

**WAKAYA LTD v KENNETH CHAMBERS AND MARSHA NUSBAUM
(CBV008 of 2011)**

SUPREME COURT — APPELLATE JURISDICTION

5 MARSOOF, CHANDRA and SUNDARAM JJ

25 April, 9 May 2012

10 **Practice and procedure — injunctions — injunction to restrain from entering and burying body on land — whether granting of interim injunction was beyond jurisdiction — substantive relief of damages — no loss suffered — assessment of damages — no cause of action — Administration of Justice Decree ss 8(1), 8(2)b — Court of Appeal Rules s 12(2)(f) — High Court Rules O 29, r 1 — Supreme Court Act s 7(3).**

15 The petitioner had obtained an ex parte interim injunction from the High Court, restraining the respondents from entering and burying the body of the first respondent's deceased son on the land belonging to the second respondent. The first respondent subsequently buried the body at another burial ground. The Court of Appeal dissolved the injunction and referred the matter to the Master for an assessment of damages. The
20 petitioner sought special leave to appeal.

Held –

(1) Special leave to appeal is granted as this case relates to important questions of law in respect of interim injunctions in relation to property rights and their dissolution.

25 *Bulu v Housing Authority* [2005] FJSC 1 CBV0011.2004S (8 April 2005); *Dr Ganesh Chand v Fiji Times Ltd* (2011) FJSC 2; CBV0005.2009; *Praveen's BP Service Station Ltd v Fiji Gas Ltd*, followed.

(2) This case deals with an extraordinary situation, in which the petitioner had sought injunctive relief while praying for damages as his substantive relief. The grant of the interim injunction virtually brought about the final relief that the petitioner wanted, as it had the effect of preventing the respondents from the proposed burial and therefore, no loss was caused to the petitioner.

(3) There was no evidence regarding damages before the Court and therefore the Court erred in predetermining the issue of damages before the trial in the main case.

35 (4) While the High Court had jurisdiction to entertain the application for an interim injunction, it erred in granting the injunction as the application was not in accordance with the main relief they had sought, which was damages. Consequently, refusal to dissolve the injunction would also be erroneous. There was no question of balance of convenience in the circumstances, as there was no infringement of a proprietary or legal right of the
40 Petitioner.

American Cyanamid Co v Ethicon Ltd [1975] AC 396, considered.

Special leave to appeal granted, interim injunction dissolved, direction for assessment of damages quashed, parties directed to proceed with trial on substantive matters.

45 Case referred to

Ba Town Council v Fiji Broadcasting Commission [1976] 22FLR 91, followed.

R Naidu for the Petitioner.

50 *K Chambers* in Person.

W Hiua instructed by *W Hiua* for the second Respondent.

[1] **Marsoof, Chandra, Sundaram JJ.** The petitioner by ex parte notice of motion dated 25th August 2010 applied to the High Court of Suva for an injunction to restrain the 1st and 2nd Respondents from entering and burying the body of Alexander Gerald Walsh-Wrightson Lynch-Chambers on Wakaya Island
5 as soon as the petitioner found out about the 1st Respondent's plan.

On 25th August 2010 Justice Hettiarachchi, High Court Judge granted the ex parte injunction against the 1st and 2nd Respondents restraining them from entering and burying the body of the said Alexander on Wakaya Island or on Certificate of Title No 27687.

10 On 30th August 2010 the 1st Respondent applied to have the ex parte injunction dissolved. By order dated 6th September 2010 Justice Hettiarachchi dismissed the 1st Respondent's application.

On 18th September the 1st Respondent had buried the body of Alexander at Nukuwatu Village burial ground in Lami, near Suva.

15 On 21st September 2010 the 1st and 2nd Respondents filed their notice of appeal in the Court of Appeal and the Court of Appeal held in favour of the present Respondents and ordered as follows:

(i) the interim injunction granted by Justice Hettiarachchi on 25th August 2010 be dissolved and other orders, if any, in the Court below be set aside.

20 (ii) Any caveat lodged by the respondent preventing registration of a transfer of 50% interest in Lot 6 to Kenneth Chambers to be removed by Wakaya Ltd forthwith.

(iii) The matter be referred to the Master for the assessment of damages suffered by the appellants Kenneth Chambers and Marsha Nusbaum by reason of the respondent's interim injunction.

25 (iv) The Respondent is to pay the appellant's costs of \$3,000 in this Court and \$ 3,000 for their costs below.

SPECIAL LEAVE TO APPEAL

30 The Petitioner by petition dated 26th April 2011 has sought special leave to appeal against the judgment of the Court of Appeal to have the said judgment set aside and for costs. In its petition of appeal the petitioner has set out eleven grounds of which the application for special leave is based, which are as follows:

(1). Whether the 1st respondent is entitled to damages for denial of access to lot 6 notwithstanding that he was not the registered proprietor of Lot 6 and he did not otherwise have any legal or equitable interest in lot 6 nor did he have possession of it when the petitioner obtained the injunction.

35 (2). Where a court discharges an interlocutory injunction, can the court order the plaintiff to pay damages to the defendant in the absence of an undertaking in damages from the plaintiff?

40 (3). The time when and the circumstances under which the court may order an inquiry into damages once it discharges an interlocutory injunction.

(4). Should the court make an order for assessment of damages against the plaintiff upon the discharge of the interlocutory injunction without first requiring the defendant to prove both the fact of the damage and its causation since the onus is on the defendant to prove both the fact of the damage and its causation.

45 (5). Whether the Court of Appeal acted erroneously in holding that the 1st and 2nd Respondents suffered severe psychological trauma and anxiety over a prolonged period as a result of the injunction, without having before it direct and or credible evidence of severe psychological trauma and anxiety so as to enable it to judge the seriousness of the suffering by the Respondents and its longevity.

50 (6). Whether the Court of Appeal acted unfairly and in breach of natural justice without giving the Petitioner's Counsel an opportunity to be heard before awarding \$ 6000.00 as cost in favour of the Respondents.

(7). The decision of the Court of Appeal raises a major issue of law which is directed to a judgment that lacks any apparent reasoning for its conclusion as to how it came to assessing the quantum of costs to be awarded to the 1st and 2nd respondent.

5 (8). The application of the American Cyanamid v Ethicon Ltd principles in Fiji in the interlocutory injunction jurisdiction. The extent to which the American Cyanamid principles have the approval of the Court of Appeal in Fiji now remains very much in doubt after the judgment of the Court of Appeal in Strategic Nominees Ltd (In Receivership) v Gulf Investments (Fiji) Ltd, Civil Appeal No ABU 0039 and the present case. There is need for special consideration of the extent to which the American
10 Cyanamide principles should be applied in Fiji.

(9). The effect of and the binding principles of *Strategic Nominees Ltd (in Receivership) v Gulf Investments (Fiji) Ltd* Civil Appeal No ABU 0039 of 2009.

(10). Whether damages are available in equity for psychological trauma and anxiety.

15 (11). Whether the Petitioner had an interest or locus to seek the assistance of the Court to determine the legality of the burial planned by the 1st Respondent?

In terms of s 8(1) of the Administration of Justice Decree No 9 of 2009, the Supreme Court has exclusive jurisdiction, subject to such requirements as prescribed by law, to hear and determine appeals from all final judgments of the Court of Appeal. The Supreme Court may grant special leave to appeal as
20 provided in s 8(2)(b) of the said Decree only if he satisfies one of the several criteria set out in s 7(3) of the Supreme Court Act No 14 of 1998.

8. Section 7(3) of the Supreme Court Act of 1998 provides that:

25 “in relation to a civil matter (including a matter involving a constitutional question), the Supreme Court must not grant special leave to appeal unless the case raises-
(a) a far reaching question of law;
(b) a matter of great general or public importance;
(c) a matter that is otherwise of substantial general interest to the administration of
civil justice.”

30 The decisions of the Supreme Court of Fiji in *Bulu v Housing Authority* (2005) FJSC 1 CBV0011.2004S (8 April 2005), *Dr Ganesh Chand v Fiji Times Ltd* (2011) FJSC 2; CBV0005.2009 and *Praveen's BP Service Station Ltd v Fiji Gas Ltd*, (6th April 2011) have set down that special leave to appeal is not granted
35 as a matter of course, and that for the grant of special leave, the case has to be one of gravity involving a matter of public interest, or some important question of law, or affecting property of considerable amount or where the case is otherwise of some public importance or of a very substantial character. Even so special leave would be refused if the judgment sought to be appealed from was
40 plainly right, or not attended with sufficient doubt to justify the grant of special leave.

In considering the grounds of appeal and the submission made to Court by the parties, this Court would grant special leave to appeal in view of the fact that this case relates to important questions of law in respect of interim injunctions in
45 relation to property rights and their dissolution.

THE JUDGMENT OF THE HIGH COURT

The petitioner made an application for the grant of an injunction in terms of Order 29 Rule 1 of the High Court Rules 1998 filing an affidavit on 25th August
50 2010 and at the same time filing a writ of summons against the defendants seeking substantive relief as prayed for in its statement of claim.

The High Court Judge, Justice Hettiarachchi upon reading the Ex-Parte Notice of motion taken out by the Petitioner dated 25th August 2010 and the Affidavit filed on behalf of the Petitioner in support of the application and upon hearing the submissions of the Counsel for the Petitioner made order as follows:

5 *“An interim injunction that the Defendants by themselves and/or through their servants and/or agents or howsoever be restrained from entering and burying Alexander Gerald Walsh-Wrightson Lynch-Chambers on Wakaya Island or on Certificate of Title No 27687.”*

10 On being served with the above order, the 1st Respondent filed a notice of motion together with an affidavit on 30th August 2010 seeking the case to be taken up inter partes on 1st September 2010 and also moved for a dissolution of the ex parte injunction. The Petitioner filed an affidavit in reply to the affidavit of the 1st Respondent on 2nd September 2010. The Petitioner and the 1st
15 Respondent filed written submission in respect of their positions in relation to the application made by the 1st Respondent to have the ex parte injunction dissolved.

Justice Hettiarachchi delivered his interlocutory judgment on 6th September 2010 disallowed the application of the 1st Respondent to dissolve the ex parte
20 injunction and ordered that the matter be set down for expedited trial and referred the matter to the Master of the Court on 9th September 2010 for directions on pleadings and expedited trial.

The Respondents had filed a leave to appeal application seeking leave from the High Court, which application had been refused on 20th September 2010 on the
25 basis that under S.12(2)(f) of the Court of Appeal Rules an appeal could be filed without obtaining leave from the High Court.

On the 21st of September 2010 the 1st Respondent filed his appeal in Court of Appeal. It is to be observed from the record of the Court of Appeal that the 1st
30 Respondent had on 23rd September 2010 filed his statement of defence and counterclaim in the High Court and thereafter the Petitioner too had filed his reply to the defence and counterclaim on the 1st of November 2010.

Justice Hettiarachchi in his judgment dated 6th September having considered the factual situation as set out in the affidavits of the parties, considered the
35 judgment of Lord Diplock in *American Cyanamid Co v Ethicon Ltd* 1975 1 AER 504 and other authorities in relation to the granting of interim injunction arrived at the conclusion at paragraphs 39 and 42 of the judgment.

The arguments placed by the parties clearly point to the fact that there are serious
40 issues to be tried. The evidence available to Court at this stage is insufficient and has not been tested under oral cross examination. Since there are issues for trial before the court in this action, it certainly is not a frivolous or vexatious action. Hence, the question is whether in the circumstances of this case, the injunction should be dissolved or not until the trial of the action.

Having considered all the facts and circumstances as set out above, this court is of
45 the view that it would be appropriate to allow the status quo to remain in so far as the parcel of land in issue is concerned. The court also finds that the balance of convenience clearly favours the plaintiff at this stage.

THE JUDGMENT OF THE COURT OF APPEAL

50 In the notice of appeal filed in the Court of Appeal the orders that were prayed for were:

(a) The whole of the interlocutory judgment of Justice Hettiarachchi sustaining the ex parte order dated 25th August 2010 for injunctive relief delivered at the interlocutory hearing of High Court Civil Action No HBC 256 of 2010 on 6 September 2010 be set aside;

- 5 (b) order for interlocutory Interim Injunction be rescinded;
 (c) Respondent be directed to immediately withdraw the caveat against dealing lodged with the Registrar of Titles on 1 September 2010;
 (d) further and other relief;
 (e) Costs.

10 The said notice of appeal also set out 17 grounds of appeal which were said to be the grounds on which the learned Judge on the Interlocutory proceeding for Interim Injunction erred in law and or in fact.

The Court of Appeal delivered its judgment as set out in paragraph 5 above. The main judgment and reasons were by Izaz Khan JA while Marshall JA gave an explanatory judgment while concurring with the judgment of Izaz Khan JA.

15 At the hearing of the appeal the 1st Respondent had declared to Court that they had no intention of disinterring the body of Alexander Lynch-Chambers from his grave at Nukuwatu and re-burying him on their land on Wakaya Island if this Court dissolved the injunction.

20 This case deals with an extraordinary situation which has given rise to the exercise of the jurisdiction of the High Court in relation to the granting of injunctive relief. It is in the ordinary course of events for a party to seek an interim injunction where the final relief prayed for is a permanent injunction or a declaration of rights regarding matters in issue between the parties. But in the present case, the Petitioner has sought injunctive relief while praying for
 25 damages as his substantive relief as set out in the statement of claim filed by the petitioner.

The High Court Rules Order 29 Rule 1 states:

30 (1) An application for the grant of an injunction may be made by any party to a cause or a matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be.

The application of the Petitioner based on the intended act of the 1st Respondent is a claim for damages as set out in his statement of claim and it is in connection with this claim that he had made the application for the interim injunction.

35 In effect in the present case the grant of the interim injunction virtually brought about the final relief that the Petitioner wanted as it had the effect of preventing the 1st Respondent from carrying out what he intended to do, namely the burying the body of his son on the land belonging to the 2nd Respondent and therefore apparently there was no loss caused to the Petitioner as stated in his statement of claim. In *Ba Town Council v Fiji Broadcasting Commission* [1976] 22 FLR 91 it was held that it is not the practice
 40 of the Court to grant an interlocutory injunction which will have the practical effect of granting the sole relief claimed.

The grant of an interim injunction would be to maintain the status quo of the parties in relation to a state of affairs which would have changed if the party
 45 against whom such relief is sought was allowed to carry on his actions. In the present case the prevention of the 1st Respondent from carrying out what he intended to do has not brought about a change in the state of affairs in relation to the parties as far as their property rights have been concerned which remained before the grant of the interim injunction. As at the time of seeking the interim
 50 injunction, the Petitioner claimed ownership of Wakaya Island and certain residuary rights in respect of Lot 6, the 1st Respondent claimed equitable

ownership of 50% of Lot 6 on the basis of an agreement to purchase such share from the 2nd Respondent from Lot 6, and the 2nd Respondent owned the said Lot 6 on the basis of a marriage settlement from her husband and was entitled to the possession of the said Lot 6.

5 A quia timet injunction is an injunction to restrain wrongful acts which are threatened or imminent but have not yet commenced. The question that arises in the present case is whether the situation as contemplated by the Petitioner brought about a situation which entitled him to have such relief. Was the action intended to be carried out by the 1st Respondent, a wrongful act in respect of the
10 Petitioner's rights, proprietary or otherwise? The main or substantive claim of the Petitioner was damages based on what the Petitioner thought would cause him loss if the burial took place. A question therefore arises as to the alleged cause of action, which was the happening of an event in the future, which of course did not materialize due to the granting of the injunction. This in effect would show
15 that the Petitioner had no proper cause of action for his claim for damages which was the substantive relief that the Petitioner was seeking. Therefore in the absence of a cause of action, the granting of the interim injunction was erroneous and consequently the refusal to dissolve same would also be erroneous. The Court of Appeal had held that the High Court had no jurisdiction to grant the
20 injunction. This Court would agree with that conclusion but of course on the basis that though the High Court had jurisdiction to entertain an application for an injunction, the Court erred in law in granting the injunction as the Court had no jurisdiction to do so on the facts presented to Court specially on the basis of the claim for substantive relief.

25 The Petitioner claimed the ownership of Wakaya Island from which certain parcels of land had been sold and the material placed before the High Court would show that Lot 6 was owned by the 2nd Respondent even though the Petitioner may have been able to exercise certain rights in respect of the said parcel of land in terms of the contract on which the ownership of the 2nd
30 Respondent to the said land was based. Did the proposed action of the 1st Respondent affect the Petitioner's rights, if any, in respect of the said Lot 6? There was no material to show that such a situation had arisen.

There are several matters adverted to in the judgment of the Court of Appeal which have been considered by this Court in considering the appeal of the
35 Respondents. The reliefs prayed for by the Respondents in the Court of Appeal were the setting aside of the interlocutory judgment of the High Court, the rescinding of the interim injunction, a direction that the caveat lodged by the Petitioner be withdrawn, for further and other relief and costs. The Court of Appeal ordered the interim injunction to be dissolved, the caveat to be
40 withdrawn, and the matter to be referred to the Master for the assessment of damages suffered by the Respondents and costs. This order is to the effect that the Court of Appeal had decided on the issue of damages purportedly suffered by the Respondents which was not prayed for specifically, in the notice of appeal and has the effect of finally deciding the matters between the parties, as was stated by
45 Izaz Khan JA in his judgment in the Court of Appeal at paragraph 52, where he stated "*In the interests of resolving this matter fully and finally I award the first and second appellants damages for wrongful denial of access to Lot 6 through the interim injunction granted by Justice Hettiarachchi*".

50 Apart from the matters set out above in paragraph 25, there were several issues, such as locus standi of the Petitioner, the equitable ownership of the property in question as claimed by the 1st Respondent, the ownership of the

property of the 2nd Respondent, the effect of the contract on which the 2nd Respondent was entitled to the property, the validity of the consent regarding transferring of ownership between the 1st and 2nd Respondent, the validity of the certificate granting permission for burial when it was not gazetted, the damages
5 suffered by the Respondents as a result of the issue of the interim injunction by the High Court which were all issues that had to be considered by evaluating proper evidence and adjudicating upon them in a proper trial rather than relying on affidavits with supporting documents and submissions.

10 Izaz Khan JA in his judgment stated that the Petitioner had no locus standi to seek an injunction since the 2nd Respondent was the owner of Lot 6 and that he had not produced any evidence as to how he was going to be affected by the proposed burial on the said Lot 6. It is on that basis he stated that the Petitioner was not entitled to seek an interim injunction.

15 Izaz Khan JA had then proceeded to deal with the right of the petitioner to eject the second Respondent on the basis of the contract on which the 2nd Respondent became entitled to the particular parcel of land referred to as Lot 6. The effect and rights of the parties regarding the said contract were matters that could not be decided upon the affidavits that were available to the High Court when granting
20 the interim injunction and were matters which again showed that it was a matter that could be properly decided at the trial into the substantive claim of the Petitioner.

Izaz Khan JA thereafter considered the use to which the said Lot 6 could be used, and the effect of the Minister's consent and breach of any condition which
25 again were matters that had to be decided upon at a proper trial.

In considering the nature of the interim injunction the Court took the view that it had the effect of preventing the Respondents from entering their land. A consideration of the affidavit filed by the Petitioner shows that what the Petitioner sought to prevent was the burying of Alexander in the land claimed by the 2nd
30 Respondent. An extra emphasis had been added to the manner in which the interim injunction was couched, which when considering the nature of the order sought by the Petitioner is clear that what was sought by the Petitioner was preventing them from entering to bury the body of Alexander on the said land, and not preventing entry to the land. Before the Court of Appeal, Counsel for the
35 Petitioner had agreed with this position.

Izaz Khan JA proceeded to hold that the Petitioner wrongfully kept the first and second Respondents out of their land. Having concluded that the Respondents had been kept out of their land, it was declared that they were entitled to damages as the injunction had caused them severe psychological
40 trauma and anxiety over a prolonged period. There was no evidence placed before Court, for the Court to arrive at such a decision. However, Justice Izaz Khan then proceeded to order that the matter be referred to the Master for assessment of damages as there was no evidence of the quantum of damages. This by itself would show that there was no evidence regarding damages before
45 Court and that the Court erred in predetermining the issue of damages before the trial in the main case.

The Court of Appeal had not taken cognizance of the fact that what was before Court was the challenging of the interim injunction and not the final relief sought by the parties regarding which the parties as shown above in paragraph 17 had
50 taken steps to proceed in the High Court claiming their reliefs soon after filing the notice of appeal in the Court of Appeal.

A further fact that emanated from the judgment of the Court of Appeal was the fact relating to an undertaking as to damages by the Petitioner which the Court stated that the Court was not aware of. The High Court in granting the interim injunction failed to obtain an undertaking regarding damages, which was
5 erroneous as it is usual to obtain such an undertaking to safeguard the interests of a defendant against whom an injunction is obtained. In the affidavit filed on behalf of the Petitioner when seeking the interim injunction it was stated that the Petitioner was a viable company and has the ability to meet any award of damages, and also a Bank statement as at that date to show their financial
10 viability, but this would not be sufficient to be considered as an undertaking to pay damages. As Justice Marshall stated in his judgment that if the cross-undertaking is not given, the loss suffering defendant should upon vindication at trial be awarded damages in respect of his loss. This would go on to show that the 1st Respondent could vindicate his rights at the trial into the
15 main case before the High Court

It is the view of this Court that the High Court which had jurisdiction to entertain an application for an interim injunction in terms of Order 29 Rule 1 of the High Court Rules 1988 which permits such an application to be made to the High Court whether or not a claim for an injunction is included in the writ of
20 summons, erred in granting same as the application was not in accordance with the main relief that they had sought as set out in the statement of claim, which relief was for damages. Consequently, the refusal to dissolve same too would be erroneous. This Court is in agreement with the view of the Court of Appeal that the present case did not come within the principles enunciated in the *American*
25 *Cyanamid Co v Ethicon Ltd* [1975] AC 396 regarding the granting of interim injunctions as there was no question of balance of convenience in the circumstances of the case as there was no infringement of a proprietary or legal right of the Petitioner.

In view of the above reasoning this Court affirms the decision of the Court of
30 Appeal regarding the dissolution of the interim injunction issued by the High Court, we quash the order of the Court of Appeal setting aside the other orders of the High Court and the order directing the matter be referred to the Master for the assessment of damages suffered by the Respondents to this application by reason of Petitioner's interim injunction, and direct the parties to proceed to trial
35 on the substantive matter before the High Court. It is to be noted that the Court of Appeal has observed that the High Court overlooked an essential requirement for the grant of an interim injunction, in that it had not obtained an undertaking as to damages. Adverting to this omission Marshall JA in the Court of Appeal stated "In my view common law and equity have developed to the point that the
40 cross undertaking is to be implied in quia timet applications. That will not stop judges from requiring the undertaking from the Plaintiffs so that they are advised of the adverse risks involved in making a quia timet application. But this risk is now so well known, that if the cross-undertaking is not given, the loss suffering defendant should, upon vindication at trial, be awarded damages in respect of his
45 loss. We are in agreement with that observation, as the question of damages has to necessarily await the conclusion of the trial in the High Court. If in the High Court the Petitioner fails, then in addition to any other relief, it will be obliged to make an order for damages against the Petitioner for the loss, if any, that was sustained as a result of the grant of the injunction by the High Court. This Court
50 does not wish to interfere with the costs ordered against the Petitioner and no costs are awarded in this appeal.

CONCLUSION

(1) The petition for special leave to appeal is granted.

5 (2) The judgment of the Court of Appeal is varied to the effect that the interim injunction issued by the High Court is dissolved and the direction to refer the matter to the Master for assessment of damages is quashed;

(3) The parties are directed to proceed with the trial before the High Court on the substantive matters;

(4) The costs awarded in the Court of Appeal in favour of the Respondents to stand;

10 (5) There will be no costs regarding this application and the parties to bear their own costs.

Petition allowed.

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