

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 228 of 2016

BETWEEN : **GOVIND SAMI PADAYACHI**
First Plaintiff

AND : **NARSA REDDY**
Second Plaintiff

AND : **DAMENDRA AMAS GOUNDER**
First Defendant

AND : **KUMAR SAMI GOUNDER**
Second Defendant

AND : **SOM PADAYACHI**
Third Defendant

AND : **SILENDRA KUMAR**
Fourth Defendant

AND : **PRAGDISHWARAN GOUNDER**
Fifth Defendant

AND : **VIJAY NARAYAN**
Sixth Defendant

AND : **MUNI KAMLESH NAIDU**
Seventh Defendant

BEFORE : **Hon. Justice Kamal Kumar**

COUNSEL : Mr D. Sharma and Mr V. Singh for Plaintiffs
Mr S. Ram for Defendants

DATE OF HEARING : 22 September 2016

DATE OF JUDGMENT : 20 October 2016

RULING

(Application for Interlocutory Injunction by Plaintiffs; Application for Dissolution of Interim Injunction; Transfer and to Strike Out Action by Defendants)

1.0 Introduction

1.1 By Originating Summons filed on 8 September 2016, the Plaintiffs seeks following declaration/orders:-

- “A. A declaration that the appointment of the Defendants as the National Executives of the Then India Sanmarga Ikya Sangam on 28 August 2016 is void.*
- B. An order that a properly constituted General Meeting of the Then India Sanmarga Ikya Sangam be held to elect the National Executiives of the Then India Sanmarga Ikya Sangam.*
- C. Such further or other relief as this Honourable Court deems fit and proper.*
- D. Costs of this action.”*

(“the Originating Summons”)

1.2 On the same day, the Plaintiffs filed Ex-parte Application seeking following interim orders:-

- “A. The Defendants by themselves or by their servants agents or otherwise howsoever be restrained from acting as the National Executives of the Then India Sanmarga Ikya Sangam including calling any meetings of the Then India Sanmarga Ikya Sangam or council of management meetings or any meetings and from dealing with the financial and administrative affairs of the Then India Sanmarga Ikya Sangam whatsoever until further order of the Court.*
- B. That the Defendants pay the costs of and occasioned by this application.”*

(“the Injunction Application”)

1.3 The Injunction Application was called on the same day at 4.30pm when following Orders were granted:-

- “A. The Defendants by themselves or by their servants, agents or otherwise howsoever be restrained from acting as the National Executives of the Then India Sanmarga Ikya Sangam including calling any meetings of the Then India Sanmarga Ikya Sangam or council of management meetings or any meetings and from dealing with the financial and administrative affairs of the Then India Sanmarga Ikya Sangam whatsoever until further order of the Court.*
- B. Plaintiffs do serve all documents including order on the Defendants by 4pm tomorrow, (9/09/16).*
- C. Defendants do file and serve Affidavit in Opposition by 16th September 2016.*
- D. Plaintiffs do file and serve Affidavit in Reply by 21st September 2016.*
- E. Matter adjourned for mention on 22nd September 2016 at 9.30am.”*

1.4 On 15 September 2016, Defendants Solicitors filed Notice of Appointment of Solicitors, Acknowledgement of Service and Ex-parte Summons dated 15 September 2016, which was converted to Inter-parte Summons.

1.5 The Inter-parte Summons dated 15 September 2016, seek Orders in following terms:-

- “1. The injunction order granted ex-parte by this Honorable court made until further order of the Court on the 8th September 2016 to be dissolved forthwith.*
- 2. The Originating Summons filed by the Plaintiffs against the Defendants be struck out on the following grounds:-*
 - (a) It discloses no reasonable cause of action.*
 - (b) It is frivolous and/or vexations and/or scandalous.*
 - (c) It is otherwise an abuse of process of the court.*
 - (d) That this court does not have jurisdiction to hear this matter.*
- 3. That the matter be transferred to Lautoka High Court.*
- 4. That there be abridgment of time for filing and service of this Application.*

5. *Costs in favour of the Defendants against the Plaintiff on an indemnity basis.”*
- 1.6 For the sake of convenience the Injunction Application and Application to Dissolve Interim Injunction in prayer 1 of Defendants Application will be dealt together and will be referred to as the Injunction Application.
- 1.7 The Application in prayers 2 and 3 of Defendant’s Application will be referred to as Striking Out Application and Transfer Application respectively.
- 1.8 Defendants Application was called on 16 September 2016, before his Lordship Justice Mutunayagam when by consent following Orders were made:-
- “1. *The Defendant shall be entitled to pay the salary of the persons itemised in paragraph 46.1 to 46.4 of Affidavit of Damendra Amas Gounder filed on the 15th September 2016.*
2. *Matter to be called before Honourable Justice Mr. Kamal Kumar on the 20th September 2016.*
3. *Plaintiff to file Affidavit in Opposition within 7 days (22/09/16).”*
- 1.9 On 20 September 2016, this matter was called before this court when Defendants Application to dissolve interim injunction was refused and following directives were given:-
- (i) Plaintiff to file and serve Affidavit in Opposition by 2.00pm the next day (21 September 2016);
- (ii) Defendants do file and serve Affidavit in Reply by 10.00am on 22 September 2016;
- (iii) Application adjourned to 22 September 2016 at 11.30am for hearing.
- 1.10 On 22 September 2016, Plaintiffs and the Defendants by their Counsel made Submissions in respect to all the Applications, when Defendants by their Counsel handed in written Submissions and the Applications were adjourned for ruling on notice.
- 1.11 Following Affidavits were filed by the parties:-

For Plaintiffs

- (i) Affidavit in Support of Govind Sami Padayachi sworn and filed on 8 September 2016 (“**Padayachi’s 1st Affidavit**”);
- (ii) Affidavit in Support of Narsa Reddy sworn and filed on 8 September 2016 (“**Reddy’s Affidavit**”);
- (iii) Affidavit in Response and Affidavit in Support of Govind Sami Padayachi sworn and filed on 21 September 2016 (“**Padayachi’s 2nd Affidavit**”);
- (iv) Supplementary Affidavit of Govind Sami Padayachi sworn and filed on 22 September 2016 (“**Padayachi’s 3rd Affidavit**”).

For Defendants

- (i) Affidavit of Damendra Amas Gounder sworn on 14 September 2016 and filed on 15 September 2016 (“**Damendra Gounder’s Affidavit**”);
- (ii) Affidavit of Kumar Sami Gounder sworn and filed on 22 September 2016 (“**Kumar Sami’s Affidavit**”).

1.12 On 22 September 2016, this Court varied the interim Order as follows:-

- “1. *The Injunction orders granted on 8th September 2016 is varied as follows:-*
- a) The Defendants by themselves and/or their servants and/or their agents howsoever be restrained from acting as national executives of the Then India Sanmarga Ikya Sangam (“TISI”) or calling of Council of Management meeting or any other meeting or commencing or completing any capital projects until further order of the court.*
 - b) The current signatories to TISI Head Office operating account, Sangam College of Nursing (SCN) operating account, Sangam Institute of Technology (SIT) operating account, namely Damendra Amas Gounder (first defendant), Som Padayachi (third defendant) and Sadasivan Naicker sign the cheques in respect to the operating account of TISI Head Office, SCN and SIT including but not limited to staff salary and cheques to all payments to creditors listed in annexure DAG 11 of the Affidavit of Damendra Amas Gounder*

sworn on 14th September 2016 and filed on 15th September 2016 until further order of this court.

c) The signatories, namely, Damendra Amas Gounder (first defendant), Som Padayachi (third defendant) and Sadasivan Naicker submit details of all payments made to the Court on a fortnightly basis until further order of this court.

2. *Costs for the day is costs in the cause.”*

2.0 Background Facts

2.1 Background facts appear from the Affidavits filed.

2.2 All parties are members of Then India Sanmarga Ikya Sangam (“**TISI**”).

2.3 The objectives of TISI is listed in Clause 3 of its Memorandum of Association being Annexure “A” of Padayachi’s 1st Affidavit.

2.4 The Annual General Meeting of TISI was scheduled to take place on 29 May 2016, in Nadi which meeting was called off.

2.5 TISI on its own right and as parent body of its youth branch Then India Valibor Sangam Fiji (“**TIVSF**”) filed proceedings in Lautoka High Court being Civil Action No. 98 of 2016 against Dorsami Naidu, Praveen Kumar Bala, Raja Kumaran and Jai Narayan (“**Lautoka Action**”).

2.6 Lautoka Action was settled by Terms of Settlement dated 30 June 2016, (Annexure “DAG6” of Damendra Gounder’s Affidavit) and on 1 July 2016, High Court Lautoka made Orders which was in terms of the Terms of Settlement.

2.7 Annual General Meeting of TISI was called on 28 August 2016, at 12.00pm but at certain stage of the meeting it was cancelled at the direction of Police Department.

3.0 Application for Interlocutory Injunction/Dissolution of Interim Injunction Material Non-Disclosure

- 3.1 Defendants by their Counsel submit that the interim injunction granted should be dissolved on the ground of material non-disclosure.
- 3.2 What is material will depend on the circumstance of each case and the cardinal rule is that whether the Court would have still granted the interim injunction if the material facts which the other party say should have been disclosed would have been disclosed to the Court, when interim injunction was granted.
- 3.3 The Defendants at paragraphs 73.1 to 73.4 and 74.1 to 74.3 of their Submissions submit that Plaintiffs failed to disclose the following facts which were material:-

“73.1 The TISI employs people to manage its head office;

73.2 The TISI owns, manages and administers the Sangam School of Nursing and technology institute;

73.3 The office bearers are responsible for managing the affairs of TISI and its related bodies;

73.4 The office bearers are responsible for paying the employees of TISI and its related bodies and restraining them in this manner means that the employees will not be paid.”

“74.1 The elections to be held at the AGM of 28 August 2016 was only for three office bearer positions. The seven (7) defendants named herein were elected unopposed.

74.2 The Council of Management meeting of 10th September 2016 was going to decide on a date for election of the three office bearers and the legal advisor. The first plaintiff exhibited the notice calling this meeting (see paragraph 14 of first plaintiff’s affidavit and Exhibit G) but did not disclose the agenda.

74.3 The actual provisions (with paragraph/section numbers) of the Memorandum and Articles of Association that were allegedly breached by the election of the seven defendants to their respective office bearer positions.”

3.4 Plaintiffs in Padayachi's 1st Affidavit annexed the Revised Articles of Association of TISI which clearly show that Council of Management which includes office bearers, manage the affairs of TISI.

3.5 Plaintiffs at paragraph 9 to 13 of Padayachi's 1st Affidavit states as follows:-

"9. At the said AGM on 28 August 2016 the election of office bearers of the TISI Sangam was to take place. I applied as a candidate for the position of General Secretary Operations and was approved by the TISI Sangam as a candidate for this position on 27 August 2016.

10. On 28 August 2016 I went to the AGM of the TISI Sangam held at Nadi Sangam College. There were about 500 TISI Sangam members attending the meeting on that date. During the course of the meeting issues arose when the national executives of the TISI Sangam, who are the Defendants, were asked certain questions by me and others and they were unable to respond. The Defendants then requested security to escort us out of the meeting venue. Police officers were also at the meeting who then intervened and said that due to the commotion the permit to hold the meeting was revoked and the meeting was cancelled.

11. The police then made sure that all members cleared the premises. The police also announced that no further meetings of the TISI Sangam were to be held on that day.

12. As a result of the AGM being cancelled no election was held.

13. On or about Monday 29 August 2016, a press release was issued purportedly by the TISI Sangam that said that the Defendants had been elected as National Executives of the TISI Sangam. I was surprised to read this as the AGM had been cancelled without any appointments of the National Executives. I believe that the appointment of the National Executives of the TISI Sangam without an AGM and elections being held is unlawful and contrary to the Memorandum and Articles of Association of the TISI Sangam."

3.6 The Plaintiffs challenge the claim by the Defendants that they have been elected as National Executives of TISI.

- 3.7 I do not see any lack of good faith on part of the Plaintiffs when they did not disclose the material which Defendants say should have been disclosed.
- 3.8 This Court would have granted the interim injunction even if the material facts listed at paragraph 73.1 to 73.4 and 74.1 to 74.3 of Defendants Submissions would have been disclosed to Court.
- 3.9 It is undisputed and well established that this Court has unfettered discretion as to whether to grant the interlocutory injunction or not which discretion of course is to be exercised judicially.
- 3.10 The principles to be applied in respect to Application before this Court is that stated by Lord Diplock in **American Cyanamid Co. v. Ethicon Ltd** [1975] AC 396 which are:-
- (i) Whether there is a serious question to be tried;
 - (ii) Whether damages would be adequate remedy; and
 - (iii) Whether balance of convenience favor granting or refusing Interlocutory Injunction.
- 3.11 Lord Diplock in **American Cyanamid v. Ethicon Ltd** [1975] AC 396 stated as follows:-

“My Lords, when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff’s legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex-hypothesis the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It was to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction; but since the middle of the 19th century this has been made subject to his undertaking to pay damages to the defendant for any loss sustained by reason of the injunction if it should be held at the trial that the plaintiff had not been entitled to restrain the defendant from doing what he was threatening to do. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the

uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages of the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where "the balance of convenience" lies."

- 3.12 In **Series 5 Software v. Clarke** [1996] 1 All E.R. 853 Justice Laddie stated that the proper approach in dealing with Application for Interlocutory Injunction is as follows:

"(1) The grant of an interim injunction is a matter of discretion and depends on all the facts of the case. (2) There are no fixed rules as to when an injunction should or should not be granted. The relief must be kept flexible. (3) Because of the practice adopted on the hearing of applications for interim relief, the court should rarely attempt to resolve complex issues of fact or law. (4) Major factors the court can bear in mind are (a) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other party to pay, (b) the balance of convenience, (c) the maintenance of the status quo, and (d) any clear view the court may reach as to the relative strength of the parties' cases."

- 3.13 His Honour Justice Cook in **Klissers Farmhouse Bakeries Ltd v. Harvest Bakeries Ltd**[1985] 2 NZLR 129 at 142 (paragraphs 20-30):-

"Whether there is a serious question to be tried and the balance of convenience are two broad questions providing an accepted framework for approaching these applications ... the balance of convenience can have a very wide ambit. In any event the two heads are not exhaustive. Marshalling considerations under them is an aid to determining, as regards the grant or refusal of an interim injunction, where the overall justice lies. In every case the judge has finally to stand back and ask himself that question. At this final stage, if he has found the balance of convenience overwhelmingly all very clearly one way ... it will usually be right to be guided accordingly. But if on the other hand several considerations are still fairly evenly posed, regard to the relative strengths of the cases of the parties will usually be appropriate. We use the word "usually" deliberately and do not attempt any more precise formula: an interlocutory decision of this kind is essentially discretionary and its

solution cannot be governed and is not much simplified by generalities.”

Serious Question To Be Tried

3.14 The Application for Interlocutory Injunction must establish that there is a serious question to be tried.

3.15 It is well established that the test for serious question to be taken is that the evidence produced to Court must show that Applicant’s claim is not frivolous, vexatious or hopeless.

3.16 In **American Cyanamid** Lord Diplock stated as follows:-

“In those cases where the legal rights of the parties depend upon facts that are in dispute between them, the evidence available to the court at the hearing of an application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral examination.” (p 406)

“It is not part of the court’s function at this stage of the litigation to try to resolve conflicts of evidence in affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.” (p 407)

3.17 His Lordship further stated as follows:-

“In view of the fact that there are serious questions to be tried upon which the available evidence is incomplete, conflicting and untested, to express an opinion now as to the prospects of success of either party would only be embarrassing to the judge who will have eventually to try the case.”

3.18 Defendants by their Counsel submit that the injunction orders sought by the Plaintiff are mandatory and such a more stringent test than what is stated in American Cyanamid case be adopted.

3.19 With due respect this Court is of the view that injunction Orders granted were prohibitory and not mandatory as the order restrained the Defendants from acting as National Executive of TISI until further Order of this Court.

3.20 As such the principles in American Cyanamid case apply in this instant.

3.21 Plaintiffs contend that:-

- (i) The Defendants were to be elected or declared as National Executives of TISI at the Annual General Meeting of TISI to be held on 28 August 2016 (**“the AGM”**);
- (ii) Since the AGM was cancelled by the Police Department before it reached the Agenda for election of National Executives the claim by the Defendants that they are National Executives of TISI is wrong and that the Defendants were not elected at the AGM.

3.22 Defendants in their Submission claimed that problem arose prior to the AGM on the basis that:-

- (i) TISI instituted legal proceedings in High Court Lautoka Civil Action No. 98 of 2016, seeking declaratory Orders (**“Lautoka Action”**),
- (ii) Lautoka Action was settled and on 1 July 2016, when orders were made (Annexure DAG - 7 of Damendra Gounder’s Affidavit). The relevant parts of the Court Order are in following terms:-

- “2. That the Annual General Meeting of the Then India Sanmarga Ikya Sangam shall be held on 28th August 2016 at 12.00pm.
3. That the membership of the Then India Sanmarga Ikya Sangam for the Annual General Meeting shall be as at the approved register of members on 21st May 2016;
4. That there shall be a fresh filing of nominations and said nominations shall be processed in the normal manner in accordance with the Constitution of the Then India Sanmarga Ikya Sangam and Rules and Regulations of the Then India Valibar Sangam Fiji;
5. That the nominations committee be appointed by the Council of Management of the Then India Sanmarga Ikya Sangam.”

(“Consent Order”)

- (iii) Prior to the AGM certain members instituted committal proceedings, obtained interim injunction whereby Respondents were restricted from restraining Applicants to take part in the AGM as members and candidates which Order was dissolved on 26 August 2016, with costs in favour of the Respondents.

3.23 Counsel for Plaintiffs and Defendants referred to Articles 17.4 and 17.5 of the Revised Article of Association (Annexure “A” of Padayachi’s 1st Affidavit) which reads as follows:-

“17.4 The Office bearers shall be elected at the Annual General Meeting or an extra-ordinary Meeting of the Association convened for the purpose.

17.5 The procedures for nomination of candidates for Office Bearers and election shall be as follows:

17.5.1 All nominations shall be in writing on the prescribed forms.

17.5.2 The nominations shall be deemed to be declared upon the issue of the notice convening the Annual General Meeting or an Extra-ordinary General Meeting and closing with the Secretary General Seven (7) days prior to the date of such meeting.

17.5.3 Every candidate shall be nominated by a subscribed members and seconded by another subscribed member. The candidate must consent to the nomination.

17.5.4 If there are insufficient nominations for any office, verbal nominations shall be permitted at the Annual General Meeting or Extra-ordinary General Meeting. Such verbal nomination shall be consented to by the candidate either verbally or in writing.

17.5.5 If only one candidate is nominated for an office, he or she shall be declared elected.

17.5.6 If there are more than one nomination for any office, the election shall be held by secret ballot unless the Chairman with the consent of the Meeting shall otherwise decide. Scrutineers shall be appointed by the Chairman for the purpose.”

3.24 It is undisputed fact the AGM did not reach the “election of office bearers” stage as provided for in the Agenda for 28 August 2016 meeting as advertised in The Fiji Times of 5 August 2016.

3.25 The issue that Court needs to determine is that when the declaration has to been made as to who are office bearers (National Executives) of TISI and who has to make that declaration.

- 3.26 The Rules annexed by both parties (Annexure DAG 1 of Damendra Gounder's Affidavit and Annexure "8" of Padayachi's 2nd Affidavit) does not answer this question.
- 3.27 Plaintiffs and Defendants are also in dispute to which one is the valid rule of TISI AGM.
- 3.28 After the hearing the Submissions of the Counsel and reading the Affidavits filed I find that Plaintiffs case is not frivolous, vexatious or abuse of court process.
- 3.29 I therefore find that there is a serious question to be tried as to whether the Defendants are properly elected executives of TISI.

Whether Damages would be Adequate Remedy

- 3.30 It is undisputed that the Plaintiffs and Defendants are members of TISI and any position held by them in TISI is voluntary and as such no income or profit is derived by them as members.
- 3.31 The Plaintiffs are challenging Defendants claim that they are not properly elected Executive of TISI and any damage Plaintiffs and Defendants will suffer will be legal cost incurred by them for instituting these proceedings.
- 3.32 The issue as to whether damages would be adequate remedy does not arise at all.

Balance of Convenience

- 3.33 I agree with Defendants Counsels' Submission that there needs to be certainty in running the affairs of TISI which is a large institution, which runs and manages secondary schools and primary schools, Sangam School of Nursing and Sangam Institute of Technology.
- 3.34 TISI has approximately 6500 members (paragraph 22.3 of Damendra Gounder's Affidavit).

3.35 It appears that there has been uncertainty in respect to TISI from 29 May 2016, when the Annual General Meeting scheduled for 29 May 2016 was called off by then Executive Committee (May AGM) as appears from paragraph 7 of Padayachi's 1st Affidavit.

3.36 The Defendants claim that the status quo remain.

3.37 The question that needs to be answered is what is the status quo for following reasons:-

(i) I have taken judicial notice of the action filed in Lautoka Action in which TISI as Plaintiff sought following declaratory orders in respect to TISI:-

“6. *That the purported Annual General Meeting and/or meeting of the Then India Sanmarga Ikya Sangam held on 29th May 2016 at Nadi be declared null, void and/or invalid.*

7. *That the decisions, orders, resolutions and/or motions raised and passed at the purported Annual General Meeting of the Then India Sanmarga Ikya Sangam held on 29th May 2016 at Nadi be declared null, void and/or invalid.*

8. *That National Executive Committee of the Then India Sanmarga Ikya Sangam prior to 28th May 2016 be declared the valid, proper and/or authorised National Executive Committee of the Then India Sanmarga Ikya Sangam until the next Annual General Meeting of the Then India Sanmarga Ikya Sangam.*

9. *Alternatively, the Council of Management of the Then India Sanmarga Ikya Sangam prior to 28th May 2016 be declared the valid, proper and/or authorised Council of Management of the Then India Sanmarga Ikya Sangam until the next Annual General Meeting of the Then India Sanmarga Ikya Sangam.*

10. *That National Executive Committee of the Then India Sanmarga Ikya Sangam prior to 28th May 2016 be charged with the overall government of the Then India Sanmarga Ikya Sangam until the next Annual General Meeting of the Then India Sanmarga Ikya Sangam.*

11. *Alternatively, the Council of Management of the Then India Sanmarga Ikya Sangam prior to 28th May 2016 be charged with the overall government of the Then India Sanmarga Ikya Sangam until the next Annual General Meeting of the Then India Sanmarga Ikya Sangam.”*

(ii) At paragraphs 36 and 37 of Affidavit of Sadasivan Naicker filed in Support of the Originating Summons in Lautoka Action he states as follows:-

“36. *That the 1st, 2nd and 3rd Defendants together with their supporters, servants and/or agents then held a meeting and purported to called it the Annual General Meeting of the Plaintiff at Nadi Special Education School in Nadi. I wish to say that the Plaintiff and/or its Youth Branch did not sanction this meeting.*

37. *That I am informed that the 1st, 2nd and 3rd Defendants chaired the purported meeting at the Nadi Special School. I am unaware of the exact agenda of the meeting or the resolutions, orders and/or motions passed/resolved at the said meeting however I am informed that the purported meeting passed/resolved that there be an interim committee undoubtedly led by the 1st, 2nd and 3rd Defendants appointed to lead and/or govern the Plaintiff. I wish to say that any such meeting and/or action goes against the constitutional documents of the Plaintiff and is unlawful, illegal and beyond the authority of the 1st, 2nd and 3rd Defendants.”*

(iii) This means that on 29 May 2016, some members of TISI held meeting which was called Annual General Meeting, in which certain decisions were made and resolutions passed.

(iv) It appears as is stated in Mr Naicker’s Affidavit (paragraph 3.37 (ii) of this Ruling) that in that meeting members present appointed interim committee to run the affairs of TISI until next Annual General Meeting of TISI.

- (v) Pursuant to consent order TISI was to hold AGM on 28 August 2016, as appears from paragraph 3.22 (ii) of this Ruling.
 - (vi) The Annual General Meeting that was being held pursuant to Consent Order was cancelled by Police Department whilst meeting was in progress, and as such Annual General Meeting was not completed.
 - (vii) Could it then be that since AGM was not completed on 28 August 2016, the status quo requires the interim committee appointed on 29 May 2016 meeting, manage the day to day affairs of TISI until next Annual General Meeting.
 - (viii) The issue as to validity of 29 May 2016 AGM was before the Court in Lautoka Action but was not determined by the Court and Lautoka Action but was settled and consent order was made.
- 3.38 Defendants submit that Plaintiffs have not provided evidence to show that they can pay damages should their undertaking as to damages is invoked.
- 3.39 There is no doubt that Plaintiffs have not given any evidence of their asset.
- 3.40 Whilst the parties are required to provide evidence of their assets to support their undertaking as to damages it is not the determinative factor in refusing to exercise discretion in favour of extending interim injunction.
- 3.41 Whether Plaintiffs should provide the evidence or the failure to do so should lead to refusing the injunction will depend on circumstances of each case.
- 3.42 If the Court is of the view that Defendants will suffer substantial commercial loss because of the injunctive orders granted then obviously evidence to support undertaking as to damages is essential.
- 3.43 When as in this instance, the Defendants are not to suffer any financial loss, then failure to provide evidence to support undertaking as to damages may not be that crucial.
- 3.44 In this instance, Defendants are voluntary members of TISI and Executives of TISI are not paid for their posts. Hence, as stated at paragraph 3.31 of this Ruling only damages that Defendants may suffer is legal costs.

3.45 In view of what is stated above I exercise my discretion in granting the interlocutory injunction and accordingly I extend Orders made on 22 September 2016, until final determination of this proceedings.

4.0 Transfer of Proceedings

4.1 The leading authority in respect to whether a proceeding should be transferred from one registry to the other is **State v. President of the Fiji Islands** [2000] 1 FLR 241 (12 October 2000).

4.2 His Lordship Justice Gates, the current Chief Justice of Fiji at pages 254 (paragraph g) and 255 (paragraph a) stated as follows:-

“Transfers are governed by Order 4 Rule 1(4) which provides:

“Any action commenced in the High Court may be transferred by the Court from one High Court registry to another or to a Magistrate’s Court.”

The exercise of the power of transfer is discretionary Barclays Bank Plc. v. Bemister & Anor. [1989] 1 WLR 128 at 132.”

His Lordship further went on to state as follows:-

“In summary, the judge presently appointed [5th Respondent] residing at Lautoka wishes to have the case remain in Lautoka. The person wishing to replace the judge, the Applicant, who resides at Lautoka, also wishes it to remain at Lautoka. These are the parties with most at stake in the outcome, and both are obliged to fund their own litigation and travel costs for counsel to attend Suva. On the other hand the 1st - 4th Respondents are all funded civil servants. This is a case which will probably have no viva voce evidence and will be decided on affidavit evidence, discovery, and legal submissions. Weighing the circumstances I find it in the interests of justice that the matter remain to be heard in Lautoka. Accordingly, the application for transfer is refused.”

4.3 Defendant’s claim that the AGM was held in Nadi and as such the cause of action arose in Nadi.

4.4 This proceedings does not require oral evidence and as such this matter can be dealt with by Affidavit evidence and Submissions.

- 4.5 Mere fact that the AGM pursuant to Court Order was called in Nadi, does not mean that the matter has to be dealt in High Court Lautoka.
- 4.6 This Court also takes note of the fact that:-
- (i) Both Plaintiff, Second and Fourth Defendants reside in Suva and Nasinu.
 - (ii) The Fifth Defendant resides in Rakiraki which is almost same distance from Lautoka and Suva.
 - (iii) The Sixth Defendant resides in Sigatoka which has a difference of thirty kilometers of travel distance between Lautoka and Suva.
 - (iv) Only the First, Third and Seventh Defendants reside in Nadi.
- 4.7 In **State v. President of Fiji Islands** the Application for Transfer was refused on the ground that probably “no viva voce” evidence will be required, both Applicant and the Judicial Officer concerned were residents of Lautoka and matter will probably be decided on Affidavit evidence and Submissions.
- 4.8 Defendants claim they will incur substantial costs if matter is not transferred. On the same breath the Plaintiffs will also suffer costs with two other Defendants if the matter is transferred to Lautoka.
- 4.9 Defendants also claimed that this action should be transferred to Lautoka because of Lautoka Action and Committal proceeds is unsustainable for the reason that:-
- (i) Lautoka Action has been settled;
 - (ii) Issue in committal proceeds are totally different to this proceeding;
 - (iii) Plaintiffs, Fourth, Fifth and Seventh Defendants are not parties to committal proceeding.
- 4.10 It is not doubted and is evident from address of the parties that members of TISI are spread over Fiji.
- 4.11 In exercise of my discretion and for reason stated at paragraphs 4.4 to 4.10 hereof, I refuse the transfer application.

5.0 Application to Strike Out Action

5.1 The Defendants apply to have this action struck out on following grounds:-

“2.(a) It discloses no reasonable cause of action.

(b) It is frivolous and/or vexatious and/or scandalous.

(c) It is otherwise an abuse of process of the court.

(d) That this court does not have jurisdiction to hear this matter.

pursuant to Order 18 Rule 18 of High Court Rules and inherent jurisdiction of this Court.

5.2 It is well established that jurisdiction to strike out claim or pleadings should be used very sparingly and only in exceptional case **Timber Resource Management Limited v. Minister for Information and Others** [2001] FJHC 219; HBC 212/2000 (25 July 2001).

5.3 In **National MBF Finance (Fiji) Ltd v. Buli** Civil Appeal No. 57 of 1998 (6 July 2000) the Court stated as follows:-

“The Law with regard to striking out pleadings is not in dispute. Apart from truly exceptional cases the approach to such applications is to assume that the factual basis on which the allegations contained in the pleadings are raised will be proved. If a legal issue can be raised on the facts as pleaded then the Courts will not strike out a pleading and will certainly not do so on a contention that the facts cannot be proved unless the situation is so strong that judicial notice can be taken of the falsity of a factual contention. It follows that an application of this kind must be determined on the pleadings as they appear before the Court...”

5.4 Having held that this action is not frivolous, vexatious or abuse of courts process and that there is serious question to be tried at paragraphs 3.28 and 3.29 of this Ruling, this Court has no alternative but to dismiss Defendants Application to strike out this action.

6.0 Costs

I have taken into consideration the Affidavits filed by all parties, Submissions filed by the Defendants and Oral Submissions made on behalf of the parties. I also consider that issues raised in the proceedings are quite legitimate and needs to be determined by Court and the fact that all parties are members of TISI and provide voluntary service to TISI.

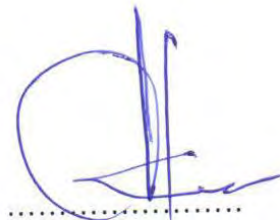
7.0 Orders

I make following Orders:-

- (i) Following orders made on 22 September 2016, are extended and to continue until final determination of this action:-
 - a) The Defendants by themselves and/or their servants and/or their agents howsoever be restrained from acting as national executives of the Then India Sanmarga Ikya Sangam (“TISI”) or calling of Council of Management meeting or any other meeting or commencing or completing any capital projects.
 - b) The current signatories to TISI Head Office operating account, Sangam College of Nursing (SCN) operating account, Sangam Institute of Technology (SIT) operating account, namely Damendra Amas Gounder (first defendant), Som Padayachi (third defendant) and Sadasivan Naicker sign the cheques in respect to the operating account of TISI Head Office, SCN and SIT including but not limited to staff salary and cheques to all payments to creditors listed in annexure DAG 11 of the Affidavit of Damendra Amas Gounder sworn on 14th September 2016 and filed on 15th September 2016.
 - c) The signatories, namely, Damendra Amas Gounder (first defendant), Som Padayachi (third defendant) and Sadasivan Naicker submit details of all payments made to the Court on a fortnightly basis until further order of this court.

- (ii) Defendants Application to Strike Out this Action, Dissolve injunction and Transfer this proceedings to Lautoka by Summons dated and filed on 15 September 2016, is dismissed and struck out.
- (iii) Costs of Application for Injunction by Summons filed on 8 September 2016, and Application to Dissolve Interim Injunction, Application to Strike Out the Action and Application to Transfer this action to Lautoka Registry be costs in the cause.




K. Kumar
JUDGE

At Suva

20 October 2016

Parshotam Lawyers for the Plaintiffs

Samuel K. Ram, Esquire for the Defendants