IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER:	**ERCA 21 of 2013**
BETWEEN:	**TPAF STAFF ASSOCIATION**
	APPELLANT
AND:	**FIJI NATIONAL UNIVERSITY**
	RESPONDENT
Appearances:	*Mr. D. Nair for the Appellant.*
	Mr. Viren Kapadia for the Respondent.
Date/Place of Hearing:	*Monday 9 March 2015.*
Date/Place of Judgment:	*Tuesday 17 March 2015 at Suva.*
Coram:	*Hon. Madam Justice A. Wati.*

JUDGMENT

Catchwords:

Employment Law – Appeal – Interlocutory decision – Need to obtain leave to appeal – judgment obtained in absence of a party can be set aside – procedure available at the lower Court needs to be exhausted- collective agreement – enforceability of a CA.

Cases Referred To:

1. ***Prince Vyas Muni Lakshman v. Estate Management Services Limited [unreported] Court of Appeal of Fiji Islands Civil Appeal Case Number: ABU 0014 of 2012.***

2. ***Vinod Raj Goundar v. Minister for Health [unreported] Court of Appeal of Fiji Islands Civil Appeal Case Number: ABU 0075 of 2006S.***

3. ***Bank of Baroda v. Fiji Bank and Finance Sector Employees Union [unreported] Employment Relations Court Case Number: ERCA 4 of 2009***:

Legislation:

1. ***The Employment Relations Promulgation 2007 ("ERP"): ss. 162(1) (c); 165(8); 233; 242(5) (e) (i).***
2. ***Magistrates' Courts Rules Cap. 14("MCR"): Order XXX Rule 5.***

The Background

4. On 26 August 2011, the appellant filed a notice of motion with a supporting affidavit at the Employment Relations Tribunal ***("ERT")*** seeking for an interpretation and implementation of clause 14 of the Collective Agreement ***("CA")***.

5. Clause 14 of the CA relates to group medical insurance for the employees of the respondent being members of the appellant. In particular it reads that:

   " The management and the Staff Association to mutually agree on the best group medical scheme available for implementation. The management contribution towards the scheme shall be within its current commitment and any sum beyond that shall be charged to staff accordingly and recovered through payroll deduction. The scheme shall be reviewed by management and staff accordingly".

6. The appellant at the lower Court claimed that it was initially registered as FNTC Staff Association and later changed its name to TPAF Staff Association in 2008 after the organization changed its name from Fiji National Training Council to Training Productivity of Fiji. The parties had entered into an agreement in 1992 which has been amended from time to time by consent of the parties.

7. An agreement amending the main agreement was signed on 20 March 2003 which had a retrospective effect from 1 January 2001. The amendment included that the immediate family members would benefit from the insurance scheme.

8. It was alleged that on 12 April 2012 the employer made a unilateral decision to exclude the family members from receiving the benefits under the medical insurance scheme and the discussions between the parties had turned futile which gave rise to the application at the ERT.

9. At the tribunal the respondent's position was that on 20 March 2003, an amendment was made to the agreement. Clause 14 was the amendment. The respondent says that the practice to include the family members of the staff for the medical insurance benefit was unlawful as the TPAF Board had not authorized or agreed to extend the medical scheme to the family members.

10. The respondent stated that the practice was stopped as it was unlawful and that past practices did not create a legal right as such. Clause 14 did not give any entitlement to the family members to enjoy such benefits.

11. Then on 14 March 2013, the respondent filed a motion to strike out the application for interpretation and implementation of clause 14 of the CA on the grounds that the amended CA dated 20 March 2003 was not registered as required by s. 162 of the ERP and as such not valid and enforceable.

12. The application for striking out was fixed for hearing on 13 November 2013. On that date the appellant did not appear and Mr. Kapadia argued his case and the ERT ordered that the application be struck out as prayed for.

The Appeal

13. Aggrieved at the decision to strike out, the appellant filed an appeal on the grounds that:

    1. ***The application for striking out was made late in the day.***

    2. ***There ERT failed to cite the legal provisions under which it struck out the case.***

    3. ***The ERT failed to take into account the position of the appellant that the certificate of registration of the CA was issued by the Registrar of Trade Union on 27 March 2003 but not signed which was an error on part of the office of the Registrar.***

4. ***The ERT had given directions that it would issue a ruling on whether the CA is enforceable but no such ruling was delivered.***

5. ***The issue before the ERT was simple on interpretation of the CA and should have been dealt with by the ERT instead of just striking out the matter.***

The Submissions

14. Mr. Nair argued that the ERT had granted order in terms of the motion which means that the striking out was granted on the basis that the CA was not registered. Mr. Nair argued that there was information before the ERT by an affidavit that the Registrar of the Union had issued the certificate of registration but that certificate was not signed by the Registrar. That fault cannot be levied on the parties especially the employees and their rights being snatched away from them. They have been enjoying the benefits from several years and to refuse them the benefit all of a sudden is unjustified.

15. The parties had filed their affidavits and written submissions and instead of striking out the matter, the ERT should have ruled on the substantive cause because the parties had stated their position through the affidavits and the submissions.

16. The ERT gave no justification or reasons why it struck out the matter except for saying that the application is struck out on the respondent's motion.

17. It was incumbent on the ERT to consider all the materials before it and deliver a proper written ruling on the matter as the Registrar of the Trade Union had admitted that it was the fault of their office but for all purposes the CA was deemed registered.

18. Mr. Kapadia stated that an order upon the motion to strike out the cause was granted after 3 consecutive non appearances of the appellant and when the motion was set for hearing. The striking out was granted because the appellant failed to produce a signed and stamped certificate of registration of an amendment to the CA dated 20 March 2003.

19. On 10 September 2013, the appellant had called on Rileshni from the Ministry of Labour who came with the relevant file and confirmed to the Chief Tribunal that there was no signed, stamped and registered amendment of the CA in the file. In absence of any registration, the amendment was unenforceable and had no effect pursuant to s. 34 of the Trade Disputes Act and s. 162 of the ERP.

20. Mr. Kapadia stated as a preliminary point that the appeal is not validly filed. Mr. Kapadia stated that the decision to strike out was made on an interlocutory application and so the decision to strike out is an interlocutory one thus leave to appeal ought to have been sought first before the appeal was filed. Mr. Kapadia argued that the requirement for leave is enunciated in s. 242(5) (e) of the ERP. Mr. Kapadia relied on ***Prince Vyas Muni Lakshman v. Estate Management Services Limited [unreported] Court of Appeal of Fiji Islands Civil Appeal Case Number: ABU 0014 of 2012*** which followed the case of ***Vinod Raj Goundar v. Minister for Health [unreported] Court of Appeal of Fiji Islands Civil Appeal Case Number: ABU 0075 of 2006S.***

21. On the substantive appeal, Mr. Kapadia argued that the appellant had never taken objection to it filing a motion late for striking out and that it actively participated by filing the opposition. The ground of delay was never raised and in any event there was no detriment to the appellant when the motion was filed. It had the opportunity to address the Court by the affidavits and submissions and attending at the hearing which opportunity it failed to take advantage of.

22. Mr. Kapadia argued that when there were 3 consecutive non-appearances, the appellant's application as struck out. The ERT had powers under ss. 233 and 213(d) of the ERP to do so.

23. It was already established by the Ministry of Labour that the CA was unregistered but that was not the only basis on which the striking out was based. It was also for the appellant's non - appearance to argue the case.

The Law and Analysis

24. The first important issue that I must decide is the preliminary point raised by Mr. Kapadia that this appeal is not validly filed in that the decision to strike out was an interlocutory one and leave to appeal must have been obtained.

25. S. 242(5) (e) (i) of the ERP states that no appeal shall lie except with the leave of the Tribunal or the Court from any interlocutory decision. The order for striking out was granted on the motion to strike out. To determine whether the order is an interlocutory one I have to follow the decision of the Court of Appeal in ***Prince Vyas Muni Lakshman v. Estate Management Services Limited [unreported] Court of Appeal of Fiji Islands Civil Appeal Case number: ABU 0014 of 2012*** which followed the case of ***Vinod Raj Goundar v. Minister for Health [unreported] Court of Appeal of Fiji Islands Civil Appeal Case Number: ABU 0075 of 2006S.***

26. From the decision of Vinod Raj Goundar the correct position of the law on what is a final decision and what interlocutory is made clear from paragraphs 37 and 38:

> ***" 37. This is the position. Where proceedings are commenced in the High Court in the Court's original jurisdiction and the matter proceeds to hearing and judgment and the judge proceeds to make final orders or declarations, the judgment and orders are not interlocutory.***
>
> ***38. Every other application to the High Court should be considered interlocutory and a litigant dissatisfied with the ruling or order or declaration of the Court needs leave to appeal to that ruling order or declarations. The following are examples of interlocutory applications:***
>
> ***1. an application to stay proceedings;***
> ***2. an application to strike out pleadings;***
> ***3. an application for an extension of time in which to commence proceedings;***
> ***4. an application for leave to appeal;***
> ***5. the refusal of an application to set aside a default judgment;***
> ***6. an application for leave to apply for judicial review".***

27. It is thus clear from the above ruling that an application to strike out is an interlocutory application and any decision thereon is interlocutory. As a result the appellant should have obtained leave to appeal the decision. There is no such leave obtained and as such the appeal is prematurely filed.

28. I will repeat what I had said in ***Bank of Baroda v. Fiji Bank and Finance Sector Employees Union [unreported] Employment Relations Court Case Number: ERCA 4 of 2009***:

> ***" 20. The Notice of Appeal should not have been filed in the first place without leave of the ERT or ERC.***
>
> ***21. Whether the orders issued by the Tribunal was right or wrong is not the issue here. The simple issue is whether the appeal should have been file with or without the leave.***
>
> ***22. The requirement for leave is not a cosmetic rule. It has profound purpose. That is why the requirement for leave is mandatory. No compliance of the rule is fatal and will affect the proceedings".***

29. I do not see any reasons why I must deviate from the above position. I must add that Mr. Nair's argument that not obtaining leave is an irregularity and must not nullify the proceedings is not correct as irregularity regarding the form of the proceedings may be validated and not irregularity regarding the substance. The requirement for leave is a substantive issue and not an issue as to the form of proceedings so such irregularity cannot be validated.

30. My finding is enough to strike out the appeal but I wish to go a step further and state that when the ERT struck out the application it did not state the reasons for the striking out. It however had only stated that order in terms of the motion was granted. The application in the motion was to strike out on the grounds that the CA relied on in the substantive cause was not registered.

31. It appears that the ERT was satisfied that the CA was not registered and it granted the orders as prayed for. The orders were made only after hearing the respondent on its application and in absence of the appellant. The proper procedure therefore was for the appellant to have gone back to the ERT and have applied for a setting aside of the orders. If the setting aside was refused then the appellant could have appealed against the refusal. There is already a provision for setting aside provided for by the MCR and that procedure must be exhausted before the appeal is filed.

32. ***Order XXX Rule 5*** of the ***Magistrates' Courts Rules*** states that ***"any judgment obtained against any party in the absence of such party may, on sufficient cause shown, be set aside by the court, upon such terms as may seem fit".***

33. An order to strike out is judgment against the appellant made in its absence. Under Order XXX Rule 5 of the MCR, the appellant should have applied for setting aside the order to strike out its application and to be heard. If the order was set aside then the motion to strike out would become current and the appellant would have had an opportunity to defend the application for striking out. If the setting aside was refused then the appellant could have appealed against the refusal to set aside the order striking out its cause.

34. Since order in terms of the motion was granted, it appears that the respondent's submission was accepted that there was no CA in place. It was for the appellant to have established that there was a CA which was registered. The Registrar of Trade Unions had shown a certificate of registration which was neither signed nor sealed. It does not matter that the appellant's had filed their affidavits and submissions; they still had to be present in Court on the hearing date to present their case. There are times when despite the written submissions, the Court wishes to clarify matters from the parties. That is why a hearing date is assigned. Parties must be present to prosecute their case.

35. S. 162 (1) (c) of the ERP states that a collective agreement has no effect unless it is registered by the Registrar. S. 165(8) states that a certificate of registration is proof of the fact that the collective agreement is binding and enforceable. It appears that the ERT has not given any validity to the unsigned and unsealed certificate of registration and found that the CA was not valid and enforceable. If that is the finding then the hurdle that the appellant has is that it cannot enforce a CA that is not binding and enforceable on the parties notwithstanding the past practices based on the CA. I need not say more than this.

36. It has not been challenged that Mr. Kapadia presented his case on his motion to strike out and that the orders were granted after hearing the counsel for the respondent. Under s. 233 of the ERP the ERT has powers to proceed to hear the matter if a party fails to appear. In this case that is what the ERT did by proceeding to hear the case in absence of the appellant. There was no error as to procedure.

37. The application for striking of a cause can be made at any stage of the proceedings. The appellant's submission that there was delay in making the application does not help its case.

38. Procedurally, this appeal is brought prematurely and cannot be entertained.

Final Orders

39. The appeal is struck for want of leave being obtained and for want of exhausting the procedures available at the ERT before appealing the matter.

40. The appellant is to pay to the respondent the costs of the proceedings in the sum of $1,500 within 21 days.

Anjala Wati
Judge
17.03.2015

To:

1. ***Mr. Damodar Nair for the Appellant.***
2. ***Mr. Viren Kapadia for the Respondent.***
3. ***File: Suva ERCA 21 of 2013.***