THE COURT OF APPEAL, FIJI

[ON APPEAL FROM THE HIGH COURT]

CIVIL APPEAL NO. ABU 34 of 2021
[Employment Court of Appeal: 34 of 2018]

BETWEEN	:	**NASESE BUS COMPANY LIMITED**
		Appellant
AND	:	**TRANSPORT WORKERS UNION**
		Respondent
Coram	:	**Dr. Almeida Guneratne P**
Counsel	:	**Mr. D Nair for the Appellant** **Mr. R A Singh for the Respondent**
Date of Hearing	:	**20th April, 2023**
Date of Decision	:	**2nd June, 2023**

DECISION

[1] This is a matter that arose between the Appellant (a registered bus company) and the Respondent (a registered trade union). Thus, the matter being one within the area of Employment/Labour Relations, the original action was instituted by the Respondent in the Employment Tribunal (the Tribunal) seeking *"compliance orders"* as envisaged under Section 212 (1) (b) of the Employment Act (as amended) *"The Act"*.

The *"Compliance Orders"* sought by the Respondent

"a. The Respondent to deduct the Union fees and remit the same to the Appellant.
b. Respondent to enter into collective bargaining with the Appellant in accordance with Part 16 of "the Act".

c. *The Respondent to cease from issuing individual contracts to Union members. In the events an employee who is a Union member wished to migrate to individual contract, the Union must be consulted and only with the written consent of the employee.*
d. *Upon request from employees the Respondent to issue wages statement in accordance with Section 44(i) of "the Act."*

[2] The Appellant filed a motion to strike out the Respondent's action by disputing the names, signatures, authorities and employment identities of the persons contemplated in the Respondent's said action (as recounted in paragraph [1] above.

[3] "The tribunal" (it would appear) did not entertain the aforesaid striking out application separately but proceeded to issue the *"the compliance orders"* sought.

[4] The Appellant appealed against the judgment of the Tribunal to the Employment Relations Court (ERC) raising the following grounds:

"a. THAT the Learned Resident Magistrate erred in law and fact in issuing the said decision on affidavit material when the facts in question were in dispute.
b. THAT the Learned Resident Magistrate erred in law and fact in allowing the application when the facts and the validity of the Union membership and the consent forms for the deduction of the Union subscription was disputed.
c. THAT the Learned Resident Magistrate erred in law and fact when he ordered the Appellant to enter into a collective agreement which is contrary to section 150 of the Employment Relations Act (ERA).
d. THAT the Learned Resident Magistrate erred in law and fact when he ordered against the issuance of individual contracts in the absence of any agreed Collective Agreement registered with the Registrar of Trade Unions which is contrary to section 37 (1) (a) of the ERA.
e. THAT the Learned Resident Magistrate erred in law and fact when he ordered compliance with section 44 (1) of the ERA in the absence of any complaint filed by the workers or the Labour Officers.
f. THAT the Learned Resident Magistrate erred in law and fact when he failed to first determine the strikeout application filed by the Appellant in the proceeding before the Employment Tribunal."

[5] The *'ERC'* after hearing made orders as follows:

"i. That within seven (7) days from the date of the Order the Employer shall start deducting the Union fees in respect of all those employees who are currently employed by NBCL and whose names have been submitted by TWU.

ii. If there is any failure to deduct the Union fee, the employer will be liable for payment of the fee in arrears without deducting the same from the employees' wages.

iii. Further, if there is any failure to deduct the fees as outlined above, all the Directors of the company shall then show cause why an order for a penalty or a term of imprisonment should not be imposed on them.

iv. The NBCL is to meet the TWU within a period of 7 days for the purposes of collecting bargaining. The time and venue for the meeting shall be appointed by TWU. Any failure to attend the meeting shall be treated as contempt of an order of the Court and the Directors shall be answerable for such non-compliance.

v. The employees shall also be provided with the wages statement as and when they so request.

vi. The employer shall not issue any individual contracts to the subject employees until such time the parties enter into a collective bargaining. If any such action is done by the employer, the employees are to inform the TWU for it to take proper action for defiance of court orders. The employees are then at liberty to refuse to sign the individual contracts and they are not to be prejudiced by the employer.

vii. The employer to pay costs to TWU in the sum of $5,000.00 within a period of seven days."

[6] The Appellant has raised the following grounds in seeking leave to appeal against the said judgment of the ERC.

1. <u>THAT</u> the Learned Judge erred in law in misinterpreting that under section 47 (1) (b) of the Employment Act the Appellant is required to deduct Union fees whereas the deduction of Union fees is authorised under section 163 (1) and (2) of the Employment Act provided there is a duly executed Collective Agreement.

2. <u>THAT</u> the Learned Judge erred in law in misinterpreting that section 37 (1) of the Employment Act is applicable to only Foreign Contracts whereas section 37 (1) (a) requires all contract of service where the duration of employment is in excess of one month to be in writing.

3. <u>THAT</u> the Learned Judge erred in law and in fact in holding the Appellant to engage in Collective Bargaining negotiation which is contrary to sections 149 and 152 of the Employment Act that requires the parties to engage in

good faith for collective bargaining and should not be imposed upon the parties.

4. *THAT the Learned Judge erred in law and in fact in holding the Appellant to comply with section 44 (1) of the Employment Act in the absence of any complaint by the employees or the Labour Officers.*
5. *THAT the Learned Judge erred in law and in fact in upholding the compliance orders issued by the Employment Tribunal on 23rd July, 2018 when the basis and the particulars of the application was irregular and in dispute.*
6. *THAT the Learned Judge erred in law and in fact in not holding that the Employment Tribunal failed to provide valid reasons for not hearing the interlocutory application to strike out the compliance action due to serious incurable irregularities.*

    a) *The persons whose names appeared in the listing provided by the Respondent had not given their consent.*
    b) *The list of the persons provided in the listing did not correspond to the workers employed.*
    c) *Under section 47 (1) of the Employment Act only authorised deductions may be made by the Appellant with the consent of the workers and not the Respondent.*

7. *THAT the Learned Judge erred in law by issuing 7 days to comply with the orders without giving the right to appeal under section 245 (3) of the Employment Act, 2007.*
8. *THAT the Learned Judge erred in law and in fact by imposing the costs of $5,000.00 which is manifestly excessive, disproportionate and cannot be rationally justice under the prevailing circumstances."*

Discussion and reasoning

[7] I shall first take and deal with grounds 6 and 8 urged by the Appellant.

Re: Ground 6

[8] Rather than to fault the Learned Judge I commend the Learned Judge in that regard. I myself in several of my Rulings (Decision) I have pursued the view that, proceeding within proceedings ought not to be condoned for they lead to protracted litigation which view I re-iterate here without feeling the need to cite those precedents. The Rationale for saying so being that, a party's action and the opposing party's counter thereto are

sufficient premises for a Court to make a determination, an *"interviewing striking out application"* being subsumed in a party's opposition to an initial action.

[9] Accordingly, I reject the said ground 6 raised by the Appellant.

Re: Ground 8

[10] An order as to costs made by *"a Court"* is, prima facie, a matter of judicial discretion unless, it is shown to be unreasonable. The Appellant which is *"a company"* has not placed any material as to why it says that the costs of $5,000.00 ordered by the Court is unreasonable. Without making any attempt to do that as contemplated in Section 236 of *"the Act"*, the Appellant argued that the order for costs *"is an attempt to curtail litigants from filing appeals which is in breach of their right to access Justice due to fear of excessive costs if unsuccessful"* (vide: paragraph 1.50 of the Appellant's written submissions dated 30th November, 2022)

[11] Consequently, I reject ground 8 urged by the Appellant.

[12] I wish to say at this point that, this kind of forensic excesses must be avoided by draftsmen of pleadings and their written submissions.

[13] Of course, to the credit of (Mr.) Nair for the Appellant, he did not canvass the issue in his oral submissions.

The resulting position

[14] In the result I gave my mind to the remaining grounds of appeal urged viz; grounds 1 to 5 and 7.

[15] Taking them seriatim, the first ground is a complaint that the ERC in its judgment had misinterpreted Section 47 (1) (b) of the Employment Act.

[16] The second is the lament that, the Learned Judge had misinterpreted Section 37 (1) of the *"the Act"*.

[17] The third alleged ground is that the Learned Judge erred in law and in fact in holding the Appellant to engage in collective bargaining negotiation which is contrary to Section 149 and 152 of *"the Act"*.

[18] The fourth ground is that the Learned Judge (ERC) had erred in holding that the Appellant had failed to comply with Section 44 (1) of *"the Act"* in the absence of any complaint by the employees or the labour officers.

Pausing at this point to reflect on the said grounds urged

[19] Although I have not expressly referred to the impugned judgment of *"the ER Court"*, the basis of it which stood discernible to me in the light of the grounds of appeal urged, I was unable to say that *"the Court"* had misinterpreted the statutory provisions urged in ground 1 and 2 for which reason I reject the said grounds.

[20] However, I felt persuaded by (Mr.) Nair's submissions on the aforesaid grounds 3 and 4, in which regard I gave my mind to the Appellant's initial written submissions dated 30th November, 2022 followed by his further submissions dated 24th April, 2023 and the oral submissions made by him at the hearing before me taken in the light of (Mr.) Singh's oral submissions and the further written submissions dated 5th May, 2023, in the light of the factual material on record.

[21] In so far as ground 5 urged is concerned, I found that *"the ER Court"* had not given its mind to the issue complained therein.

Determination on the leave to appeal application

[22] In the result, while I am inclined to grant leave to appeal restricted to the grounds 3, 4, 5 and 7 urged, in addition thereto, I grant leave to appeal on the point urged on behalf of the Appellant that, whether the orders made by the ER Court amounted to *"further compliance orders"* (or incidental to the *"the initial compliance orders"* made by *"the tribunal and affirmed by "ERC),* the Appellant's argument being that, if *"they"* were *"further compliance orders,"* whether the Appellant was bound by them.

Re: The Appellant's application for *"a stay order"* and the Respondent's objection thereto

[23] (Mr.) Nair for the Appellant contended that, the case was fixed for the 21st July, 2023 before the ERC (the High Court) of *"the compliance orders"* being complied with or not being in issue.

[24] (Mr.) R.A. Singh in counter objected to *"any kind of stay order"* Learned Counsel contended and asked *"how could a stay order be helpful to the Appellant? What prejudice could result to the Appellant?"*

Determination thereon

[25] In my determination on the application for leave to appeal the judgment of the *"ER Court"*, I have granted leave on whatever limited grounds as articulated above.

[26] On 21st July, 2023, when the case is scheduled to be *"taken-up"* before the Court, the only issue to be considered would be *"the compliance orders"* against which this Court has granted leave to appeal.

[27] Yet, in the absence of *"a stay order"*, the Appellant would stand exposed to and liable for consequences for not complying with the said *"compliance orders"*.

[28] Accordingly, while granting leave to appeal the ER Court's Judgment on the grounds allowed as articulated above in this decision, I have no hesitation in granting *"a stay order"* to make any further orders pending the hearing and determination of the appeal before the Full Court.

Conclusion

[29] On the basis of the foregoing reasons I proceed to make the following orders.

Orders of Court:

1. *Leave to appeal against the impugned judgment of the Employment Relations Court is allowed on the grounds as articulated in paragraph [22] of this decision.*
2. *A stay of further proceedings in the ERC (the High Court) is granted for the reasons adduced in paragraphs (26) to (28) of this decision, pending the hearing and determination of the Appeal by the Full Court for which leave to appeal has been granted in terms of order 1 above.*
3. *The Registrar is prevailed upon to communicate this decision expeditiously to the "ER Court", in any event before the 21st July, 2023.*
4. *I make no order as to costs for the purposes of this application and the same shall await the determination by the Full Court in Appeal.*

COURT OF APPEAL FIJI

.....
Hon. Justice Almeida Guneratne
PRESIDENT, COURT OF APPEAL

Solicitors:

Nilesh Sharma Lawyers for the Appellant
Parshotam Lawyers for the Respondent