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IN THE FIJI COURT OF APPEAL

AT SUVA

CIVIL JURISDICTION

CIVIL APPEAL NO. 28 OF 1989
(Civil Action No. 94 of 1989)

BETWEEN:

CECELIA CHUTE	1st Appellant
LITIANA BALEISUVA KEIL	2nd Appellant

-and-

VITILEVU INTERNATIONAL HOLDINGS LIMITED	1st Respondent
DRAGOSLAV MARJANOVIC a.k.a DAVID DRAGON MARIANOVICH	2nd Respondent

Mr. L. Namasivayam for the Appellants
Mr. T. Fa for the Respondents

Date of Hearing : 19th March, 1992
Date of Delivery of Judgment : 23rd March, 1992

J U D G M E N T

This bitter battle goes back to 20th March 1989 when the plaintiffs commenced proceedings for an injunction to restrain the defendants from interferring in the control and affairs of the first plaintiff, and from trespassing on the premises occupied by it. The claim sought orders for damages and costs as well.

On the same day as the issue of the writ, the plaintiffs moved by notice of motion for an ex parte injunction to restrain the defendants from continuing to act for and on behalf of the first plaintiff and from trespassing on its premises and using anything that belonged to it.

On 21st March 1989 the learned Judge who heard the application granted an ex parte injunction restraining the second defendant in roughly the terms sought in the notice of motion, and in addition restraining both defendants from conducting at what was claimed to be the offices of the first plaintiff any business other than that of the first plaintiff. The injunction was granted until further order, the usual undertaking as to damages having been given.

By summons dated 23rd March 1989, the defendants applied to have the ex parte injunction dissolved. In it the defendants also sought an order that the second plaintiff be restrained from approaching customers of the defendants and from making damaging statements about the defendants.

The matter came before a Judge in Chambers on 5th May 1989, by which time a number of affidavits had been filed on behalf of both sides. His Lordship dismissed the summons.

On 9th September 1989 the defendants lodged an appeal against the dismissal. That is the matter that is now before us. Leave to appeal out of time was duly granted.

The notice of appeal seeks orders from this Court not only to have the order made at first instance dismissing the defendants' summons set aside, but to grant an interim injunction in the same terms as that sought in the defendants' summons, that is, that the second plaintiff be restrained from approaching any of the customers of the defendants and making damaging statements about them.

It is unnecessary to advert to the background of this dispute except in the briefest outline. The first plaintiff was incorporated in early April 1988. The moving force was the second plaintiff, who was an Australian . The business of the first plaintiff appears originally to have been in the real estate area, but it branched out into building activities. It appears to have entered into a lease of certain premises in Suva. The first defendant appears to have been appointed a director of the company. The second plaintiff called himself managing director of it, but whether he was ever appointed a director remains problematical at this stage.

By February 1989 the second plaintiff and first defendant had fallen out, and the first defendant set about taking over control of the company; she purported to terminate the *"employment and role"* of the second plaintiff with the company but on what authority is not known (record p.51). She purported to appoint the second defendant a director of the company, but there is no evidence that any such appointment was made in accordance with the requirements for such an appointment as set

out in the articles of association. On 9th March 1989 the second plaintiff arranged for what was called a special general meeting of shareholders, but there is no evidence that its calling complied with the requirements for doing so contained in the articles. At this so called meeting it was purported to have him *"reinstated as Managing Director"* and the two defendants dismissed as directors (record p.54). It was in this state of affairs that the plaintiffs commenced proceedings and approached the Court for an interlocutory injunction.

At the outset it can be said that there was no evidence at all in support of the summons filed by the defendants relating to the order that the second plaintiff had done anything in relation to any business of the defendants. Whether the order seeking an injunction against him was argued on an interlocutory basis is not known. Anyway there was no evidence to support this aspect of the defendants' summons, and we do not propose to interfere with the order dismissing it.

So far as concerns that portion of the defendants' summons which sought an order dissolving the interlocutory orders made by the learned trial Judge on the application by the plaintiffs, we say at once that it is difficult to know what allegations made by both sides in the affidavits filed can be treated as evidence on which this Court might rely. We think that the learned trial Judge probably understated the position when he said in his Judgment: *"The parties have filed numerous affidavits containing much material of dubious admissability....."* (record p.90)

What, however, does emerge is that there is no evidence that the purported appointment of second defendant as a director of the plaintiff company complied with the requirements of the articles of association relating to the appointment of directors, and no evidence from her that she claimed to be a director of the first plaintiff. The learned trial Judge was therefore quite justified in making an order restraining her from, in effect, from acting as such. There is no reason why we should interfere with this order.

The second order made by the trial Judge was directed to restraining both defendants from carrying on a business other than that of the first plaintiff from its premises. There was material before him that the two defendants were, at the time of the commencement of these proceedings, conducting from the premises of the first plaintiff a business under the name of "Cecelia & Litiana Company Limited" (record p.10). There is a bald denial of this by the first defendant (record p.68), but no denial of it by the second defendant. Indeed the summons filed on behalf of the defendants on 23rd March 1989 seeks an order:-

> *"THAT the 2nd Plaintiff by himself and/or by his servants and/or agents or otherwise howsoever be restrained from approaching any of the customers of the Defendants and in anyway making damaging statements about the Defendants."*

It is to be noted that the order does not seek a restraint upon approaching customers of the first plaintiff, so it can be assumed that the two defendants are carrying on some kind of

business. Seeing they do not choose to say from where, it lends weight to the order made by the Judge about conducting their business from the premises of the first plaintiff. In the circumstances the learned trial Judge was entitled to make the order that he did in the first instance, and refuse to alter it on the application of the defendants. There has been nothing put before us to satisfy us that it should be interferred with.

When the matter came before us, counsel for the appellants/defendants sought to support the appeal by claiming (i) that the second plaintiff had no locus standi to bring the proceedings on behalf of himself and the company as plaintiffs because he was not an officer of the company or authorised by it to do so, and (ii) that having no work permit in this country at the time the proceedings were launched he was not entitled to be or had ceased to be such an officer, and (iii) illegality.

Not only is there a confused mass of mostly inadmissible material about these aspects, but counsel for the appellants concedes they were not raised before the learned trial Judge when matter was being argued before him, and that they involved disputed questions of fact. In these circumstances it would have been quite impossible for this Court to proceed to consider them.

The other points raised in support of the appeal had no substance whatever.

That disposes of the appeal. It is to be noted that the proceedings commenced on 20th March 1989 have not yet been brought before the Court for hearing and determination. The parties can bring them on for hearing if they wish.

The appeal will be dismissed with costs.

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Justice Michael Helsham
President, Fiji Court of Appeal

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Sir Peter Quilliam
Justice of Appeal

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Justice ~~Arnold~~ Amet
Justice of Appeal