

850
128

IN THE FIJI COURT OF APPEAL
Civil Jurisdiction
CIVIL APPEAL NO. 49 OF 1980

Between:

TIMOCI BAVADRA AND
15 OTHERS

APPELLANTS

- and -

1. TEVITA FA & JONACANI LEWENIQILA
2. M.C. GARDINER

1ST RESPONDENTS

2ND RESPONDENTS

Mr. K. Chauhan for Appellants.

1st Respondent in person.

Mr. M.C. Gardiner in person for
2nd Respondent.

Date of Hearing: 18th March, 1981.

Delivery of Judgment:

JUDGMENT OF THE COURT

SPRING, J.A.

Tevita Fa and Jonacani Leweniqila (hereinafter called the respondents) brought an action in the Supreme Court at Suva by way of originating summons against the Fiji Public Service Association (hereinafter called the Association) and 16 other defendants including the Registrar of Trade Unions (hereinafter called the Registrar); the Registrar is now cited as the second respondent in this appeal. The respondents, both of whom are civil servants and financial members of the Association sought declarations from the Supreme Court as follows :

- (a) that Rules 81 and 87 of the Constitution of the Association are invalid, null and void as being in conflict with Clause 21 of the Schedule to section 37 of the Trade Unions Act, Cap. 80 (hereinafter called "The Act").
- (b) that the Annual General Meeting of the Association held on 1st March, 1980, at Suva was invalid, null and void as being held pursuant to and in accordance with Rules 81 and 87 of the Constitution of the Association, the said Rules being invalid, null and void, and not being held pursuant to, or consistently with, Clause 21 of the Schedule to section 37 of the Act.
- (c) that on 1.3.80 at the meeting of the Association the election of the 15 appellants to the various offices in the Association was invalid, null and void for reasons appearing in (a) and (b) above.

The respondents also sought orders for injunction but the applications were withdrawn.

The dispute which led to the issuing of proceedings out of the Supreme Court was over (a) the validity of the quorum at the Annual General Meeting of the Association held in Suva on 1st March, 1980, and (b) the legality of the elections made at that meeting of the 15 appellants elected to the respective offices of the National Council of the Association named and described in the pleadings in this case on appeal.

The appellants comprise the 15 named office bearers in the Association and the Association itself. The interpretation of certain rules of the Association is the principal matter in issue.

The Supreme Court after considering the affidavits filed and hearing submissions of counsel declared -

(1) that the Annual General Meeting held on 1st March, 1980, lacked the requisite number of members to constitute a quorum as required by the rules of the Association and (2) that the election of the 15 appellants to their respective offices in the Association was invalid.

Appellants appealed to this Court; their grounds of appeal are lengthy overlapping and repetitive, but may be conveniently summarised as follows :

(1) The Court had no jurisdiction to make the declarations sought as the respondents had no legally enforceable right at law to maintain an action against the Association as they had suffered no loss, could show no prejudice, and, that the matters complained of were of an internal domestic nature.

(2) That the procedure under Part II of the Act available to the Registrar had not been fully exhausted or utilised by the Registrar and respondents were usurping the powers of the Registrar.

(3) That the rules of the Association had been duly registered and the certificate issued by the Registrar was conclusive proof that all matters required by the Act had been fully complied with.

(4) That the learned trial Judge erred in holding that while Rule 81(a) of the Association's rule was invalid to the extent it provided voting by proxy to form a quorum, Rule 87 pertaining to a delegate's vote is valid.

The facts may be briefly stated: On 24th August, 1979, the Registrar wrote to the Association advising that Rule 81(a) of its rules purported to permit a quorum to be established at any Annual or Special General Meeting by the use of proxies which was inconsistent with the requirements of clause 21 of the Schedule to the Act, which clause requires that

there must be present at any meeting of the Association or Branch thereof not less than 20% of the voting members of the Association or Branch thereof. Section 37(1) of the Act requires that the rules of every trade union shall provide for all the matters specified in the Schedule to the Act. The Registrar requested that the offending words relating to voting by proxy be deleted from Rule 81(a); certain correspondence passed between the Registrar and the General Secretary of the Association, but no finality was reached. The General Secretary advised that he proposed placing the Registrar's request before the National Council of his Association. A meeting of that Association was held on 22nd September, 1979, but the matter was not raised. On 29th February, 1980 - the day before the Annual General Meeting - another meeting was held and the Registrar's letter was produced and discussed. An extract from the minutes of this meeting reads :

" The General Secretary tables a report to the Council concerning the view expressed by the Registrar of Trade Unions in a letter dated 24.8.79 that Rule 81(a) of the Association's Constitution was inconsistent with Clause 21 of the Schedule to the Trade Unions Act. The Registrar's views were in regard to the quorum required for an Annual or Special General Meeting. The General Secretary's report quoted the relevant provisions of the FPSA Constitution, Clause 21 of the Schedule to the Trade Unions Act and Section 37 of the Trade Unions Act for the members information and also provided a brief but clear summary of initial registration of the Association's Constitution and of his own views of the legality of current practice followed by the Association in constituting a quorum by the use of proxy..... the Council authorised the use of proxy for the Annual General Meeting. It also authorised the ex-officio members of the Council to contest any actions by the Registrar of Trade Unions against the Council's decision."

On 1st March, 1980, the Annual General Meeting was attended by about 200 financial members including 27 delegates from the Nadi, Lautoka, Labasa and Nausori

branches. At that date there were 6095 financial members of the Association and to constitute a legal quorum of 20%, 1219 members were required to be present.

The appellants submitted that proxies could be used in establishing a quorum at meetings of the Association; further applying Rule 87 each of the 27 branch delegates present at the meeting was entitled to a single vote which if exercised was equivalent to 50 votes. When so treated the Association claimed that this represented the presence at the meeting of not less than 1350 voting members thereby establishing the requisite quorum for the valid transaction of business.

The respondents claimed that Rule 81(a) does not comply with Clause 21 of the Schedule to the Act and is therefore contrary to the provisions of section 37(1) of the Act; that the interpretation placed on Rule 81(a) by appellants was ultra vires; that no legal quorum can be constituted by treating one member present holding a number of proxies as being equivalent to the presence at that meeting of the total number of persons he represents and for which he holds proxies. Further, that as no legal quorum was present at the meeting any business transacted thereat was rendered nugatory.

We turn now to the grounds of appeal and grounds 1 and 2 can be taken together.

Mr. Chauhan submitted that respondents' complaint related entirely to internal management and that the Court had no jurisdiction to interfere when mere irregularities occurred, which were within the power of the Association to regularise. Counsel for appellants called in aid the rule in Foss v. Harbottle (1843) 2 Hare 461 that the matter relied on as constituting the cause of action should be a cause of action properly belonging to the general body of members of the Association as opposed to a cause of action which some individual member may assert.

The rule in Foss v. Harbottle (supra.) was applied in Humphries v. Auckland Tailoresses' Union (1950) N.Z.L.R. 380 at p. 388 where Finlay J. says :

".....In the result, it seems to me that the principle of Foss v. Harbottle (1843) 2 Hare 461; applies to a mere irregularity in the altering of rules where alterations are authorised just as much as it does to irregularities in any other respect in relation to matters which are intra vires; alterations of that kind are just as much a domestic matter to be settled in domestic forum as are those other matters; and, where (as here) there is no doubt as to the opinion of an overwhelming majority of members, the Court cannot, I think, assume a jurisdiction to set aside on the ground of irregularity something that the majority can, and no doubt will, immediately and easily re-establish."

however, the rule in Foss v. Harbottle (supra) has no application where the individual rights of the members are violated, transgressed or invaded.

In Edwards v. Halliwell (1950) 2 All. E.R. 1064 Jenkins L.J. at p. 1067 said :

".....The gist of the case is that the personal and individual rights of membership of each of them have been invaded by a purported, but invalid, alteration of the tables of contributions. In those circumstances, it seems to me the rule in Foss v. Harbottle (supra) has no application at all, for the individual members who are suing sue, not in the right of the union, but in their own right to protect from invasion their own individual rights as members."

In this appeal the respondents submitted that rule 81(a) was ultra vires and invalid in that it purported to establish a quorum by the use of proxies; further, the individual members of a trade union have the right, to require their union officials to act within rules that are not ultra vires and accordingly the individual rights of the respondents have been invaded. The question of permitting proxies to be used to establish a quorum as suggested by appellants is a

matter of substance.

In our opinion respondents have a locus standi to test such matters before the court. Accordingly, we reject Mr. Chauhan's argument that respondents had no cause of action.

Mr. Chauhan further submitted that while there was no provision in the Act which entitles a member to challenge the validity of a rule of a trade union section 37(4) of the Act dealt with the matter in a remote way. Section 37(4) provides :

" In any case in which proceedings may competently be instituted by a member of a trade union for the purpose of restraining the trade union or officer thereof from acting in breach of the provisions of its rules, such proceedings may be instituted by the Registrar if he shall think it fit or expedient so to do."

It was implicit in Mr. Chauhan's argument that the Registrar was given the power under Part II of the Act to institute proceedings in respect of the type of matters raised by respondents; that the Act provided machinery for the Registrar to deal therewith and that these procedures should have been fully utilised by the Registrar before respondents' action was entertained. Numerous authorities were quoted by Mr. Chauhan, but they related to cases where the legislature has enacted that a certain mode of procedure should be followed before a Court can be asked to provide other relief. Section 37(4) does not exclude members from bringing actions against their Unions to the Courts until such time as the Registrar has exhausted his powers. In our view section 37(4) is an enabling section which permits the Registrar in certain limited situations to take proceedings to rectify a matter which may have been brought by a member. The section does not however, give the Registrar power to make declarations of the type sought by the respondents, nor is it within his power to grant any relief of the nature sought by the respondents. It is wrong in our view to say as maintained by the

appellants that the respondents were usurping the powers of the Registrar.

Accordingly, we do not accept Mr. Chauhan's submission that until the Registrar has exhausted his remedies and powers under Part II of the Act the Court has no jurisdiction to determine the matters raised by the respondents; nor, do we agree that the learned trial Judge before entertaining the claim by respondents was under a duty to inquire into the action taken by the Registrar (if any) and ascertain whether the Registrar had complied with the machinery provisions set out in the Act.

Mr. Chauhan submitted that the only way in which the Supreme Court could be called upon to deal with the claim of the respondents was by way of an appeal pursuant to section 16 of the Act. Section 16 reads :

" Any person aggrieved by the refusal of the Registrar to register a trade union, or by an order made by the Registrar under section 14 of this Ordinance, may within one month of the date of the refusal or order, as the case may be, appeal against such refusal or order to the Supreme Court and from such appeal the Supreme Court may order as it thinks proper, including any directions as to the costs of the appeal...."

Sections 14, 15 and 16 of the Act deal with the cancellation and suspension of the registration of a trade union by the Registrar with a right of appeal as set forth in section 16 above. Sections 14, 15 and 16 afford to the Registrar alone, entirely different remedies from those claimed by respondents and they do not in any way interfere with or prohibit the right of members to bring separate actions to the Court in appropriate circumstances. Accordingly, we reject Mr. Chauhan's submissions that the learned trial Judge was bound to accept the Registrar as the only competent authority to deal with the matters brought before the Court by the respondents.

Accordingly, we reject the claim of appellants that the Supreme Court lacked jurisdiction for the reasons we have given and agree with learned Judge when he said :

" I hold that this Court has jurisdiction and that the plaintiffs, being financial members of the FPSA, are entitled to challenge the validity of the business conducted at the Annual General Meeting at which the first 16 defendants were elected and also the validity of any of the Union's rules."

In arguing the third ground of appeal, Mr. Chauhan submitted that the certificate issued by the Registrar under section 10 of the Act on the registration of a trade union is conclusive proof that all the requirements of the Act have been complied with and that nothing can thereafter be inquired into questioning the regularity of the registration of the trade union and the rules by which it is governed. The Association was registered with the Registrar on the 26th August, 1970 after the rules had been examined by the Registrar. Section 10 of the Act provides :

" The Registrar, on registering a trade union under the provisions of the last preceding section, shall issue to the trade union a certificate of registration in the prescribed form and that certificate, unless proved to have been cancelled or withdrawn, shall be conclusive evidence for all purposes that the trade union has been duly registered under this Ordinance."

In our view section 10 means that the certificate issued by the Registrar is conclusive proof that the society or association has been duly registered, in law, as a "trade union". The Registrar before registering a trade union has to assure himself that the Association seeking registration is in law and in fact a trade union. Production of the certificate of registration of the Association as a trade union will ipso facto- (a) enable the Association to obtain recognition by various Government agencies and departments as a trade union; (b) confer the right on the trade union to hold land in its own name ;

(c) bestow the right on the trade union to sue in its own name and (d) generally establish to the world at large that it is a legal entity.

In our view registration of a trade union can never be advanced as being conclusive on the question of the validity of the rules of a registered trade union. The validity of Union rules is a question that belongs exclusively to the province of the Courts.

In Osborne v. Amalgamated Society of Railway Servants (1909) 1 Ch. 163 at p. 176 Cozens Hardy M.R. said :

"Section 13, sub-s.5, of the Act of 1871 makes the first certificate of registration of a trade union conclusive evidence that the regulations of the Act with respect to registration have been complied with. This is the only provision making a certificate conclusive evidence. Section 13, sub-s.6, authorises the Home Secretary from time to time to make regulations respecting registration under the Act, and generally for carrying the Act into effect, but I do not think it would be competent for the Home Secretary by regulation to make the registrar's certificate of any alteration of the rules conclusive evidence of the validity of the alterations. However that may be, the regulations which have been made do not even purport to make the certificate conclusive evidence. On the construction of these Acts I am clearly of opinion that it would be wrong to hold the certificate to be conclusive."

For the reasons we have given we reject Mr. Chauhan's submission that the issue of a certificate by the Registrar confirming registration of the Association as a trade union is conclusive proof that the rules of the Association are valid and cannot thereafter be impeached on the grounds of being ultra vires the provisions of the Act.

We now turn to the last ground of appeal. Counsel for appellant submitted that the learned trial Judge was in error in holding that Rule 81(a) was invalid to the extent that it permitted voting by proxy to establish a quorum. It is important to

consider the statutory provisions under which the rules of the Association are made.

Section 37(1) of the Act provides :

"The rules of every trade union shall provide for all the matters specified in the Schedule to this Ordinance, and shall not be so altered or amended as to cease to contain provisions in respect of all such matters."

The Schedule to the Act is headed "Matters for Which Provision Must be Made in The Rules of Every Trade Union".

Clause 21 of the Schedule to the Act provides :

"A requirement that at any meeting of the union or branch thereof a quorum shall consist of at least 20 per cent of the voting members of the union or branch as the case may be."

It follows that in interpreting clause 21 of the Schedule section 37(1) of the Act must be borne in mind; section 37(1) is a mandatory provision in that the rules of all trade unions shall provide for all the matters specified in the Schedule and shall not be so altered or amended as to cease to contain the requirements set forth in the Schedule to the Act. The rules of a trade union are interpreted literally by the Courts. In Martin v. Scottish Transport and General Workers Union (1952) 1 All. E.R. 691, the executive committee of the union admitted men to be members on a temporary basis for the duration of the war, but under the rules there was no power in the union itself, let alone in the executive, to admit members on a temporary basis. These men so admitted fulfilled all the obligations of membership for eight years and received the corresponding advantages; and there was ground for saying that all the other members knew of their membership and acquiesced in it: Nevertheless it was held by the Court of Session, and affirmed by the House of Lords, that they were not and never had been members. The reason given was that it was ultra vires

the union to admit members on a temporary basis and that, being ultra vires the union itself, no ratification was possible. The union officials were given no power at all by the rules to create a class of temporary members, their act of admitting Martin to temporary membership was invalid as a whole, i.e. not only the suspensive condition on which Martin had been allowed to think that he was a member, but the membership itself. In other words, Martin had never been, in law, a member of the union. The conduct of the union officials was irretrievably ultra vires. In the case before us the Association is claiming that the statutory quorum required by clause 21 of the Schedule can be achieved by the use of proxies which the respondents argue breaches the requirement of clause 21, and is therefore an alteration or variation of such requirement which conflicts with section 37(1) of the Act.

The Rules of the Association are divided under various headings. Rule 81 appear under the heading "quorum" and provides as follows :

"QUORUM"

- 81.(a) Presence of twenty per centum of the members eligible for voting either in person, or by proxy under the provisions of section 87 of this Constitution, shall constitute a quorum at any Annual or Special General Meeting.
- (b) At any other meeting a quorum shall consist of :
- (i) not less than thirty-three and one-third per cent of the members thereof where the total number of such members is not less than twenty-one;
 - (ii) not less than fifty per cent of the members thereof where the total number of such members is twenty or less:

Provided that, in no case a quorum shall consist of fewer than five members.

- (c) Where any committee appointed by the Council consists of less than ten members the quorum shall consist of the presence of two-thirds of the members thereof.

Under the heading of "Voting" Rules 86 and 87 appear :

Rule 86 provides :

"On any question before any meeting of the Association, each member present shall be entitled to one vote, and, a member if not present at any such meeting shall not be entitled to vote by proxy."

It is noted that Rule 86 states each member present shall be entitled to one vote and expressly prohibits members voting by proxy.

Rule 87 on the other hand permits a branch being represented by a delegate.

Rule 87 provides :

"Notwithstanding the provisions of section 86 of this Constitution -

- (a) At every Annual or Special General Meeting of the Association, every branch thereof shall be entitled to be represented in accordance with the provisions of this section.
- (b) A branch shall be entitled to send -
- (i) one delegate for every 50 members thereof eligible to vote at such a meeting;
 - (ii) one additional delegate where the total exceeds a multiple of 50.
 - (iii) one additional delegate where the total number of such members exceeds a multiple of twenty.
- (c) Before the commencement of any such meeting a statement signed by the President and the Secretary of each branch shall be delivered to the General Secretary giving -

- (i) the total number of voters entitled to vote at the meeting;
 - (ii) the names of such members; and
 - (iii) the names of delegates appointed to represent the branch.
- (d) Every vote cast at such meeting by a branch delegate shall be counted as twenty ordinary votes:

Provided that, where all the delegates from any branch are present and cast their votes the total number of ordinary votes counted in respect of such delegates' votes shall not in any case exceed the total number of voters submitted by the branch in its statement referred to in paragraph (c) of this section.

- (e) A member of any branch whose name has been submitted to the General Secretary under paragraph (c) of this section may attend the meeting and cast his vote personally. In such an event, the committee appointed to conduct the ballot shall, before giving a ballot paper to such a member, strike out his name from the list of members submitted by that branch.
- (f) Where any member of any branch other than a delegate casts his vote under paragraph (e) of this section the votes cast by the delegates of that branch shall be counted as if the name of such member had not been so submitted by that branch under paragraph (c) of this section."

Rules 86 and 87 deal with the matter of voting at meetings after the quorum thereat has been duly constituted.

In other words it is not possible to conduct any voting at a meeting of the Association unless and until a quorum is present at such meeting.

The questions that arise for decision are -

- (a) what meaning is to be ascribed to clause 21 of the Schedule and (b) is Rule 81(a) which purports to allow a quorum to be formed by proxies in conformity with the interpretation accorded to clause 21 of the Schedule to the Act.

Mr. Chauhan submitted that Rule 81(a) is not in breach of section 37(1) of the Act; that there is no prohibition in the Act preventing the Association from providing in Rule 81(a) for an alternative means of achieving a quorum of 20% of the voting members by using proxy votes; that whether or not there be provision in the Rules for vote by proxies is purely an internal matter for the management of the Association to provide in its rules pursuant to clause 21 of the Schedule that a quorum be present at any meeting of the Association, namely not less than 20% of the voting members. Further that this requirement in clause 21 requires that a proper legal quorum of not less than 20% of the voting members be present at that meeting before any voting thereat is embarked upon.

Mr. Chauhan submitted that Rule 87 should be read with Rule 81(a) and that a branch delegate, who is presumably a member, present at a meeting of the Association represents physically and numerically 50 members for the purposes of the formation of a quorum. He argued that Rule 87 qualifies the provisions of Rule 81(a) because Rule 81(a) provides "or by proxy under the provision of Rule 87 of the Constitution". Mr. Chauhan in making this submission is endeavouring to convert one person into 50 persons. Mr. Chauhan argued further that the word "delegate" used in Rule 87 meant the same as "proxy". A "proxy" is defined in Wharton's Law Lexicon 14th Edition as :

"a person, usually appointed by written authority, by a person entitled to vote personally, to vote at the discretion of the proxy".

A delegate from a branch cannot be said to be representing as a proxy 50 members of a branch - the delegate does not hold proxies from the members of the branch he represents; he is not the proxy of any one or more members - he is the delegate from the branch. Therefore we reject Mr. Chauhan's submission that the word "delegate" is synonymous with the word "proxy".

Mr. Chauhan also referred to numerous cases in company law dealing with quorum at company meetings. However, these cases are not of great assistance as the Articles of Association of Companies usually prescribe the number of members who must be present in order that a valid meeting may be held; further this requirement in the Articles of Association differs from company to company, various classes of shareholders are quite often provided for in the Articles of Association, some with voting rights and some without. Accordingly, in our view constitution of a quorum in the case of Companies depends on the Articles of Association and little assistance is to be gained therefrom in interpreting the provisions of the Trade Unions Act and the rules made thereunder.

Clause 21 is expressed in clear and unambiguous language - it requires - that at any meeting of the union or branch a quorum of at least 20% of the voting members of the union or branch. The word "quorum" is not defined in the Act or Schedule. The Shorter Oxford English dictionary defines "quorum" as -

"a fixed number of members of any body, society, etc. whose presence is necessary for the valid transaction of business".

Therefore the construction urged by respondents is one which involves no strain to the literal words of clause in other words in ascribing to the word quorum the dictionary meaning thereof section 21 would read - that at any meeting of the union or branch thereof the presence is necessary for the valid transaction of business of at least 20% of the voting members of the union or branch.

Counsel for appellants accepted the foregoing dictionary definition of quorum, but claimed notwithstanding the acceptance of such definition that there was no

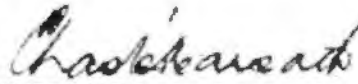
prohibition in the Act or the Schedule precluding the Association from adopting as a matter of internal management an alternative method of obtaining a quorum by using proxy votes. Appellants' case involves a departure from the literal meaning of the words in clause 21 to the Schedule. Section 37(1) of the Act does not permit of any alteration or amendment of the requirements specified in the Schedule and accordingly the contention of appellants that proxies can be used to establish a quorum is outside the provisions of the rules and necessarily fails. Section 37(1) and clause 21 of the Schedule require that the rules of a registered trade union "shall provide for all the matters specified in the Schedule" and the decision in Martin v. Scottish Transport & General Workers Union (supra) makes it clear that any purported deviation or alteration of the rules made in any manner other than in accordance with the Act has no validity. The difference in the construction of section 21 between appellants and respondents is not due to any ambiguity in the language, but to a difference of approach to the method of forming a quorum; we are of the opinion that the Legislature in enacting section 37(1) and clause 21 of the Schedule did not intend, or contemplate, the interpretation of clause 21, and the consequences thereof, urged by appellants; in our view the Legislature never intended any deviation from the clear literal meaning of clause 21, coupled with the ordinary meaning of the word quorum, and the mandatory requirements of clause 21 of the Schedule as enacted by section 37(1) of the Act. Therefore, in our opinion the learned trial Judge was correct when he said :

" Section 37(1) of the Act satisfies me that the legislature never intended any deviation from the clear mandatory requirement of paragraph 21 and the members of FPSA could not legally introduce a variation or optional method of that requirement into the rules which allowed a quorum to be formed by proxies. To the extent that Rule 81(a) purports to permit representation by proxy to form a quorum the Rule is in my view ultra vires."

145
ST

Accordingly, we affirm the orders made in the Supreme Court and dismiss the appeal.

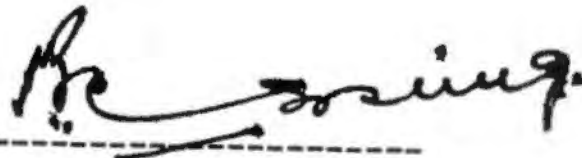
So far as costs are concerned the respondents appeared in person; they are not entitled to solicitors costs, but they advised they had lost time from work to prepare their case on appeal and asked for reimbursement. In the circumstances we allow the sum of \$75 to each of the respondents Tevita Fa and Jonacani Lewiniqila to be paid by the Association.



Judge of Appeal



Judge of Appeal



Judge of Appeal