution, without asserting information and belief - asserting nothing - that The Defendants in those proceedings had agreed to the consent order on the basis that no disciplinary action would be taken against them. That assertion is incompetent. He does not even state the source of his information.”

Plaintiffs Response

The Court proceedings being referred to have already become part of this case and aspects of the proceedings have already been discussed at length.

The Court Record of what had transpired before the Lautoka Court and the representations made by the 8th Defendant’s Counsel Wasu Pillay are also before the Court.

Any person reading the transcript would know that undertakings were given by Mr Wasu Pillay to Court.

It is relevant and once again it is up to the Court to give it whatever weight or probative the Court wants to give to it.

Court does not see anything wrong in the court record from another case which has some relevance to issue before the Court being put in evidence. This Court accepts Plaintiffs Counsels’ Submission that the evidence placed before the Court will depend on what weight or probative value Court gives to this evidence in deciding the issues.

(vi) **Paragraph 20**

Sometime in August 2016 the nominations committee of TISI Sangam unlawfully and improperly disqualified certain members as candidates because of their part in the meeting held on 29 May 2016 and because of their appointments to the Interim Committee by the TISI Sangam members. Their disqualification and suspension were done after consent orders had been entered in Lautoka High Court Action No. HBC 98 of

2016 where parties in that action had agreed to hold an AGM for the purpose of an election on 28 August 2016. It is not in dispute that the elections were not held on 28 August 2016. The said consent orders also required that the membership of TISI Sangam not be reduced and be as at 21 May 2016 until the AGM. But the suspensions effectively did reduce this number.

Eighth Defendant's Ground/Submission

This paragraph breaches Order 41 Rule 5 of the HCR. Other than the sentence, "It is not in dispute that the elections were not held on 28th August 2016" the deponent asserts no personal knowledge of or involvement in the matters deposed to. It is accordingly material which the deponent is not able of his own knowledge to prove.

"Mr Padayachi does not state the source of his information. He asserts that suspensions occurred unlawfully and improperly. This is not a fact, this is an opinion, which he has no qualifications to offer.

Mr Padayachi says The suspensions effectively did reduce this number. Again this is not a fact - it is an opinion, which he has no qualifications to offer."

Plaintiffs Response

The Deponent was present at the AGMs held by TISI Sangam.

Certain candidates were suspended and disqualified.

The 8th Defendant has a right to refute the point being made that the persons were suspended in order to remove them as candidates and to penalize them for taking part in the Meeting held on 29th May 2016.

Whatever GSP observed at these meetings and has a belief about are relevant to the issues that are before the Court.

It is up to the Court to give it whatever weight or probative the Court wants to give to it.

Padayachi being a life member of Eighth Defendant and having held several executive positions in Eighth Defendant, is deemed to have a thorough knowledge of the working of the Eighth Defendant and decisions taken by it.

This evidence is relevant to the issues before the Court and will depend on its weight and probative value.

(vii) **Paragraph 21**

The disciplinary action was also taken in extreme bad faith as clarifications had been provided and representations made by Mr Vasu Pillay to the Court and the relevant Defendants that there would be no disciplinary action against them. By virtue of this TISI Sangam procured the Defendants to consent to the orders that were entered on 1 July 2016. The Defendants in the Lautoka action had effectively compromised their positions by accepting the representations made by counsel for TISI Sangam and entered into the consent orders.

Eighth Defendant's Ground/Submissions

This paragraph breaches Order 41 Rule 5 of the HCR in that:

- *the deponent asserts no personal knowledge of or involvement in the matters deposed to. It is accordingly material which the deponent is not able of his own knowledge to prove.*
- *The paragraph contains asserts (extreme bad faith had effective compromised their positions) which are not facts.*

“As appears to be usual, the deponent offers no source of his information.

On further review, this paragraph contains no matters of fact at all. It is essentially a legal submission.”

Plaintiffs Response

The Deponent was supporting the candidates who were suspended and disqualified.

As a Life Member he has every right to hold a view and belief about why they were suspended.

It is relevant and once again it is up to the Court to give it whatever weight or probative the Court wants to give to it.

This Court accepts Eight Defendant's Submission that Plaintiffs are not in a position to make comments such as 'bad faith' or the fact that Defendants in Lautoka Action has compromised their position and as such this Court finds what is said at paragraph 21 of Padayachi's Affidavit to be inadmissible.

(viii) **Paragraph 22**

“The following members who were party to Terms of Settlement and also candidates in the TISI Sangam were suspended:-

- (a) Mr Parveen Kumar Bala, who was nominated for the office of National President.***
- (b) Mr Dorsami Naidu, who was also nominated for the office of National President.***
- (c) Mr Raja Kumaran, who was nominated for the office of Secretary General.”***

Eighth Defendant's Ground/Submission

This paragraph breaches Order 41 Rule 5 in that the deponent asserts no personal knowledge of or involvement in the matters deposed to. It is accordingly material which the deponent is not able of his own knowledge to prove.

“The deponent offers no source of his information or belief.”

Plaintiffs Response

The Terms of Settlement are already before the Court.

It is a fact that the three named persons were suspended.

It is already a fact before the Court that three persons were candidates in the Elections.

The contents of the paragraph is relevant and once again it is up to the Court to give it whatever weight or probative the Court wants to give to it.

As stated earlier Padayachi in his capacity as life member of Eighth Defendant would deem to be aware about the suspension of the persons named in paragraph 22.

Therefore content of this paragraph is admissible and will depend on the weight Court gives to it, after considering the evidence of all parties.

(ix) **Paragraph 24**

The suspension letters that were sent out to the members being suspended were sent out by the First Defendant as the Secretary General. This further shows the situation of conflict in which the First Defendant had a conflict as he was also a candidate vying for the position of National President of TISI Sangam.

A true copy of the nominations list issued by TISI Sangam prior to the aborted AGM on 28 August 2016 is annexed hereto marked "H".

Eighth Defendant's Ground/Submission

This paragraph breaches Order 41 Rule 5 of the HCR in that:-

- *the deponent asserts no personal knowledge of involvement in the matters deposed to. It is accordingly material which the deponent is not able of his own knowledge to prove.*
- *It contains material (this further shows the situation of conflict in which the First had a conflict...) which are not facts.*

“Even if there was any basis at all for retaining this paragraph, it is irrelevant. It is not contended as a ground in the Originating Summons that the First Defendant had a “situation of conflict” because he delivered a letter. So why is this relevant?”

Plaintiffs Response

The issues raised in this paragraph are interrelated to the issues that are before the Court.

The suspension letters were signed by the 1st Defendant.

He was a candidate for the position of President.

It gives rise to a perception of conflict of interest.

It is relevant and once again it is up to the Court to give it whatever weight or probative the Court wants to give to it.

Padayachi has set out the facts and expressed his view about the conflict.

Whether Court accepts his view as to conflict will depend on other evidence produced before Court and Submissions made by the parties.

This paragraph is to remain as it is.

(x) **Paragraph 25 and Annexure I, J, K, L**

I have been provided by the respective deponents copies of the following affidavits that were filed by them in the Lautoka committal proceedings and provide a background to the suspension of the members who were suspended:-

(a) *A true copy of the affidavit of Raja Kumaran in Lautoka High Court Miscellaneous Action No. HBM 14 of 2016 sworn and filed on 18 August 2016, a copy of which is annexed hereto marked “I”.*

- (b) A true copy of the affidavit of Parveen Kumar Bala sworn and filed on 18 August 2016 , a copy of which is annexed hereto marked “J”.**
- (c) A true copy of the supplementary affidavit of Parveen Kumar Bala sworn and filed on 24 August 2016, a copy of which is annexed hereto marked “K”.**
- (d) A true copy of the further supplementary affidavit of Parveen Kumar Bala sworn and filed on 25 August 2016, a copy of which is annexed hereto marked “L”.**

I am informed by the deponents and verily believe that the contents of the affidavits are true. The affidavits are produced by me as evidence of the facts stated therein.

Eighth Defendant’s Ground/Submission

This paragraphs breach Order 41 Rule 5 in that the deponent asserts no personal knowledge of or involvement in the matters deposed to. It is accordingly material which the deponent is not able of his own knowledge to prove.

“Here, Mr Padayachi at least says that he has been provided a copy by the respective deponents of the affidavits he annexes. But what do they say?”

Exhibit I (Kumaran)

Paragraphs 1-3: irrelevant

Paragraph 4: refers to affidavits (apparently in draft) of 1st and 2nd Respondents (which affidavits? Does he mean 1st and 2nd Applicants?) in draft and confirm the history leading to this application.

Paragraphs 5-14 relate to suspension. There is no reason given why Mr Kumaran could not depose to these matters himself.

Exhibit J: (Bala)

Paragraph 2 refers to draft affidavit of Dorsami Naidu intended to be filed...what is that affidavit?

Paragraph 5 onwards relates to suspension. There is no reason given why Mr Bala could not depose to these matters himself.

Exhibit K: (Bala Supplementary Affidavit)

This seems to be comprised entirely of evidence about when disciplinary charges were posted. What is the relevance of this to these proceedings?

Exhibit L (Bala Further Supplementary Affidavit)

This seems to exhibit a list of nominees for positions and a set of rules for the conduct of AGMs. The relevance of this evidence is unclear.

Generally:

Sangam has applied to strike out these affidavits as being non-compliant with the High Court Rules (which they self-evidently are). If (as Plaintiffs appear to claim) these affidavits are now to be admitted as “hearsay” on the basis of a hearsay notice, then it is only fair that the Defendant also be given the opportunity to admit its own “hearsay” evidence in response - that is, the affidavits that Sangam filed in answer to these affidavits in HBM 14 of 2016. That puts all parties in the litigation back in exactly the same position they were in before the orders of 13 March 2018 - that a multiplicity of affidavits from other proceedings are being offered up as evidence.

Plaintiffs Response

The purpose of the affidavits is that they provide a background to the suspensions.

This issue is clearly relevant to this case.

The 8th Defendant does not set out any valid reason why these affidavits are not relevant to the current proceedings.

The 8th Defendant has every right to refute whatever material is placed before the Court.

It is relevant and once again it is up to the Court to give it whatever weight or probative the Court wants to give to it.

It is no doubt that suspension of members included deponents of Annexure I, J, K and L are before this Court and as such it is the evidence in those Affidavits are relevant at to issue of suspension before this Court.

This paragraph is to remain as it is and will go towards weight at the substantive hearing.

3.0 Costs

3.1 Since the Eighth Defendant is partly successful each party is to bear their own cost of the Application.

4.0 Order

4.1 This Court makes following Orders:-

(i)

Govind Sami Padayachi's Affidavit sworn 6 April 2018	
<u>Paragraphs</u>	<u>Order</u>
11, 13	Admissible
16 and Annexure C	Paragraph 1 to 18: Admissible Paragraph 68 to 93: Admissible Paragraph 94 to 134: Inadmissible subject to Plaintiffs being at liberty to refer to these paragraphs in their Affidavit in Reply to Eighth Defendant's or any other Defendants Affidavit in Opposition in

	respect to matters referred to in paragraph 94 to 134 of Annexure C.
17 and Annexure D	Inadmissible
19 Annexure E, F and G	Admissible
20	Admissible
21	Inadmissible
24 and 25	Admissible

(ii) Each party do bear their own costs of the Application.




K. Kumar
JUDGE

At Suva

28 September 2018

Parshotam Lawyers for the Plaintiffs

Samuel K. Ram, Esquire for the First to Fourth, Sixth and Seventh Defendants

Munro Leys for Eighth Defendant