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IN THE SUPREME COURT OF FIJI  
Civil Jurisdiction  
ACTION NO. 271 OF 1980

Between:

TEVITA FA AND ANOTHER

PLAINTIFFS

- and -

TIMOCI BAVADRA & 16 OTHERS

DEFENDANTS

Plaintiffs in Person.

Mr. K. Chauhan for first 15 Defendants.

The Registrar of Trade Unions in Person.

J U D G M E N T

The plaintiffs are both civil servants and are financial members of the Fiji Public Service Association, the 16th defendant, which I shall hereinafter refer to as FPSA. The first fifteen defendants are office bearers or members of the National Council of FPSA the validity of whose elections on the 1st March, 1980 at the Annual General Meeting of FPSA is challenged by the plaintiffs. The 17th defendant is the Registrar of Trade Unions and a nominal defendant only. I will hereinafter refer to him as "the Registrar" and to the first 16 defendants as "the defendants".

The plaintiffs commenced this action by originating summons seeking certain declarations which I will refer to later. The plaintiffs also applied for certain injunctions which at the hearing they withdrew when informed by the Court that, if the declarations were made, there would appear to be no need for the injunctions.

Mr. M.P. Chaudhary, the 4th defendant and General Secretary of FPSA, in his affidavit in apposition sworn on the 30th June, 1980 and filed on the following

day, raised the issue, which was also argued by his counsel Mr. Chauhan, who appeared for the defendants, that this Court has no jurisdiction to entertain the plaintiffs' claim for relief as being premature in view of the provisions of sections 14, 15, 16 and 37(4) of the Trade Unions Act Cap. 80 which he alleges adequately provide for and vest powers in the Registrar of Trade Unions to first deal with any matters he considers inconsistent with the provisions of the Act or where the Trade Union or its officers act in breach of the Trade Union rules.

The only section of the four referred to by Mr. Chaudhary which has any relevance in my view in the instant case is section 37(4) which is as follows :

"37(4) 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."

That subsection is permissive and merely authorises the Registrar to institute proceedings which may competently be brought by a member of a trade union to restrain a trade union or officer thereof from acting in breach of its rules. The authorities quoted by Mr. Chauhan in support of his argument that at this stage the court has no jurisdiction have no relevance. They are authorities for the proposition that where a legislature provides for a procedure or remedy to be followed or pursued that procedure or remedy must first be exhausted before recourse can be had to the court.

The Act does not require a member to refrain from instituting court proceedings against his union until the Registrar has first decided what action he will take.

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.

If any authority is required to support the proposition that a member of a trade union may seek a declaration that rules of the union are illegal and void reference need only be made to the case of Amalgamated Society of Railway Servants v. Osborne (1910) A.C. p. 87 which went on appeal to the House of Lords.

It is convenient at this stage also to dispose of another argument raised by Mr. Chauhan that Rule 81 of FPSA's Constitution was approved by the then Registrar of Trade Unions when the Rules were registered in 1970 and the legality of the rules cannot now be challenged by a member of the union.

In Birch v. National Union of Railwaymen (1950) Ch. 602 the validity of a trade union rule which had been approved by the Registrar of Friendly Societies was successfully challenged in Court by a member of that Union and the member was held entitled to the declaration which he sought.

The dispute between the parties is whether there was a legal quorum at the Annual General Meeting of FPSA held in Suva on the 1st March, 1980 and whether the elections of the defendants were legal.

Section 37(1) of the Trade Unions Act provides as follows :

"37(1) 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."

Paragraph 21 in the schedule to the Act is as follows :

"21. 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."

At the relevant time there were 6095 members in FPSA made up as follows :

Lautoka	..	977
Nadi	..	455
Lautoka	..	291
Nausori	..	294
Suva	..	3,950
Levuka	..	55
Kadavu	..	25
Lau & Lomaiviti		40
Rotuma	..	8
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		6,095
		<hr/>

The above figures are taken from Mr. Chaudhary's affidavit. The second reference to Lautoka may be an error and should read "Labasa" as that town is not listed.

It was not stated whether all the members were financial at the relevant time but, assuming they were, 20% of that number would be 1219 which would be the minimum number of voting members required by the Act to form a quorum at any of the union meeting.

The Rules of FPSA were registered on the 26th August, 1970. Rule 81(a) thereof seeks to make provision for a quorum in the following terms :

"QUORUM

81.(a) Presence of twenty percentum 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."

Rule 86 which is also of some relevance is as follows :

"86. 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."

Rule 87 is as follows :

87. 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; and
  - (ii) one additional delegate where the total exceeds a multiple of 50.
- (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.

(2) 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."

Rule 87 is the machinery designed for representation of Branches at any Annual or Special General Meeting. The introduction of the rule was no doubt due to recognition of the difficulties faced by members being outside Suva in attending meetings of the Union. Paragraph (b) originally provided that a branch was entitled to send one delegate for every 20 members eligible to vote at such meeting and one additional delegate where the total member of such members exceeded a multiple of 20. Paragraph (d) of the original rule provided that every vote of a delegate was to be counted as 20 ordinary votes.

At some later date, which was not stated, Rule 87 was amended to provide that a Branch could send one delegate for each 50 members and for every vote cast by a branch delegate to count as 50 ordinary votes. It is a reasonable assumption that the rule was amended to overcome difficulties experienced in forming a quorum. The effect of the amendment on Suva members which I will refer to later cannot have been appreciated when it was passed.

It is not disputed that there were not 1219 voting members of FPSA physically present at its last Annual General meeting. There were in fact only about 200 persons (including delegates) present but there could have been less than this number. There were however 27 delegates from the Branches all entitled to a single vote which could, if the vote was used, be equivalent to 50 ordinary votes when counted. Together they had the potential voting strength of 1350 members, if they all voted a figure in excess of 20% of the then membership of FPSA.

The defendants' case is that Rule 81(a) does comply with paragraph 21 of the schedule to the Act and that there is nothing in any event in the act to prevent FPSA from providing in its Rules for an alternative means of achieving the

statutory quorum of 20% of the voting members of FPSA namely by the use of proxy votes. They argue that Rule 81(a) is not in breach of section 37(c) of the Act.

This view is not shared by the plaintiffs nor is it shared by the Registrar, who on the 24th August, 1979 wrote to the General Secretary of FPSA drawing its attention to his view that Rule 81 as framed was contrary to the requirements of section 37 of the Act. The Registrar gave notice to the General Secretary requiring the deletion of offending words (relating to use of proxies) from Rule 81 as soon as possible. The Registrar also asked for written confirmation that this would be done and that in addition the Union would not rely on Rule 81 as a valid provision meantime.

The General Secretary replied to the Registrar by letter dated the 5th September, 1979 and stated therein (inter alia).

"In the meantime you have my assurance that the FPSA will not rely on the present provisions of the Constitution in determining a quorum for its A.G.M."

In his letter Mr. Chaudhary stated he would place the Registrar's letter before the National Council of FPSA. There was a meeting of that Council on 22nd September, 1979 but the letter was not placed before the Council on that occasion. Mr. Chaudhary in his affidavit explains why the letter was not placed before the Council on that occasion and stated it was put before the Council on the 29th February 1980, which was the day before the Annual General Meeting of FPSA. FPSA Executive decided to ignore its General Secretary's undertaking and Mr. Chaudhary's written assurance to the Registrar was not honoured by FPSA.

The Annual General Meeting was held and Rule 81 was relied on by FPSA in breach of its Secretary's assurance to the Registrar. The 50 ordinary votes that each vote of 27 delegates present were worth in voting strength, were totalled and utilised to represent the presence of 1350 voting members at the meeting and more than made up the required quorum of 1219

members. Mr. Chaudhary could not state precisely how many members were at the meeting but he did know how many delegates were present. It would appear members were not counted but delegates were.

The deliberate breach by FPSA of what was a written undertaking to the Registrar is deserving of the strongest condemnation. FPSA's wilful action would justify the Registrar's cancellation or suspension of the Union's registration under the provisions of section 14(1)(d) of the Act. Mr. Chauhan glossed over the matter by stating that his client, Mr. Chaudhary was not authorised to give the assurance he gave.

In interpreting paragraph 21 in the schedule to the Act, section 37(1) of the Act must be borne in mind. That section makes it mandatory for the rules of every trade union to provide for all the matters specified in the schedule. Specifically that section prohibits alteration or amendment of the requirement specified in paragraph 21 so that a rule purporting to give effect to that requirement ceases to give full effect to the requirement.

A "quorum" is defined in the Shorter Oxford English dictionary as "a fixed number of members of any body, society, etc. whose presence is necessary for the valid transaction of business."

I do not consider there is any difficulty in interpreting paragraph 21. The words and meaning are clear. It is a mandatory requirement that the rules of FPSA must provide that there be present at any meeting of the union to form a quorum, not less than 20% of the voting members of the Union. On the figures before me at least 1219 voting members of FPSA should have been present at the last Annual General Meeting of FPSA to form a quorum. Only about 200 were present. Part of FPSA Rule 81 does in fact contain the statutory rule but the rule goes further and purports to permit formation of a statutory quorum by the use of proxies.



FPSA may provide in its rules for a larger percentage of voting members to be present to form a quorum but it cannot legally reduce the number below 20% of the voting members. There is no doubt at all in my mind that the legislature intended in respect of all trade unions that the specified percentage of voting members of a union be personally present to form a quorum at all meetings of their union. The percentage figure of 20 may be too high in some cases but that is the figure required by the legislature and it must remain that figure until the law is changed.

I have now to consider whether FPSA could use proxies to form a quorum. A 'proxy' is a person appointed to act for another. He is also "a person, usually appointed by written authority, by a person entitled to vote personally, to vote at the discretion of the proxy" (Whartons Law Lexicon 14th Edition.)

The editorial note to Re Waxed Papers Ltd. (1937) 2 A.E.R. 117 states :

"Proxies are purely the creatures of the articles of association of a company since there is no common law right to vote in this way."

Reference is also made to voting by proxy in Halsbury Volume 5 second edition at p.364 paragraph 592 where it is stated :

"There is no common law right on the part of the members to vote by proxy. Where the right exists, it depends on the contract between the company and its members as expressed in its regulations, the provisions of which, such as, for instance, those regarding attestation, must be strictly complied with."

Section 37(1) of the Act satisfies me that the legislature never intended any deviation from the clear mandatory requirement of paragraph 27 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.

However, if I am incorrect in this view, and formation of a quorum is permissible by the use of proxies Rule 81(a) has to be reconsidered. The rule is badly worded and the meaning is obscure. Rule 86 expressly prohibits members voting by proxy but Rule 87 permits a Branch being represented by delegates. It does not deal with proxies. "Proxy" in Rule 81(a) can only refer to a delegate who represents a Branch but not any particular member or members. He is not the proxy of any member of his Branch. A delegate can only cast one vote and that vote can be worth 50 ordinary votes if he uses his vote, but as I will demonstrate later, his vote can be valueless. Indirectly he may be said to represent a number of voting members of his Branch if he votes because of the value of his single vote but he is not a proxy nor does he vote by proxy.

The Association in the instant case when determining whether a quorum was present at the last Annual General Meeting treated each delegate as being present representing 50 voting members. So treated the 27 delegates present at that meeting were counted as representing that 1350 voting members were present by proxy at the meeting a number more than sufficient on their own, to form a quorum in the eyes of FPSA. If that state of affairs is legally permissible there is nothing to stop Rule 87 being changed again to provide for a delegate for every 200 voting members to represent a Branch. Lautoka and Nadi Branches between them sending only 7 delegates could then form a quorum with 7 delegates. Judging by the past apathy displayed by Suva members, who do not have a Branch, Lautoka and Nadi Branches together could control the union of over 6000 members with only 7 delegates. A ballott held to decide whether the members should take strike action could be passed resoundingly with 7 votes - the

unanimous votes of 1400 members !

I have referred to the fact that a delegate's vote may be valueless. This follows from the proviso to paragraph (a) of Rule 37 and subsequent paragraphs. An example will demonstrate the position. A Branch with 100 voting members can send 2 delegates whose 2 votes (if they vote) are counted as 100 ordinary votes. If 20 members of that Branch turn up at the meeting and vote their names are erased from the list of voting members for that Branch. The delegates 2 votes can then only be counted as totalling 80 ordinary votes. If all 100 members turn up and vote the delegates 2 votes are valueless.

If Rule 31(a) has the meaning and effect that FPSA contends it has, the rule is virtually unworkable if delegates are relied on to form a quorum.

The voting value of a delegate's vote cannot be ascertained at the beginning of the meeting if Branch members are present, as it is only when they have exercised their right to vote or have declined to do so and balloting takes place that a delegate's vote, if cast, can be evaluated.

If I am wrong in my view and proxies can legally be used by FPSA to form a quorum, Rule 31(a) can be interpreted so as to make it work and be *intra vires*. A delegate does not under rule 37 have to be a member. He should be treated as representing only one member when forming a quorum. I am inclined to the view that the Registrar in 1970 may have put such a construction on Rule 31(a) which is why he accepted the Rule as framed for registration. If proxies are permitted to form a quorum in the instant case there would still have to be, in my view, 1219 persons, whether voting members or proxies for voting members, actually present by head count to form a quorum.

FPSA's interpretation of the rule is quite illogical despite the fact that the framers of the rule may have intended that result but if the rule can be so

interpreted it is in any event a very serious alteration of the mandatory requirement in paragraph 27 and therefore contrary to section 37(1) of the Trade Unions Act.

In Ernest v. Loma Gold Mines Ltd. (1897) 1, Ch.1 a somewhat similar situation arose with regard to voting. The Company's articles permitted voting by proxy. On a show of hands the Chairman of the meeting counted the vote of each person holding proxies as one vote notwithstanding he held a large number of proxies. This was held to be the correct procedure.

Lindley L.J. said at p. 6 !

"Absent members who have appointed proxies vote by those proxies; but unless a poll is demanded the person present is only counted once, however numerous may be the persons whom he represents. Such is admitted to be common practice."

I would also add that such procedure is also common sense.

Where there is a statutory quorum requiring the presence of a fixed number of persons in my view each person present can only be counted once notwithstanding he holds a number of proxies. On the evidence before me there was not a legal quorum at FPSA's last Annual General Meeting either in person or by proxy and it follows that FPSA could not legally transact any business at that meeting.

In a letter to the Registrar Mr. Chaudhary pointed out the difficulties FPSA faced in holding meetings. Those difficulties appear to have two causes. One cause is that in the Fiji scene of scattered islands and areas the Association has grown far too large making personal attendance difficult and costly for about one third of the members. The other cause is the apparent apathy of members who could attend meetings but do not do so. 200 members turning up for a meeting when 1219 were required to form a quorum hardly justifies the continued existence of the association. This state of affairs has forced FPSA to seek to amend or interpret the rules so as to overcome the problem of forming the quorum required by law and thus remain in existence.

So far as the plaintiffs are concerned the impression I gained was that their initial concern was the unfairness of Rule 81 and of Branch delegates being given voting powers which swamped the votes of members resident in Suva who have no Branch and therefore are not entitled to send delegates to a meeting. Fiftyone Suva members must attend to outvote one Branch delegate !

Rule 87 may work unfairly now a delegate's vote is worth 50 votes but, it is not in my view invalid. The Rule was presumably duly passed by members and the remedy for those who seek to change the Rule is by the method provided in the Rules. This Court cannot in this instance interfere.

I hold that Rule 81(a) is invalid to the extent that it seeks to provide an optional method of forming a quorum by the use of proxies. In any event I would hold that the rule does not bear the interpretation placed on it by FPSA and that no legal quorum can be formed by treating one individual present holding a number of proxies as being equivalent to the presence of the number of members he represents.

There was not a legal quorum at the last Annual General Meeting of FPSA and all business purporting to have been conducted at such meeting has no validity.

I grant the first declaration sought in amended form necessitated in part by my holding that Rule 87 is not invalid in the following terms:

I declare that Rule 81(a) of the Constitution of the Fiji Public Service Association is invalid and null and void to the extent that it purports to provide for an optional method of forming a statutory quorum by the use of proxies such optional method being in conflict with paragraph 21 of the schedule to the Trade Union Act Cap. 80 and being an alteration and variation thereof in breach of section 37(1) of the said Act.

The second declaration sought by the plaintiffs is to the effect that the meeting held by FPSA on the 1st March, 1980 at the Civic Auditorium New Town Hall was "invalid, null and void". In my view the meeting was not invalid. It was the Annual General Meeting of FPSA presumably properly convened. In the absence, however, of a statutory quorum at such meeting the members present could not validly conduct any business but it was nevertheless a properly convened meeting which should have been adjourned because there was no quorum.

I therefore decline to make the second declaration sought but the plaintiffs are entitled to the third declaration sought in an amended and shortened form as follows :

I declare that the purported elections of the fifteen defendants first named in this action to the offices in the Fiji Public Servants Association shown after their respective names in the summons in this action by the members of FPSA attending and voting at the Annual General meeting of FPSA held in Suva on the 1st March, 1980 are invalid on the grounds that at such meeting there was not present the statutory quorum of 20% of the voting members of FPSA as required by the provisions of the Trade Unions Act.

The plaintiffs appeared in person and are not entitled to solicitors costs but I order that the defendant, FPSA, refund to the plaintiffs the court fees paid by them in this action.

(R.G. KERMODE)

JUDGE

SUVA,

20th August, 1980.