

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action HBC No. 206 of 2016

BETWEEN : **NITISH SINGH NIRANJAN**
PLAINTIFF

AND : **NARAYAN SINGH NIRANJAN**
1ST DEFENDANT

AND : **PRAMODNI NIRANJAN**
2ND DEFENDANT

AND : **NIRMAL VIJAY SINGH NIRANJAN**
3RD DEFENDANT

Coram : The Hon. Mr Justice David Alfred

Counsel : Mr Devenesh Sharma for the Plaintiff
Mr H Lateef for the 1st, 2nd and 3rd Defendants

Date of Hearing : 26 September 2016
Date of Judgment : 28 September 2016

INTERLOCUTORY JUDGMENT

1. This is an Inter-Partes summons by the Plaintiff seeking the following Orders:

- (1) An Interim Order immediately reinstating the Plaintiff as the Managing Director of Niranjans Autoport Limited (the company) until the final determination of this action.

(2) An Interim Injunction against the 1st and 2nd Defendants or their servants or agents or proxies from making any further Board decisions pertaining to the Company, N. S Niranjana Holding Ltd or any other subsidiary of the above two companies without first consulting and obtaining the written consent of the Plaintiff until the final determination of this action.

(3) An Interim Injunction against the 1st and 2nd Defendants or their servants or agents or proxies from making any decisions pertaining to the N.S. Niranjana Family Trust or making any variations or new appointments without first consulting and obtaining the written consent of the Plaintiff until the final determination of this action.

(4) An Interim Injunction against the 3rd Defendant restraining him from acting as a director of the company and restraining him from interfering with the Plaintiff's operations and management of the company and all other related companies owned by N.S Niranjana Holding Ltd until the final determination of this action.

2. The Plaintiff had on 12 August 2016 filed the above mentioned writ action which I am informed by Counsel for the Plaintiff, has proceeded to the stage of the Summons for Directions. A perusal of the Statement of Claim reveals that the reliefs sought therein inter alia include exactly the 4 reliefs sought in the Summons. I shall have more to say about this later.

3. At the hearing of the Summons before me, Counsel for both sides provided written submissions and authorities and also made oral submissions. When the hearing concluded, I informed that I would take time for consideration. Having done so I now deliver my interlocutory judgment.

4. At the outset I must notice one significant omission in the reliefs sought by the Plaintiff. It is this. He does not seek in his claim any permanent order reinstating him as the Managing Director of the company and restraining the Defendants from removing him as a Director or Employee of the Company or

preventing the 1st and 2nd Defendants from making decisions on their own. There is, however, a para 12 in the claim which asks for permanent injunctions in lieu of the Interim Injunction (sic). The Oxford Advanced Dictionary of Current English defines “in lieu of” as “instead of”. Therefore if no interim injunctions are granted there cannot be any permanent injunction in their stead. This para cannot save the Summons from the fate destined for it by the binding Court of Appeal decision in: Civil Appeal No. ABU 0001 of 2013.... *Prem Krishna Goundar.. Appellant and Fiesty Limited ... First Respondent and Ministry of Lands & Mineral Resources ... Second Respondent ... and The Attorney General of Fiji ... Third Respondent* where Amaratunga J said at para 33 “How can a Plaintiff seek Interlocutory Injunctive relief without seeking a permanent injunction is a fundamental issue that had been overlooked in the court below, but this was central to the application for any injunction and since there was no permanent injunction sought this application for interim injunction should have been rejected in limine.”

5. I am not ending here because I intend to discuss the various other issues first.
6. The Plaintiff is seeking a Mandatory Injunction “the effect of which is to require the performance of a certain act” viz his reinstatement as managing director. The American Cynamind decision does not apply here because that relates to a *quia timet* action claiming an injunction to restrain a threatened infringement of the plaintiff’s patent. In the instant case the horse has not bolted, but rather the threatened action had already occurred. In other words the plaintiff’s removal is a *fait accompli*. Thus the proper authority to consider is the decision of the English House of Lords in: *Redland Bricks, Ltd. v Morris And Another*. [1969] 2 All E.R. 579. Lord Upjohn in his opinion said “a mandatory injunction can only be granted where the plaintiff shows a very strong probability on the facts that grave damage will accrue to him in the future. It is a jurisdiction to be exercised sparingly and with caution but, in the proper case, unhesitatingly.”
7. At this juncture I of opinion that the Plaintiff has failed to satisfy me that this is such a proper case. All he has done is alleging in his affidavit that the company

is suffering *inter alia* financial expenditure of an exorbitant and unauthorised nature, at the hands of the other Defendants.

8. I turn now to the issue of the appointment of the managing director of the company. Halsbury's Laws of England, 4th edition, Volume 7(1) at para 618 states "The directors have no general right to appoint a managing director." It goes on to state that Table A provides that the directors may appoint one of their number to the office of managing director.
9. However the Articles of Association of the company (annexure A of the Plaintiff's affidavit) state that Table A shall not apply to the company.
10. A perusal of Article 119 and other Articles does not assist the Plaintiff's case. These do not provide who shall appoint a managing director (M.D) after the retirement of the 1st Defendant as M.D.
11. The Plaintiff has singularly failed to specify exactly whom or what entity exactly he is asking the Court to order to reinstate him as the M.D of the company. If it is the company, he has omitted to make it a defendant. If it is the directors, he has failed to cite the other 2 directors stated in the company search result, provided by the Plaintiff's solicitors, *viz* Kuar Singh and Nitish Niranjana.
12. I will now refer to the English case of *Series 5 Software Ltd v Clarke and Others*: [1996] 1 All ER at page 868. Laddie J said "As far as the balance of convenience is concerned, it is clear that either of the first two injunctions sought by the Plaintiff may well have the effect of depriving the defendants of means of earning a living. Their new venture will be strangled near birth.
13. That is analogous to the instant situation. If I were to grant the injunctions sought it would have the consequence of paralysing or crippling the business of the company because the injunctions would have the effect of subjecting every decision relating to the business of the company to the veto of the Plaintiff. It

would be flying in the face of company law principles that state the decisions of the directors or the management are by majority decision and not by individual diktat.

14. In any event, Gower And Davies' Principles of Modern Company Law, 7th edition, at page 372, states that at common law the directors' duties are owed to the members of the company as a whole, the members being those who created it or who bought shares.
15. I note the Plaintiff is not a shareholder of the company. So how can he complain that irreparable damage will be done to it, by the other directors.
16. I also note it was a general meeting of the members (whether it was an E(xtraordinary) or A(nnual) on 13 July 2016 that appointed the 1st Defendant as the new M.D. Now, not being a shareholder can the plaintiff complain of what transpired there or that he was not given any notice. If it was the members of the company who appointed the 1st Defendant as the new M.D, why is the Plaintiff not specifying them as the entity who are to be enjoined to reappoint him as the M.D.
17. The best way of describing the Plaintiff's case are the words of his Counsel that the "application is only against individuals and not the limited company." It is precisely because of this that the Plaintiff's summons falls to the ground as I have show above. It is as clear as daylight there is no conceivable way in which the Plaintiff can claim as claimant in the admitted absence of a contract of employment as M.D. nor the Defendants be sued *qua* directors when the Plaintiff is not a shareholder/member of the company.
18. Finally I fail to see how the Plaintiff can succeed at all on any of his grounds for any injunctive relief when in my opinion the entire argument of the Plaintiff rests on a misunderstanding of the difference between a director or M.D. of a company and a member. His application is incapable of bearing the fanciful and tortuous meaning assigned to it by his Counsel. It is fortunate the surplusage did not

result in my being unable to see the wood for the trees, which is that the Plaintiff is not a member of the company and therefore has no *locus standi* with regard to the company or any of the related companies referred to.

19. I cannot end without clarifying one issue that arose during the course of oral submissions. Counsel for the Plaintiff referred to the lack of, what he termed, a cross undertaking from the Defendants regarding costs. This is indeed a curious proposition. According to the Supreme Court Practice 1995 (the White Book) at para 29/1/2, “a cross undertaking from the plaintiff to be answerable in damages if the injunction proves to have been wrongly granted is almost always required.”
20. To my mind it would be bizarre, to say the least, if suddenly the Defendants were required to give such an undertaking. No one should think that because the adjective “cross” is used that it means it is the defendant who is required to give an undertaking. He is not.
21. For all the above reasons, I hereby dismiss the Inter-Partes Summons, decline to grant the Interim Order and Injunctions sought therein and in the circumstance make no order as to costs.

Delivered at Suva this 28th day of September 2016.



David Alfred
JUDGE
High Court of Fiji