

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

CIVIL APPEAL NO. ABU61 OF 2003S
(High Court Civil Action No: 400 of 2003S)

BETWEEN:

FIJI PUBLIC SERVICE ASSOCIATION

Appellant

AND

KRISHNA SAMI CHETTY

Respondent

Coram: Barker, JA
Kapi, JA
Scott, JA

Hearing: Thursday, 24 February 2005

Counsel: Mr. H. K. Nagin for the Appellant
Mr. F. Koya for the Respondent

Judgment: Friday, 4 March 2005

JUDGMENT OF THE COURT

INTRODUCTION

[1] This is an appeal by a Trade Union (the Union) against an injunction granted by the High Court at Suva on 24 October 2004 (Connors J) preventing it from holding its Annual General Meeting (AGM).

BACKGROUND

- [2] The Union is one of Fiji's foremost trade unions. It was founded in 1943 and now has upwards of 4000 members. Its honours list includes three former Prime Ministers, a Governor-General and a President of Fiji.
- [3] The Respondent (Mr. Chetty) joined the Union as a young man in 1980. He was clearly an enthusiastic trade unionist and rose to be secretary of the Nadi Branch of the union and later of its Civil Aviation Branch. In all, he held these positions for over 12 years.
- [4] Unfortunately, towards the end of 2001 Mr. Chetty began to be unhappy with the direction the Union was taking. He allowed the payment of his Union dues to lapse. In October 2002 he advised the Union's General Secretary that he had decided to resign as Branch Secretary. He explained that he was "moving from a position of exhausting all personal funds to a position much more rewarding than any [he had] held before."
- [5] At about the time he resigned as Branch Secretary Mr. Chetty also resigned from his position as a technical officer with Airports Fiji Limited. He joined a local private company as its factory manager. Unfortunately, the transition from public to private enterprise was not a success and in April 2003, Mr. Chetty again resigned. Since that time he has remained jobless.
- [6] Despite resigning as Branch Secretary, Mr. Chetty did not sever his links with the Union. In particular, he continued to take an active interest in the affairs of its Civil Aviation branch. In May 2003 he intervened in the case of 14 airport workers who had lost their jobs. The Union had agreed that the men would be re-employed without payment of back pay. Mr. Chetty wrote in very strong terms to the General Secretary, Mr. Rajeshwar Singh. He was "flabbergasted"

by what had been agreed by Mr. Singh who had "no mandate [to] sell out these members". Mr. Chetty copied his letter, among others, to Mr. Mahendra Chaudhry, the Leader of the Labour Party and a life member of the Union. An exchange of acrimonious correspondence between Mr. Chetty and the Union then followed.

- [7] On 12 July 2003 the Union's National Council met in Suva. The dispute between Mr. Chetty and Mr. Singh was discussed. Mr. Chetty's conduct was described as being "severe indiscipline". Two motions were passed by the Council by a majority of 18 to 2. The first called for Mr. Chetty's expulsion from the Union while the second prohibited him from using the Union's facilities. Mr. Rajeshwar Singh, however, recommended that Mr. Chetty simply be advised that his membership of the Union had ceased.
- [8] On 17 July 2003 Mr. Rajeshwar Singh wrote to Mr. Chetty. He told him that his membership of the Union had lapsed first, for non-payment of dues and secondly, because he had taken employment with a company whose employees were not represented by the Union. There is no evidence that Mr. Chetty either sought re-instatement or appealed under the relevant provisions of the Union's constitution. As is clear from paragraph 1.02 of Mr. Koya's written submission filed on 28 January 2005 and from paragraphs 129, 131, 134 and 162 of his affidavit filed on 25 September 2003, Mr. Chetty considered himself to have been expelled from the Union.
- [9] Apart from dealing with the problem of Mr. Chetty, the Union was also busily preparing for its forthcoming AGM. This event was to be of particular importance and significance because it was planned to coincide with the Union's Diamond Jubilee Celebrations.

- [10] The Volume 28 No. 3 Edition of "Service Worker" published in August 2003 contained full details of the Programme for 26 September. Apart from the AGM there was to be a tradition welcome for VIPs and other invited guests, a special address by Mr. Chaudhry, presentation of awards and the cutting of an anniversary cake.
- [11] The Schedule to Section 37 of the Trade Unions Act (Cap 96 - the Act) requires a Union's constitution to specify the matters which are to be dealt with at the Union's AGM. These include the presentation of audited accounts. Failure to comply with this requirement can lead to the cancellation of a union's registration (Section 14 (30 (b) and even to criminal sanctions (Section 62).
- [12] Apart from the presentation of accounts, the AGM was also required by the Act and the Union's constitution to elect the principal officers of the Union and to consider motions to amend its constitution.
- [13] Motion 10 published in the "Service Worker" is particularly relevant. The proposal was that Clause 57 (e) of the constitution be amended.

The existing clause (e) (last amended together with 13 other clauses at a Special General Meeting of the Union held on 8 November 2002) read:

"General Secretary

- (e) Nominees for the post of General Secretary shall meet the following qualifications and experience criteria in addition to the requirements of the Trade Union Act:

- (i) He shall have a sound administrative and Trade Union background and a good working knowledge of all labour legislation.
- [ii] He shall have sufficient and proven advocacy skills and experience to represent the [Union] in negotiations, trade disputes, settling procedures and arbitration proceedings.
- [iii] A nominee shall have current or prior membership and service with the [Union] as a Principal Officer or National Councillor for a minimum of five (5) years.
- [iv] He shall not be convicted of any fraudulent activities prior to his nomination and he shall not be declared bankrupt or have a receiving order against him.
- [v] He shall have acquired a sufficiently high standard of literacy so as to enable him to perform his duties effectively and participation in industrial relations courses from recognised tertiary institutions would be advantageous” (emphasis added).

The motion proposed amendment of clause (e) (iii) by removal of the words “or National Councillor”. It is not disputed that by virtue of his position as Secretary of the Nadi Branches of the Union, Mr. Chetty had been a National Councillor for at least 5 years.

- [14] Clauses 66 (c) and 57 (f) of the Union's constitution added following the November 2002 Special General Meeting are also relevant. Clause 66 (c) reads:

"Nominations of Officers

- (c) The Principal Officers of the Council shall be the nominations Committee which shall, after the due closing dates and times receive and endorse all nominations that were properly delivered and scrutinise the same to certify their validity etc." (sic)

It seems that the "Principal Officers" of the Council are the President, the two Vice-Presidents, and the General Treasurer. (Clause 46 of the Union's constitution).

- [15] Clause 57 (f) reads:

"General Secretary

- (f) The Nominations Committee shall not accept any nominations for the post of General Secretary from persons who do not meet the foregoing requirements, or persons who do not accept terms and conditions offered provided however in the absence of such nominee(s) meeting the full criteria and during any mid term vacancy of the position arising, the National Council shall be empowered to accept nomination(s) suitable in circumstances."

- [16] It is not disputed that both amendments to the constitution were approved and registered by the Registrar of Trade Unions on 24 February 2002 (see Section 37 (2) of the Act).

- [17] On 22 August 2003, by advertisement placed in the "Fiji Times", the Union called for nominations for the position of National President, two Vice Presidents, a General Secretary, a General Treasurer and 16 other positions. On 26 August Mr. Chetty submitted his nomination for the position of General Secretary. On 2 September the Union advised him that his nomination had been rejected by the Nominations Committee which considered that he did not meet the selection criteria.
- [18] On 5 September Mr. Chetty's legal advisers, Messrs. Koyas, demanded a full explanation. Failing a satisfactory explanation by 8 September they had "standing instructions for legal proceedings."
- [19] On 17 September Messrs. Sherani, acting for the Union, advised Koyas that Mr. Chetty's nomination had been rejected because the Nominations Committee were of the view that Mr. Chetty failed to satisfy the requirements of Clause 57 of the Union's Constitution, in particular sub clauses 57 (e) (i) and (ii).

INSTITUTION OF LEGAL PROCEEDINGS

- [20] On 25 September 2003, the day before the Union's AGM and 60th Anniversary celebrations were set to commence, Messrs. Koyas, without any warning to Messrs. Sherani or to the Union commenced legal proceedings.
- [21] Paragraph 1 of the Statement of Claim filed on 25 September states that the Plaintiff was at all material times a member of the Union. The only matter complained of is the rejection of his nomination for the position of General Secretary. In view of the fact that the rejection occurred in August 2003, over a month after Mr. Chetty was officially advised that he was no longer a member of the Union paragraph 1 of the Statement of Claim was misleadingly incorrect.

The Statement of Claim sought special damages amounting to \$787.00 plus general damages, aggravated damages, interest and costs on an indemnity basis.

[22] Together with the Writ and Statement of Claim Mr. Chetty also filed an *ex parte* Notice of Motion. Mr. Chetty sought:

- “1. An order restraining [the Union] whether by itself, its agents servants or otherwise howsoever from conducting its Annual General Meeting on 26 September 2003.
2. Alternatively an order restraining the Defendant whether by itself, its agents, servants or otherwise howsoever from conducting its elections for the election of office bearers at its Annual General meeting on 26th day of September 2003.” (emphasis added)

[23] In addition, Mr. Chetty sought three declarations. Neither the prayer for injunctive relief nor the declarations appeared in the Statement of Claim. Neither the Statement of Claim nor the Notice of Motion referred to Mr. Chetty's alleged expulsion from the Union. A 165 paragraph affidavit was filed by Mr. Chetty in support of his application for interim relief. In our view the affidavit was quite unnecessarily lengthy and argumentative. Such prolixity does not usually assist an applicant and should be avoided. Mr. Chetty's main complaints were:

- (i) that he “totally disagreed” with the reasons given by the Nominations Committee who had “without just cause” rejected his nomination (paragraphs 19 and 165).

- [ii] that Clause 96 of the Union's constitution had not been properly complied with in relation to Motion 10 (paragraphs 45 to 51);
and
- [iii] that he would suffer a grave injustice if the Unions "general elections" were allowed to proceed (paragraph 166)

[24] In the final paragraph of the affidavit Mr. Chetty wrote:

"I give my usual undertaking as to damages."

[25] The High Court set down Mr. Chetty's application for hearing at 2.30 p.m. on the day it was filed. Mr. Nagin, who had "somehow got wind of the application" appeared. He told the Court that he had received the Chetty papers just a few minutes previously. He stressed the importance of allowing the Union's AGM to proceed as planned and argued that if Mr. Chetty eventually were to establish that the Union had erred then the consequences of those errors could be set aside. He suggested that there was no good reason for Mr. Chetty to delay his application until the eve of the meeting which he wanted to enjoin. He urged the Court to adjourn the application for hearing *inter partes* in order to give the Union an opportunity to file its evidence in answer. The request for an adjournment was, however, refused.

THE INTERIM INJUNCTION DATED 26 SEPTEMBER 2004

[26] On the morning of 26 September, the High Court granted Mr. Chetty an interim injunction in the terms of paragraph 1 of the Motion until 6 October 2003.

[27] At this stage it may be helpful to make a few observations about the law relating to applications for interim relief. First, such applications are subject to Order 29 of the High Court Rules. Order 29 Rule 1 (I) reads as follows:

“1 - (1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in the party’s writ ...”

Rule 1 (2) (which was amended in 1991 - LN 61/91) reads:

“Where the applicant is the Plaintiff and the case is one of urgency and the delay caused by proceeding in the ordinary way would entail irreparable or serious mischief such application may be made *ex parte* on affidavit but except as aforesaid such application must be made by Notice of Motion or Summons.”

[28] Order 8 r 2 which deals with motions is in almost identical terms. Unless abridged by the Court two clear days notice of either a summons or a motion must be given (O 32 r 3 and O 8 r 2(2)).

[29] The meaning of these Rules is clear. The words of Megarry J in Bates v. Lord Hailsham [1972] 1 WLR 1373; [1972] 3 All ER 1019 are particularly apposite:

“An injunction is a serious matter and must be treated seriously. If there is a plaintiff who has known about a proposal ... for nearly four weeks in detail and he wants an injunction to prevent effect being given to it at a meeting of which he has known for well over a fortnight, he must have a most cogent explanation if he is to obtain

his injunction on an ex parte application made two and a half hours before the meeting is due to begin.” (1380 – A); and

“Ex parte injunctions are for cases of real urgency where there has been a true impossibility of giving notice of motion Accordingly, unless perhaps the Plaintiff had had an overwhelming case on the merits I would have refused the injunction on the score of insufficiently explained delay alone.”

[30] Secondly, as explained by this Court in Natural Waters of Viti Limited v. Crystal Clear Mineral Water (Fiji) Limited (ABU0011 of 2004S):

“Applicants for interim injunctions who offer an undertaking as to damages should always proffer sufficient evidence of their financial position. The Court needs this information in order to assess the balance of convenience and whether damages would be an adequate remedy.”

[31] Thirdly, when assessing the balance of convenience sight must not be lost of the consequences of an order to innocent third parties. (Miller v. Jackson [1971] QB 966).

[32] Fourthly, because of their restrictive effect, injunctions should never be granted in a form which is wider than absolutely necessary to protect the legal right which the Plaintiff proclaims himself to be entitled to. Where, as in an *ex parte* application the Defendant has not had an opportunity to submit that the injunction sought is unnecessarily extensive it is particularly important that this principle be borne in mind.

- [33] Finally, the inclusion of a prayer for declaratory relief in the Notice of Motion was misconceived: there is no jurisdiction to grant interlocutory declaratory orders (Riverside Mental Health NHS Trust v. Fox (1993) *The Times* October 28 C.A.).
- [34] As explained at the outset this is an appeal against the orders made by the High Court on 24 October and is not an appeal against the interim injunction granted on 26 September. In view, however, of the fact that by the time the matter was dealt with *inter partes*, the Union's Diamond Jubilee celebrations had been ruined by the cancellation of the AGM, we think it appropriate to indicate that we doubt whether the injunction should have been granted on 26 September at all.
- [35] In our view, no adequate explanation was offered as to why it was not possible to proceed in the usual manner *inter partes* on notice, even abridged notice, duly given. As already seen, Messrs. Koya had "standing instructions for legal proceedings" as early as 8 September. It is clear from exhibits 57 and 58 of his own affidavit filed on 25 September that Mr. Chetty was planning to take legal action against the Union in early September. We do not think that it was "truly impossible" for Mr. Chetty to have given notice of motion in the normal way.
- [36] We do not think that it was sufficient merely to "note" Mr. Chetty's undertaking as to damages in the order made on 26 September. It was clear from the papers filed by Mr. Chetty that the 60th AGM would be a fairly lavish and quite expensive affair. Many of the delegates would already have arrived in Suva from the rest of Fiji. We do not think that the expense and general inconvenience of cancelling the AGM at such notice was sufficiently taken into account by the Judge.

- [37] We think the terms of the injunction as granted were, self-evidently, far too wide. As already noted the first two paragraphs of the prayer of the Motion were in the alternative. Since the second alternative would have at least allowed the AGM to proceed, albeit without the election of office bearers, the Court should have considered whether Mr. Chetty's claimed interests would have been sufficiently protected by the second alternative before rejecting it and proceeding to the first. In fact, bearing in mind that Mr. Chetty was only complaining about being denied the chance to contest the General Secretary's position and the acceptance of motion 10, there was no reason at all to prevent the elections of all the other officers of the Union from proceeding as normal and the first nine motions being debated. Even in its alternative form, the terms of the injunction sought on 26 September were unjustifiably wide.

**THE INTERLOCUTORY INJUNCTION GRANTED ON 24 OCTOBER
2003**

- [38] On 1 October 2003 the President-elect of the Union filed an affidavit in answer. On 3 October Mr. Chetty filed an affidavit in reply. In her affidavit, the President-elect suggested that Mr. Chetty had misled the Court by describing himself as a trade unionist. She suggested that the Nominations Committee had had perfectly reasonable grounds for rejecting Mr. Chetty's nomination and that it was doing no more than exercising its powers under the Union's constitution in acting in the way it did. While accepting that there had been an administrative error which resulted in motion 10 not being included in the 2002 Annual Report, she denied breach of clause 96. She averred that hundreds of members had already travelled great distances to Suva when the interim order was made. She pointed out that Mr. Chetty had not exercised his right of appeal to the Union nor involved the Registrar of Trade Unions before commencing these proceedings in the High Court. She suggested that the matters complained of by Mr. Chetty were quite insufficient to warrant enjoining the whole AGM

and that in fact Mr. Chetty had not shown that there was any serious question to be tried. Finally, she suggested that Mr. Chetty's undertaking as to damages was worthless: he was unemployed and had New Zealand permanent residence. She feared that he would abscond, leaving the Union not only with the costs of the present action, but also a bill for about \$27,000 spent by the Union on its cancelled AGM.

- [39] The final affidavit filed by Mr. Chetty was even more discursive and argumentative than the first. He did however claim (paragraph 102) to have assets of approximately \$200,000. This claim is not easy to reconcile with the "position of exhausting all personal funds" earlier referred to. He described the suggestion that he might abscond as a figment of the Union's imagination. At the hearing of this appeal on 24 February 2005, Mr. Nagin, by consent, tendered a copy of a letter from the Immigration Department which revealed that Mr. Chetty and his family had emigrated to New Zealand on 28 December 2004.
- [40] On 24 October 2003 the High Court granted Mr. Chetty a continuing injunction preventing the Union from holding its 2003 AGM. Although the Court envisaged that the trial of Mr. Chetty's action would take place in early 2004 it has yet to take place. Despite his client's departure from Fiji, Mr. Koya told us that Mr. Chetty was still determined to pursue his claim. An amended Statement of Claim had been filed and included the claim for declaratory relief.
- [41] When it was put to him that the terms of the injunction against the Union were unnecessarily wide, Mr. Koya indicated that, with the exception of the position of General Secretary and motion 10, he was not now seeking to keep the injunction in place. He accepted that the legal proceedings had gone on for far too long. The only question now therefore before this Court is whether any part of the injunction should remain at all.

- [42] As already noted, the amendment to Clause 57 of the Union's Constitution has already been accepted and registered by the Registrar of Trade Unions. Although motion 10 has not been adopted, we can find nothing to suggest that it is unlikely to be approved by the Registrar. While Mr. Chetty may be correct in suggesting that motion 10 would have the effect of narrowing eligibility to nomination to just a few persons, that is no ground for holding it to be unlawful. Whether it is sensible is an altogether different matter. Providing that alterations to the rules are *intra vires* the Union's constitution, the Court will not interfere. (see Cotter v. National Union of Seamen [1929] All ER Rep 342).
- [43] Both in the Judgment of 26 September and that of 24 October, Connors J relied on the well known principles explained in American Cyanamid v. Ethicon Ltd [1975] AC 396; [1975] 1 All ER 504. Unfortunately, in both judgments the Judge applied the first two principal tests in the wrong order. The first question is whether there is a serious question to be tried, in other words whether the Plaintiff has established that he has a good arguable claim to the right he seeks to protect. It is only if the answer to that question is in the affirmative that the adequacy of damages as an alternative to the injunction sought has to be considered.
- [44] In our opinion, it is not at all easy to discern a cause of action at all. As a non-member of the Union Mr. Chetty does not appear to enjoy a contractual relationship with the Union and therefore would not seem to be in a position to allege breach of his rights as a member. The amended Statement of Claim does not plead tort. Mr. Koya told us that Mr. Chetty was claiming loss of the salary which he would have earned had he been appointed General Secretary. This claim however is dependent on the somewhat unlikely event of Mr. Chetty succeeding at ballot. It is also notable that, despite amendment, the Statement of Claim still does not seek injunctive relief. While theoretically an interim

injunction only might be sought (and is indeed permitted by Order 29 Rule 1 – (I)), it is our experience that such a situation is highly unusual. In the words of Lord Diplock in American Cyanamid (supra) at page 408:

“Unless the material available to the Court at the hearing of the application for an interlocutory injunction fails to disclose that the Plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the Court shall go on to consider where the balance of convenience lies

and:

“the governing principle is that the Court should first consider whether, if the Plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages ...”

In the absence of a claim for a permanent injunction, it is difficult to see how the governing principle could be applied to the circumstances of this case.

[45] For reasons already explained we are of the view that an attempt permanently to prevent the passage of motion 10 would be unlikely to succeed. A mandatory injunction requiring the Union to employ Mr. Chetty as its General Secretary seems so unlikely as to be fanciful.

[46] We have already referred to doubts as to Mr. Chetty’s ability to make good his undertaking as to damages. His emigration from Fiji only makes the Union’s position even more precarious. Where undertakings as to damages are offered by persons outside the jurisdiction they should ordinarily be backed by security (see Harman Pictures N.V. v. Osborne [1967] 1 WLR 723, 739). In this case no security has been offered by Mr. Chetty.

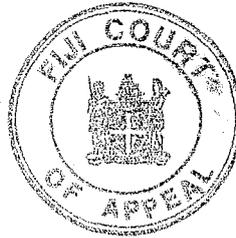
[47] In all the circumstances the injunction must be dissolved. We are satisfied that Mr. Chetty did not discharge the onus resting upon him to justify its continuation in October 2003. In view of subsequent developments it would be even more unjust to keep it in place any longer.

RESULT

- (1) Appeal allowed; injunction granted on 24 October 2003 discharged forthwith.
- (2) Appellant to have its costs which we assess at \$2000 and disbursements.

R. J. Barker J.A.

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Barker J.A.



Kapi J.A.

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Kapi J.A.

Scott J.A.

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Scott J.A.

Solicitors:

Messrs. Sherani for the Appellant

Messrs. Koyas for the Respondent