

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 122 OF 2016
(High Court HBC 228 of 2016)

BETWEEN : DAMEND GOUNDER
KUMAR SAMI GOUNDER
SOM PADAYACHI
SAILENDRA KUMAR
PRAGDISHWARAN GOUNDER
VIJAY NARAYAN
MUNI KAMLESH NAIDU

Appellants

AND : GOVIND SAMI PADAYACHI
NARSA REDDY
THEN INDIA SANMARGA IKYA SANGAM

Respondents

Coram : Calanchini P

Counsel : Mr S Ram with Mr N Padarath for the Appellants
Mr S Nandan with Mr V Singh for the First and Second
Respondents.
Mr R Naidu with Mr M Chand for the Third Respondent

Date of Hearing : 28 April 2017

Date of Ruling : 22 June 2017

RULING

[1] On 8 November 2016 the Appellants (defendants in the court below) filed a notice of appeal seeking an order from the Court of Appeal that the interlocutory orders made in the High Court on 20 October 2016 be wholly set aside. The Appellants also seek certain consequential orders. The impugned interlocutory orders are:

“(1) Following orders made on 22 September 2016, are extended and to continue until final determination of this action:-

- a) The Defendants by themselves and/or their servants and/or their agents howsoever be restrained from acting as national executives of the Then India Sanmarga Ikya Sangam (“TISI”) or calling of Council of Management meeting or any other meeting or commencing or completing any capital projects.*
 - b) The current signatories to TISI Head Office operating account, Sangam College of Nursing (SCN) operating account, Sangam Institute of Technology (SIT) operating account, namely Damendra Amas Gounder (first defendant), Som Padayachi (third defendant) and Sadasivan Naicker sign the cheques in respect to the operating account of TISI Head Office, SCN and SIT including but not limited to staff salary and cheques to all payments to creditors listed in annexure DAG 11 of the Affidavit of Damendra Amas Gounder sworn on 14th September 2016 and filed on 15th September 2016.*
 - c) The signatories, namely Damendra Amas Gounder (first defendant), Som Padayachi (third defendant) and Sadasivan Naicker submit details of all payments made to the Court on a fortnightly basis until further order of this court.*
- (2) Defendants Application to Strike Out this Action, Dissolve injunction and Transfer this proceedings to Lautoka by Summons dated and filed on 15 September 2016, is dismissed and struck out.*
- (3) Cost of Application for Injunction by Summons filed on 8 September 2016, and Application to Dissolve Interim Injunction, Application to Strike Out the Action and Application to Transfer this action to Lautoka Registry be costs in the cause.”*

[2] The appeal is therefore challenging the interlocutory relief granted by the learned Judge and is brought pursuant to section 12(2)(f)(ii) of the Court of Appeal Act 1949. Leave to appeal is not required. Subsequently the Appellants applied by way of summons dated 17 November 2016 for the following interim orders:

- “1. *The injunction orders granted by the High Court on 8th of September 2016, varied on 22nd September 2016 and continued on 20th October 2016 be dissolved and the status quo prior to grant of the orders of 8th September 2016 be maintained pending the determination of this appeal;*
2. *The Appellants be allowed to manage the day to day affairs of Then India Sanmarga Ikya Sangam (“TISI”) and call and complete the Annual General Meeting of TISI commenced on 28th August 2016;*
3. *In the alternative, the National Executives elected and managing the affairs of TISI prior to the 28th of August 2016 continue to manage and administer the TISI pending determination of this appeal.*
4. *The proceedings in the High Court at Suva be stayed pending determination of this appeal.*
5. *This Appeal be consolidated with Civil Appeals No ABU 109 of 2016.”*

[3] The application for the abovementioned orders is made pursuant to section 20(1) (e) and (k) of the Court of Appeal Act 1949 (the Act). Section 20(1) provides that a judge of the Court of Appeal may exercise certain powers of the Court including, amongst others, the power (e) to stay execution or make an interim order to prevent prejudice to the claims of any party pending an appeal and (k) generally, to hear any application, make any order or give any direction that is incidental to an appeal or intended appeal. Section 20(1) presupposes that the jurisdiction delegated to a judge of the Court is exercisable by the Court of Appeal either pursuant to a provision in the Court of Appeal Act itself or pursuant to its limited inherent jurisdiction. The jurisdiction of the Court to hear and determine this application was not the subject of argument before me and for the purpose of resolving this unfortunate dispute within a reasonable time jurisdiction will be regarded as not in issue.

- [4] The application was supported by a two volume affidavit sworn on 16 November 2016 by Damendra Amas Gounder. The application was opposed. An answering affidavit sworn on 23 December 2016 by Narsa Reddy was filed on behalf of the Respondents. The Appellants filed a reply affidavit sworn on 16 January 2017 by Damendra Amas Gounder. The Appellants then filed a supplementary affidavit sworn on 23 February 2017 by Damendra Amas Gounder. The Respondents filed a further answering affidavit sworn on 10 March 2017 by Govind Sami Padayachi. The parties filed written submissions before the hearing of the application.
- [5] On 15 March 2017 the “*Then India Sanmargya Ikya Sangam*” applied by summons to be joined as a Respondent in the appeal. The application was supported by an affidavit sworn on 15 March 2017 by Jai Narayan. The application was not opposed and an order to that effect was made by consent on 16 March 2017
- [6] The background facts that are directly relevant to the present application in particular and the appeal in general are set out in the Ruling delivered by the learned High Court Judge on 20 October 2016. It need only be noted for the purposes of this Ruling that all the parties named as Appellants and the first two Respondents are members of the Then India Sanmargya Ikya Sangam (TISI) being the third Respondent. The annual general meeting of TISI commenced on 28 August 2016. It would appear that most of the business had been completed except for the election of members to the national executive of TISI. It would also appear that the meeting was brought to an abrupt conclusion as a result of police intervention before those who had been nominated could be declared as the elected members of the national executive. The Appellants had been subsequently appointed after and outside the annual meeting.
- [7] The first and second Respondents, being life members of TISI and thus entitled to vote at the annual general meeting, filed on 8 September 2016 an originating summons seeking the following orders:

- “a. A declaration that the appointment of the Defendants as the national executive of (TISI) on 28 August 2016 is void;*
- b. An order that a properly constituted General Meeting of the (TISI) be held to elect the National Executives of (TISI).”*

[8] Although an amended originating summons seeking two further orders was filed in the High Court on 17 February 2017, the claim for additional relief was not before the High Court at the time the Ruling was delivered and the orders made on 20 October 2016. It is only those interlocutory orders that are the subject of the proceedings in this Court.

[9] The injunctive relief granted by the High Court and which is the subject of the appeal and the present application in this Court was granted pursuant to an application that was commenced by an ex parte summons filed together with the Originating Summons on 8 September 2016. The first and second Respondents sought the following orders:

“The Defendants by themselves or by their servants agents or otherwise howsoever be restrained from acting as the national executive of the (TISI) including calling any meetings of the (TISI) or council of management meeting or any meetings and from dealing with the financial and administrative affairs of the (TISI) whatsoever until further order of the Court.”

[10] The High Court granted the interim injunction in terms on 8 September 2016 and at the same made certain ancillary orders and adjourned the proceedings to 22 September 2016.

[11] By summons dated and filed on 15 September 2016 the Appellants (the defendants in the court below) applied for orders (a) dissolving the ex parte interim injunction granted on 8 September 2016, (b) striking out the originating summons, (c) transferring the matter to the Lautoka registry and (d) abridging time for service of the application. Procedural directions were given and the application came on for hearing before the High Court on 22 September 2016. At the conclusion of the hearing on that day the learned Judge made certain interim orders that were subsequently confirmed as interlocutory orders in his written Ruling delivered on 20 October 2016. Those orders have been set out in full in paragraph 1 of this Ruling.

- [12] As noted earlier in this Ruling, the Appellants challenge those orders on appeal and seek an order from the Court of Appeal to have the orders set aside and revoked. In doing so the Appellants are seeking to have themselves re-instated as the national executive pursuant to the declaration made after the annual general meeting had been prematurely terminated. In the interim, by the present application the Appellants seek the assistance of the Court and in particular, a single judge of the Court of Appeal, to bring about the same result as is being sought in the appeal itself. The Appellants seek an order that would have the effect of re-instating the Appellants as the national executive until the determination of the appeal. Alternatively the Appellants seek an order that the members of the national executive who were managing the affairs of TISI as at 28 August 2016 continue to manage and administer the affairs of TISI until the determination of the appeal.
- [13] The Appellants submitted that one of the two alternative orders should be made because the interim orders made by the learned High Court Judge do not make sufficient provision for the day to day management and administration of the affairs of TISI.
- [14] The principle relief sought by the Respondents (Plaintiffs in the court below) in the originating summons was for a declaration that the appointment of the Appellants as the national executive of TISI on 28 August 2016 was void. By way of interlocutory injunctive relief the Respondents sought an order restraining the Appellants from acting as the national executive pending the determination of the action or until otherwise ordered by the Court.
- [15] The effect of this interlocutory order was that although the Appellants had been appointed as the national executive after and outside the annual meeting, they were from 20 October 2016 restrained from acting as the national executive. In their place, the Court made provision for limited interim arrangements in relation to the signing of cheques.

- [16] By their appeal the Appellants seek to have both the interlocutory injunction and the interim arrangements set aside. In the meantime by the present application they ask this Court for a number of orders pending the hearing of the appeal. First, the Appellants ask the Court to dissolve the injunction granted on 20 October 2016. However that is not a proper interim application since it is the subject of the appeal itself. There is not a great deal of difference between seeking to have an injunction set aside and seeking to have an injunction dissolved. The Appellants then seek an interim order that they be installed as the managers of TISI and call and complete the annual meeting. That order could only be considered in the event that the Court was minded to make the first order sought.
- [17] However the third order sought as an alternative to orders 1 and 2 does seem to have merit. To order that the national executive managing the affairs of TISI prior to the commencement of the annual meeting continue to manage and administer TISI pending the hearing of the appeal would not affect the injunction restraining the Appellants from doing so. It may be that some of the Appellants were members of the national executive prior to the meeting on 28 August 2016. In my opinion their resuming membership of the national executive would not impact on the injunction restraining the Appellants who were all purporting to be the national executive as a result of an appointment made outside and after the annual meeting. The making of such an order would also enable TISI to be fully functional in terms of management and administration. The making of such an order was supported by Counsel for TISI. Finally, there can be no doubt that until a new national executive is declared elected (unopposed or otherwise) at a properly constituted annual meeting the members of the national executive who were in office at the commencement of the unfinished annual meeting on 28 August 2016 continue in office as the national executive.
- [18] I refuse the application for an order that the High Court proceedings be stayed pending determination of the appeal. Such an order would only serve to prolong what can only be described as unfortunate and expensive litigation.

[19] There appeared to be no challenge to the application for this appeal to be consolidated with civil appeal ABU 109 of 2016 and the application is granted.

[20] Counsel for TISI submitted that there was no good reason for continuing order 1(c) made by the High Court if this Court was prepared to order that the national executive who were in office as at 28 August 2016 continue in office pending the hearing of the appeal. Counsel submitted albeit from the Bar Table that the order was not being enforced nor insisted upon by the parties to the proceedings. Under the circumstances it would appear that the safeguard intended by the order may no longer be necessary.

[21] As a result I order;

1. *Until the determination of the appeal or until further order of this Court:*

(a) the members of the national executive who held office as at the commencement of the annual meeting on 28 August 2016 continue in office to manage the affairs of TISI,

(b) Orders 1 (b) and 1(c) made on 20 October 2016 are set aside.

2. *The application to stay the proceedings in the High Court is refused.*

3. *This appeal is consolidated with civil appeal ABU 109 of 2016.*

4. *The costs of this application be costs in the appeal.*



W. Calanchini

Hon Mr Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL