

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

CIVIL APPEAL NO. ABU 87 OF 2019
(High Court HBC 162 of 2019)

BETWEEN : **JOHN LAL** (*First*)
VIRENDRA KUMAR (*Second*)
NILA RAO (*Third*)

Appellants

AND : **KALA WATI** (*First*)
SANDHYA KRISHNA (*Second*)
URMILA DEVI (*Third*)

Respondents

Coram : **Calanchini P**

Counsel : **Mr N R Padarath for the Appellants**
Mr G O'Driscoll with Mr P Sharma for the Respondents

Date of Hearing : **23, 30 October and 14 November 2019**

Date of Ruling : **11 December 2019**

RULING

[1] This is an application by the appellants for orders in the form of interlocutory injunctions restraining the respondents (a) from calling a meeting (scheduled initially for 24 October 2019) to appoint three new executive board members of the Ra Naari Parishad and (b) restraining the respondents from interfering and/or disrupting the running of Ra Naari Parishad (RNP). There were two further orders sought which in effect sought the same outcome as was sought by the injunctive relief.

[2] The application was made by summons filed on 22 October 2019 and was supported by an affidavit sworn on 21 October 2019 by John Lal. A supplementary affidavit sworn on 23 October 2019 by John Lal was filed on the same day. The application was opposed. An answering affidavit sworn on 29 October 2019 (as amended by hand but without initials) by Kala Wati, Sandhya Krishna and Urmila Devi on behalf of the Respondents. A reply affidavit sworn on 1 November 2019 by John Lal was filed on behalf of the appellants. A supplementary affidavit sworn on 8 November 2019 was filed on behalf of the respondents. The parties filed written submissions prior the hearing on 14 November 2019.

[3] The application is made pursuant jurisdiction given to the Court of Appeal under section 13 of the Court of Appeal Act 1949 (the Act). Section 20(1) gives to a Judge of the Court power to make an interim order to prevent prejudice to the claims of any party pending an appeal and to hear any application to make any order that is incidental to an appeal.

[4] To understand the context in which the application is made it is necessary to outline the history of the dispute that has resulted in the appeal to this Court. In proceedings commenced in the High Court at Lautoka by originating summons the appellants sought the following relief:

“(a) A declaration that the defendants (in this Court the respondents) had no right or power to dissolve the Executive Board of RNP.

(b) That by taking such an act, the defendants are in breach of the adopted Constitution dated 3 August 2018 and the executive board can move to remove the defendants from the position of Trustee pursuant to section 7.6.10 of the adopted Constitution dated 3 August 2018.”

[5] It appears not to have been disputed that RNP is a registered charity under section 4 of the Charitable Trusts Act 1945. Nor is it disputed that a Certificate of Incorporation was issued by the Registrar under section 6 of the same Act. It is apparent from section 4 of the Charitable Trusts Act and schedule 1 to the Act that an application for incorporation

must be accompanied by a certified copy of the deed of settlement, will or other document constituting the charity and any regulations made thereunder.

- [6] In June 2019 the trustees of RNP resolved to dissolve the management board. The management board claimed that the Trustees were purporting to act under the constitution adopted on 12 May 2015. The board claimed to be acting in accordance with a constitution that they claimed had been adopted on 3 August 2018.
- [7] The learned High Court Judge declined to grant the declarations sought. The reason for doing so is clearly set out in paragraph 5 of his judgment. The Judge found that the 2018 constitution was not in force because it had not been sent to the Registrar for registration in accordance with section 4 of the Charitable Trusts Act. As a result the governing document was the 2015 constitution under which the affairs of RNP should be administrated and managed. The Judge noted that the 2015 constitution did not provide for a fixed term for the board. As a result it would not be permissible for the Trustees to dissolve the management board on the basis that their term had expired. Termination of the board could only be effected in accordance with article 4.3(c) of the 2015 constitution.
- [8] It must be noted that the learned Judge has made no finding on whether the 2018 constitution had been properly adopted. The issue is not raised in the judgment. The finding was that the 2018 constitution was of no force or effect since it had not been registered in accordance with the Charitable Trusts Act. If the adoption of the 2018 constitution was in issue in the Court below the Respondent could have filed a respondent's notice. The judgment indicates that the Judge refused the first declaration on the basis that the Trustees did have the right to dissolve the executive board, but not on the basis of a fixed term ending, but rather on the basis of article 4.3 (c) of the 2015 constitution.

[9] The Judge refused the second declaration on the basis the 2018 constitution was not the governing document of RNP since it had not been registered under section 4 of the Charitable Trusts Act.

[10] Being dissatisfied with the orders of the High Court the appellants filed a timely notice of appeal seeking an order that the High Court orders made on 13 September 2019 be wholly set aside on the following grounds:

“1. *The Learned Judge erred in law at paragraph 5 under the heading discussion and at paragraph 2 under the heading conclusion by holding that the Constitution adopted on 3rd August 2018 was of no effect because of lack of registration when*

1.1 Section 4 of the Charitable Trust Act did not make any specific requirements to register any changes made to a document which contained the rules and regulations of any charitable organization.

1.2 The ambit of section 4 was limited to making of an application in writing, to the satisfaction of the Registrar for the purpose of creating a body corporate pursuant to section 3 of the Charitable Trust Act, the provision did not require that all changes made to any document be re-submitted to the Registrar.

2. *The Learned Judge erred in law by holding that the constitution adopted on 3rd August 2018 was of no effect, effect, when the entire membership of Ra Naari Parishad accepted the constitution at its annual general meeting held on 31st January 2018.*

3. *The Learned Judge erred in law by holding that the management Board is required to file with the Registrar of Titles any changes to the existing constitution, when the Charitable Trust Act does not provide for any such provision or requirement.”*

[11] Grounds 1 and 3 in effect raise the same issue. The issue is whether the Judge erred in concluding that the 2018 constitution was of no effect because it had not been registered. Ground 2 raises an issue upon which the learned Judge has made no finding. The reason given by the Judge for refusing the second declaration was the failure to register the 2018 Constitution. It may be inferred that he reached that conclusion on the basis that the 2018 constitution had been properly adopted. It is perhaps equally arguable that he failed to

consider the issue at all. It was an issue for the respondents to raise since the reasoning of the learned Judge appears to suggest that either he had concluded that the 2018 Constitution had been properly adopted or alternatively he had failed to consider the issue.

[12] In any event interim ex parte orders were made on 23 October 2019 in the following terms:

- “1. *That the respondents and/or their servants and/or their agents be restrained from calling a meeting dated 24 October 2019 to appoint three new executive board members until further order of the Court.*
2. *That the Respondents and/or their servants and/or their agents be restrained from interfering and/or disrupting the running of Ra Naari Parishad until further order of the Court.*
3. *That the Appellants and executive board created on 30 May 2017 be allowed to run the day to day affairs of Ra Naari Parishad until further order of the Court.*
4. *Further hearing of this application is adjourned to 30 October 2019 at 2.30pm.”*

[13] On 30 October 2019 having heard the parties the Court made the following interim orders:

- “1. *The office is to be open during standard business hours from 8.30am – 4.30pm Monday to Friday.*
2. *The only person permitted to be present for day to day running is the office administrator.*
3. *All projects stayed*
4. *The orders made by this Court on 23 October 2019 are discharged.”*

[14] On 14 November 2019 following the completion of the hearing the Court clarified the orders made on 30 October 2019 by directing that the trustees (the respondents) ensure

that the office administration, Ms Famiza Mohammed, was not prevented from performing all her necessary duties, including paying accounts and bills that fall due.

[15] In **Novartis AG –v- Hospira UK Limited** [2013] EWCA Civ. 583; [2014] 1WLR 1264 the Court of Appeal discussed the principles that should be applied to the grant of an interim injunction pending appeal where the applicant has lost at first instance. At paragraph 41 those principles were summarized as:

- “i) The court must be satisfied that the appeal has a real prospect of success.*
- ii) If the court is satisfied that there is a real prospect of success on appeal, it will not usually be useful to attempt to form a view as to how much stronger the prospects of appeal are, or to attempt to give weight to that view in assessing the balance of convenience.*
- iii) It does not follow automatically from the fact that an interim injunction has or would have been granted pre-trial that an injunction pending appeal should be granted. The court must assess all the relevant circumstances following judgment, including the period of time before any appeal is likely to be heard and the balance of hardship to each party if an injunction is refused or granted.*
- iv) The grant of an injunction is not limited to the case where its refusal would render an appeal nugatory. Such a case merely represents the extreme end of a spectrum of possible factual situations in which the injustice to one side is balanced against the injustice to the other.*
- v) As in the case of the say of a permanent injunction which would otherwise be granted to a successful claimant, the court should endeavor to arrange matters so that the Court of Appeal is best able to do justice between the parties once the appeal has been heard.”*

[16] Having read the provisions of the Charitable Trusts Act and the learned Judge’s judgment I am satisfied that the appeal on grounds 1 and 3 does have a real prospect of success. It does not follow, in my judgment, that the requirement to provide a copy of the constitution with the application for incorporation in accordance with section 4 means that any subsequent amendment to a constitution or the adoption of a new constitution must be lodged for registration. That is neither an express nor an implied requirement

under the Charitable Trust Act. There is a requirement under section 29A(1) of the Charitable Trust Act to make an annual return containing the particulars of the trustees, board members and office holders of the trust and to provide a copy of the annual audited accounts. Any changes to the constitution or the adoption of a new constitution are not included in the information that is required by the Registrar in the annual return.

[17] Furthermore the only fees payable under section 30 of the same Act are set out in the third schedule. The schedule list 4 items for which fees are payable and the only relevant item is a \$1.00 fee payable on registration of a change to the registered office.

[18] The balance of convenience is connected to the obvious ill-feeling that exists between the trustees and management board. The trustees want to terminate the board's appointment ostensibly because the term of office has expired. The Judge below has indicated that cannot legally happen. It would appear that the trustees have not yet attempted termination under the 2015 constitution. The board of management want to remove the trustees under the 2018 constitution. The Judge has indicated that cannot happen as the 2018 constitution has not been registered. It is unfortunate that the beneficiaries of the Charitable Trust (RNP) are being disadvantaged as a result of this dispute. However I have concluded that the appropriate course of action at this stage is to continue the interim orders made on 30 October 2019 until the hearing of the appeal. It is also necessary, in view of the desire of both parties to terminate their opponent's appointments, to make provision to ensure that their positions remain unchanged pending the appeal. That course of action will ensure that the Court of Appeal is best able to do justice between the parties once the appeal has been heard.

[19] Before settling the orders that are proposed, it is necessary to refer to two other matters. First, I indicated at the hearing that I proposed to waive the requirement to provide an undertaking as to damages. In this case such an undertaking appears not to be necessary nor appropriate.

[20] Secondly, in their submissions the respondents have raised the issue of locus standi. It seems to me that the issue should first have been raised in the Court below. The Judge has made no reference to the locus of any of the appellants as plaintiffs. If the issue had been raised in the court below but was not considered by the learned Judge then the respondents were at liberty to file a respondents notice or commence its own appeal proceedings. Neither course of action has been followed.

[21] For the reasons stated above I make the following orders:

1. *The office premises are to open between 8.30am to 4.30pm Monday to Friday.*
2. *The office administrator, Ms Famiza Mohammed alone is permitted in the office premises to attend to the day to day functioning of the registered office of RNP.*
3. *All projects are stayed.*
4. *The trustees and the management board are to ensure that the office manager is not in any way prevented from performing her day to day duties.*
5. *The trustees (respondents) and the three members of the board as appellants are restrained from entering the office premises.*
6. *The trustees are restrained from taking any measure or adopting any procedure aimed at removing or terminating the appointment of the members of the management board.*
7. *The management board is restrained from taking any measure or adopting any procedure aimed at removing or terminating the appointment of the trustees named as respondents herein.*
8. *These orders are to remain in force until the determination of the appeal herein.*
9. *Each party is to pay its own costs.*



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