

In the High Court of Fiji
At Labasa
Civil Jurisdiction

Civil Action No. HBC 42 of 2020

Ravindra Kumar Lal aka Ravin Lal

Plaintiff

v

Balaga Bay Farms (Fiji) Pte Limited

First Defendant

Emmett Kent Morgan

Second Defendant

Counsel: Mr A. Sen for the plaintiff
Mr V. Anand for the first and second defendants

Date of hearing: 12th April, 2021

Date of Judgment: 24th October, 2022

Judgment

1. The first defendant, (Company) was incorporated by the plaintiff together with two others, viz, Peter Russell, (PR) and Alik Benjamin, (AB). All three were Directors of the Company as at the date of incorporation. The plaintiff was also Company Secretary. He was removed from both positions. His share was cancelled and a call made on his share. The second defendant was appointed a Director of the Company and issued shares.

2. The plaintiff, in his originating summons claims that his removal, the cancellation of his paid up share, the call on his share, the second defendant's appointment and the issue and transfer of shares to him are void. He challenges the second defendant's entitlement to participate at meetings of Directors and shareholders and the resolutions made thereon.
3. The plaintiff, seeks an Order that the Register of members of the Company be rectified with 1 share each to the plaintiff, AB and PR and declarations that:
- (i) the Directors of the Company are the plaintiff and PR.
 - (ii) the plaintiff is Company Secretary .
 - (iii) the "*purported*" appointment of the second defendant as a Director of the Company on 15 April, 2013, is void for want of a valid immigration permit allowing him to engage in employment in Fiji.
 - (iv) all resolutions of the "*purported*" meeting of the "*purported*" Directors of 9 March, 2016, are void and invalid.
 - (v) 1 ordinary share taken by each of the subscribers being the plaintiff, AB and PR were paid shares.
 - (vi) the cancellation of 1 ordinary share of the plaintiff via a "*purported*" resolution of the "*purported*" Directors made on 29 July, 2016, is void.
 - (vii) all resolutions of the "*purported*" meeting of the "*purported*" Directors of 31 May, 2016, are void and invalid.
 - (viii) all resolutions of the "*purported*" meeting of the "*purported*" shareholders of the Company held on 31 May, 2016, be declared void and invalid.
 - (ix) the transfer of 1 ordinary share from Antonio Baselala Sigabalavu to the second defendant via transfer instrument of 9 August, 2016, is a nullity, void and invalid for want of Foreign Investor Registration Certificate issued by Investment Fiji and breach of section 11 of the Exchange Control Act.
 - (x) the issue of 9997 ordinary shares to the second defendant on 31 May, 2016, is void and invalid for want of Foreign Investor Registration Certificate issued by Investment Fiji and breach of section 10 of the Exchange Control Act.
 - (xi) the holding of 9998 ordinary shares by the second defendant on 29 July, 2016, is void and invalid for want of Foreign Investor Registration Certificate issued by Investment Fiji and breach of section 10 of the Exchange Control Act.
 - (xii) all resolutions of the "*purported*" meeting of the Directors held on 29 July 2016 be declared void and invalid.
4. This application is made in terms of section 4 of the Foreign Investment Act, sections 10 and 11 of the Exchange Control Act, the Immigration Act and Regulations, the Articles of Association,(Article) of the Company and sections 44, 46(12), 87, 126, 127, 139, 142, 143, 144, 145, 242 of the Companies Act.

5. The second defendant contends that he had a work permit to work in another company. Section 97(1) of the Companies Act protects him, though defects in his appointment may be discovered. There is no irregularity in the transfer and issue of shares to him nor on the call on shares. The plaintiff was lawfully removed as Director at a meeting of shareholders.

The supporting affidavit

6. The plaintiff states that on 16 April, 2013, the solicitors for the Company filed a Particulars of Persons who are Directors of the Company Form, including the second defendant as a Director. AB resigned as a Director. He needed a work permit to be appointed a Director.
7. On 9 March, 2016, the second defendant and PR attempted to hold a meeting of Directors. The second defendant conducted the meeting, though he could not conduct himself as a Director and was not a shareholder. There was no quorum. A meeting of the Directors could not be held without notice to the plaintiff, a Director and Company Secretary.
8. On 4 April, 2016, Shekinah law lodged Forms with the Registrar of Companies, which "*purported*" to change the registered office of the Company, remove the plaintiff as Company Secretary and appoint Frederick Quai Hoi as Secretary.
9. The second defendant and PR called a "*purported*" meeting of shareholders on 31 May, 2016. The plaintiff was not notified. The meeting was not called by Directors, as required by the Articles. The second defendant, PR, Frederick Hoi and Antonio Sigabalavu, (a representative of AB) were present. There was no quorum. The Minutes "*show*" resolutions to remove the plaintiff as a Director, call on shares of the Company, issue 9997 ordinary shares to the second defendant and shares held by PR and Antonio Sigabalavu to be transferred to the second defendant.. Article 16 grants to Directors powers to call on shares, not members and approve or refuse transfer of shares. Antonio Sigabalavu did not hold shares until 31 May, 2016.

10. Several Forms were filed attempting to cancel the plaintiff's paid up share on the basis that the share was unpaid and on being called, the share was not paid resulting in forfeiture. were filed to attempt to issue 1 share to the second defendant with a Director's resolution. On 28 September, 2016, Forms to transfer 1 ordinary share from Antonio Sigabalavu to the second defendant were filed.

The affidavit in opposition

11. The second defendant states that the Company was incorporated by the plaintiff together with PR and AB. AB held his share on trust for the second defendant. He had a work permit in respect of Morgan Enterprises (Fiji) Limited. The resolution of 9th March, 2016, is a true and proper record of the resolutions of Directors in terms of Article 92. The plaintiff was duly advised of the meetings.
12. He was not a shareholder as at the date of signing of the Minutes of the meeting of shareholders of 31st May, 2016. The Minutes were made in due compliance of the quorum requirement in section 25(1) of the Companies Act. There were two members present at the meeting. The removal of the plaintiff was an item on the Agenda at the shareholders' meeting and a resolution was duly made for the reasons stated. The Minutes confirm that the persons conducting such meeting were shareholders and Directors at the time when the call on shares was made. The second defendant states that 9,997 shares were allocated to him with the consent of the Company. The consideration was deducted from his loans to the Company rendering the shares as fully paid. The plaintiff's approval was not required for the transfer.
13. The plaintiff, in his affidavit in reply states that the consent of Investment Fiji and the RBF is required for shares to be held on trust. There has to be a resolution of Directors for issue of new shares in terms of Article 50. The call on shares was made at a shareholders meeting. A call on shares is required to be made at a Directors meeting.

The determination

The summons to strike out

14. The second defendant contends that the originating summons does not disclose a reasonable cause of action, is scandalous, vexatious, frivolous and/or an abuse of process. There is duplicity of pending litigation.
15. *The Supreme Court Practice*, (White Book) Vol 1, (1988) paragraph 18/19/14 states that “**Scandalous**” ... *Allegations of dishonesty and outrageous conduct, etc. are not scandalous, if relevant to the issue.*”.
16. In *Devi v Lal*, [2014] FJHC 75; HBC120.2008 (7 February, 2014) as referred to in the written submissions of the defendants, Kamal Kumar J (as he then was) cited the following dicta from the judgment in *National MBF Finance (Fiji) Ltd v. Buli*, Civil Appeal No. 57 of 1998 (6 July, 2000) :

The Law with regard to striking out pleadings is not in dispute. Apart from truly exceptional cases the approach to such applications is to assume that the factual basis on which the allegations contained in the pleadings are raised will be proved. If a legal issue can be raised on the facts as pleaded then the Courts will not strike out a pleading and will certainly not do so on a contention that the facts cannot be proved unless the situation is so strong that judicial notice can be taken of the falsity of a factual contention. It follows that an application of this kind must be determined on the pleadings as they appear before the Court....

His Lordship referred to the following passage from *The Supreme Court Practice*:

“ Frivolous or Vexatious”- By these words are meant cases which are obviously frivolous or vexatious or obviously unsustainable per Lindley LJ in Attorney General of Ducty of Lancaster v. L. FN.W. Ry [1892] 3 C... 274, 277;.... The pleading must be “so clearly frivolous that to put it forward would be an abuse of the Court” (per Juene P in Young v Halloway [1895] P 87, 90; ...”

and concluded that for a claim to be frivolous or vexatious it must be established “*that the claim lacks merit (i.e. has no useful purpose) and is only to upset or annoy*” the applicant.

17. In my view, there is no duplicity of the issues in the cases referred to vis a vis the issues in this matter, which I have summarized at the commencement of this judgment.
 18. In the first,(Labasa MC Action no. 113 of 2015) the second defendant in the present case was restrained from entering a land leased by this plaintiff and threatening or intimidating him. I dismissed the appeal of the second defendant - [2016] FJHC 566; HBA 2 of 2016 (23 June,2016). In the second case, (HBC no. 229 of 2016) the Company has filed an action against this plaintiff for conversion, restitution and breach of his duties as a Director.
 19. In my view, the summons discloses a reasonable cause of action. It is not scandalous, vexatious or frivolous nor an abuse of process.
 20. The application to strike out the originating summons is declined.
- The summons*
21. The plaintiff contends that that the second defendant was not eligible to be appointed as a Director, as he did not have a work permit. The second defendant is admittedly, an American citizen.
 22. Regulation 25 of the Immigrations Regulations, 2007 prohibits a visitor from "*engage(ing) in any business, profession or employment, whether or not for reward*" without written approval of the Permanent Secretary.
 23. The second defendant has not established that he had a work permit to be engaged with the Company.
 24. In my judgment, his appointment as a Director is void.

25. The second defendant relies on section 97(1) of the Companies Act.
26. Section 97(1) states that the “*acts of a Director shall be valid, notwithstanding any defect that may afterwards be discovered in his.. appointment or qualification*”.
27. In my view, section 97 has no application to an appointment which is void ab initio. As Mr Sen, counsel for the plaintiff submitted the appointment of the second defendant was not defective, but illegal.
28. In my judgment, the second defendant was not entitled to participate at the meeting of Directors of 9 March, 2016, nor at the meeting of shareholders of 31st May, 2016, (which he chaired) when he was admittedly, not a shareholder.
29. It follows that the resolutions made at the meeting of Directors of 9 March, 2016, changing the address of the registered office of the Company, the resolution made “*Without a Formal Meeting*” by the Directors, (the second defendant and PR) on 29 July, 2016, and resolutions made removing the plaintiff as Director, call on share, issue and transfer of shares to the second defendant at the meeting of shareholders of 31 May, 2016, are void.
30. In any event, there was no quorum at the meeting of Directors in terms of Article 93. PR was the only Director in attendance. Nor a quorum at the meeting of shareholders too. Article 58 requires 3 members to constitute a quorum.
31. It was also not established that the plaintiff was notified of the meeting of Directors and shareholders. Nor that the directors called the meeting of members, gave 21 days written notice to shareholders with details of the meeting, in terms of sections 139(5), 142, 143(1) and 145 of the Companies Act.

32. On the issue of shares, section 4 of the Foreign Investment Act states that a foreign investor must not carry on business in a relevant activity in the Fiji without a Foreign Investment Registration Certificate.
33. Sections 10 and 11 of the Exchange Control states that shares cannot be issued or transferred to a person resident outside Fiji without the permission of the Minister.
34. In *Morgan & Balaga Bay Farms (Fiji) Ltd v Ravindra Kumar Lal*, [2016] FJHC 828; HBC 261.2015S (31 August, 2016) Kamal Kumar J (as he then was) stated:

2.17 It is undisputed fact that the First Applicant obtained shares in Second Applicant in breach of section 10 of Exchange Control Act and as such is invalid. Bianco v. Ruggiero & Anor. (1997) 43 FLR 229; Ruggiero & Anor. v Bianco [1998] FJCA; ABU0061 of 1997 (7 October 1998)...

2.25 Irrespective of whether or not First Applicant knew about the need to obtain RBF and FTIB approval, the shares transferred to the First Applicant by Alik Benjamin in the Second Applicant is void and as such First Applicant is not a shareholder of Second Applicant and as such had no authority to institute this proceeding on behalf of Second Applicant.

It was held that the Company was wrongly joined as a party on the ground that the second defendant in the present case is not a shareholder of the Company. Amaratunga J dismissed the plaintiff's substantive claim with costs; [2019] FJHC102(15th February, 2019).

35. In my judgment, the issue of 9997 shares to the second defendant and the transfer of 1 ordinary share from Antonio Sigabalavu to the second defendant are void.
36. I would also note that the resolution to issue 9997 shares to the second defendant was made at a meeting of shareholders on 31st May, 2016, contrary to Article 30, which provides that the Directors may refuse to register a transfer of shares.

37. The initial subscribers of the Company were PR, the plaintiff and AB. Form 11 admits that the plaintiff was a registered shareholder.
38. In my judgment, the plaintiff's paid up share was wrongfully cancelled.
39. Finally on the removal of the plaintiff as Company Secretary, Article 106 empowers Directors to remove a Secretary. There was no validly constituted meeting of Directors and resolution passed to effect same.

40. **Orders**

I make Orders as follows:

- a) the Register of Members of the first defendant Company shall be rectified with 1 share each to the plaintiff, AB and PR.
- b) I grant declarations as follows:
- (i) the Directors of the Company are the plaintiff and Peter Russel.
 - (ii) the plaintiff is the Company Secretary .
 - (iii) the appointment of the second defendant as a Director of the Company is void.
 - (iv) all resolutions of the meeting of the "*purported*" Directors of 9 March, 2016, and meeting of the shareholders of 31 May, 2016, and resolution of Directors of 29 July, 2016, are void and invalid.
 - (v) 1 ordinary share taken by each of the subscribers, the plaintiff, PR and AB were paid shares.
 - (vi) the transfer of 1 ordinary share from Antonio Sigabalalvu to the second defendant is void and invalid.
 - (vii) the issue of 9997 ordinary shares to the second defendant on 31 May, 2016, is void and invalid
 - (viii) The second defendant shall pay the plaintiff costs summarily assessed in a sum of \$ 1500.00.



A.L.B. Brito-Mutunayagam
A.L.B. Brito-Mutunayagam
JUDGE
24th October, 2022