

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION
ACTION NO. HBC109 OF 2003

BETWEEN: **SAYED AHMED HUSSAIN** of 27167 Fielding
Drive Hayward, CA 94542 in the United States
of America, Businessman.

PLAINTIFF

AND **DR. SHAUKAT ALI SAHIB** of Nadi in the
Republic of Fiji Islands, Retired Principal.

FIJI EDUCATION SOCIETY an unincorporated
body operating **NADI COLLEGE** in Nadi

DEFENDANTS

Sherani & Co for the Plaintiff
G P Shankar & Co for the Defendants

Date of Hearing: 26 August 2005
Dates of Submissions: 23 September, 14 October and 21 October 2005
Date of Ruling: 13 January 2006

INTERLOCUTORY RULING OF FINNIGAN J

This is an Interlocutory Ruling in an Originating Summons with an unusual history.

The Summons was filed on 26 March 2003, seeking seven remedies as either Orders or Declarations against an unincorporated body, the Fiji Education Society. Filed with the Summons was an *ex-parte* motion for Interim Relief. The Plaintiff as a member of the society claims that certain actions by the First of the Defendants have been improper and he wants matters rectified. The Fiji Education Society established and owns an entity known as Nadi College.

On 24 April 2003 Byrne J granted *ex-parte* the two orders sought as interim relief and decreed that "each party be at liberty to apply to court on 72 hours notice". The orders, stated briefly, are;

- (i) That the Defendants are restrained from selling, transferring or dealing in any manner whatsoever with Nadi College/or its properties;
- (ii) The Defendants are restrained from paying out any sums to satisfy liabilities as shown in the Statement of Assets and liabilities dated 23 December 2002 of the Fiji Education Society.

The second order will be litigated fully in due course because it is one of the seven remedies sought in the Originating Summons. The injunction against selling Nadi College is Interim Relief only.

Brief History of the Matter:

After those orders were made the First Defendant quickly (on 8 May 2003) filed an affidavit in reply to the Originating Affidavit. Thereafter a person called Suresh Pratap filed an affidavit which in its terms is in support of the Defendants although it contains a lot of explanations and hearsay statements. This was filed on 23 May 2003.

After that between 30 June 2003 and 8 December 2003 a further eight affidavits were filed, two by the Plaintiff, two by Suresh Pratap, one said to be in reply to Plaintiff's affidavit unidentified but referring to the 8 May 2003 affidavit of the First Defendant, the other said to be "in support" presumably of the First Defendant since it purports to be an application for deposit by the Plaintiff of \$5,000.00 as security for costs. Three were filed by the First Defendant including one which purports to be the application for security for costs. The eighth was filed by one K.S.Khan in support of the Defendants.

The matter then came before the Deputy Registrar on 20 February 2004. He directed the Plaintiff to file an affidavit in reply, (to what was not specified,) within 28 days. The matter thereafter was adjourned five times with an occasional stipulation that the Plaintiff within 28 days file an affidavit, which he eventually did on 17 February 2005. In that affidavit he prays for continuation of the interlocutory orders made on 24 April 2003 and for "an early trial date".

The file was put before me on 10 June 2005. Only Counsel for the Plaintiff appeared. He sought an adjournment "until August or later" presumably because yet another affidavit by the First Defendant had been filed on 12 May 2005 and "the Plaintiff resides overseas". I adjourned the matter until 26 August 2005.

In the meantime on 16 August 2005 yet another affidavit was filed by the First Defendant. By this time there were fourteen affidavits on the file, four by the Plaintiff and ten by or on behalf of the First Defendant. Plaintiff's Counsel sought time for written submissions, first by the Plaintiff's solicitors and then in reply by the Defendants. Defendants Counsel stated that the subject of the submissions would be discharge of the interim injunction. I timetabled submissions as set out in the

heading above. All the submissions were filed late. The last of them, the Plaintiff's submissions in answer were due on 21 October and were filed on 11 November 2005.

The Submissions:

The submissions for the Plaintiff go to 17 pages they traverse the facts comparatively briefly and seek removal of the First Defendant as a trustee of the society together with the other remedies set out in the Originating Summons.

The submissions for the Defendants are of 28 pages. They contain some facts and much law. At the end Counsel seeks discharge of the interim injunction.

The Plaintiff's submissions in answer go to 15 pages. Counsel submits (correctly) that the submissions for the Defendants do not reply to the Plaintiff's submissions. Counsel seeks rejection of affidavits filed without leave and again prays for the substantive relief.

Conclusions:

My first conclusion is that the procedure of bombardment by affidavit arose because in 2002 the Court was not able to hear all the substantive matters before it. Preparing and filing the affidavits kept the case alive and might in the end obviate the need for a hearing. That indeed is what the Plaintiff came to expect as his Counsels' submissions make clear.

The First Defendant for his part has never filed an application to discharge the Interim Orders. Neither has he filed any application for

security for costs or shown in the two affidavits concerned any reasonable grounds for that order.

I conclude therefore that I am not in a position to grant any of the relief which the First Defendant seeks. I cannot even dismiss his application.

My next conclusion is that while the orders made by Byrne J have limited significance to me they appear not to have bothered the parties unduly as all of their preparation (the affidavits) has centred around the Originating Summons. There seems no ground at all for discharging the Interim Orders.

Neither am I prepared to decide this complex matter which goes back over many years on a series of untested affidavits by a Plaintiff who is overseas (in Canada), by Defendants' deponents with a vested interest who sometimes swear to hearsay statements and opinions, or by the First Defendant who demonstrates the complexity of the matter by putting forward his detailed evidence in reference to other paragraphs in other affidavits. Having read the affidavits I am in no position to make any substantive findings of the true facts of the matter.

Indeed, if this goes to trial it will be complex litigation to the extent that each party will put forward and attempt to justify documents in its favour and if the affidavits are a guide to go by will invite the court to make findings of fact that will be no better than findings on the balance of probabilities and possibly unsatisfactory to both parties.

This is not an unusual case in its circumstances. I urge the parties in this case as in other similar cases to come together and mediate their differences.

Order:

The only order I can make is that I deem this matter to be ready for trial if trial is needed and I direct it be listed in the Callover on 24 February 2006 so a hearing date can be allocated.

If it goes to trial, Counsel for the Plaintiff will need to go to some pains to clarify to the Court the legal basis on which the Court is entitled to interfere in the internal business of this unincorporated body.

I make no order for costs.



At Lautoka

13 January 2006

A handwritten signature in black ink, appearing to read "D. Finnigan". The signature is stylized and written in a cursive hand.

D.D. Finnigan

JUDGE