

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

HBC Action No. : 216 of 2011

BETWEEN : **FIJI ORAL HEALTH WORKERS ASSOCIATION** on behalf
of duly registered members of Fiji Dental Practitioners of Lot 20
Nasilivata Road, Nadera.

PLANTIFF

AND : **FIJI DENTAL ASSOCIATION** of PO Box 14222, Suva, Fiji

DEFENDANT

BEFORE : **Justice Deepthi Amaratunga**

COUNSEL : **Mr. W. Hiuare** for the Plaintiff

Mr. N. Barnes for the Defendant

Date of Hearing : **23rd April, 2014**

Date of Decision : **20th June, 2014**

DECISION

INTRODUCTION

1. The Plaintiff (FOHWA) filed the summons seeking amendments to the originating summons. The reason for seeking an amendment was the change of the circumstances. The events had in fact overtaken the proceedings as a new AGM under new Rules were held by Defendant. Initial apprehension and fear of the Plaintiff was to stall the AGM under the draft Rules. The issues of AGM draft rules are no longer issues as new rules are now adopted and AGM was held. The Defendant (FDA) alleges that the initial originating summons was premature as there were no rules adopted. The issues were relating to Medical and Dental Practitioner Decree 2010 (the Decree) where FOHWA members sought membership in FDA in terms of the Decree, and delay of over 18 months by FDA to admit members of FOHWA.

FACTS AND ANALYSIS

2. The Plaintiffs filed a summons dated 28th June, 2013 seeking an amendment of the originating summons. This summons had initially listed before Justice Balapatabendi and later this was allocated to me. At the hearing the Defendant's counsel admitted that the Plaintiff could amend the originating summons, but sought costs on indemnity basis.
3. The reasons for seeking indemnity costs are summarized in paragraph 22 of the written submissions as follows:
 1. *The rules on amendments allow amendment if the other side can be compensated in costs.*
 2. *FDA was, and still is, a small professional body with a part time executive.*
 3. *The litigation has already had real cost consequences for FDA and to date the real questions for determining have not been fully identified*
 4. *FDA'S current membership numbers are suffering as a result of the proceedings.*
 5. *The Plaintiff, FOHWA has been warned on more than one occasion that it was incurring a cost risk unnecessarily.*
 6. *The Plaintiffs say, in heir final affidavit, that by seeking costs the Defendant is attempting to deny them access to Court. That is an after the fact gloss put on the facts by a Plaintiff who has been repeatedly warned that unnecessary costs were being incurred.*
 7. *The law on amendments are clear the appropriate response is normally to allow them provided justice can be done by an award of costs. To claim that by seeking costs the defendant is somehow attempting to prevent the Plaintiff exercising a lawful right misses the point that right must be exercised responsibly- if the consequence of their irresponsibility is that the Plaintiffs cannot proceed then they have only themselves to blame.*
4. From the above grounds the Defendants are alleging that Plaintiffs were irresponsible and could not proceed with the initial originating summons without amending it, hence the costs incurred up to the amendment was wasted and should be granted as the indemnity cost.
5. On 19th July, 2011 nearly after 18 months from the Medical and Dental Practitioner Decree 2010, the solicitors for the Defendants had stated

'(c) Under the current FDA rules, has not yet made Rules which can accommodate the membership of non-dentists in FDA. The delay is unfortunate.....'

So, they had admitted the delay on their part for not complying with the said Decree for more than 18 months. This long delay had resulted this litigation and now the Defendants cannot say the application of the Plaintiff was premature.

6. The originating summons was filed on 2nd August, 2011 seeking following orders;

- a. *A declaration that the Defendant and its agents and servants be restrained from holding its Annual General Meeting scheduled to 6th to 7th August, 2011 until further order of this court.*
- b. *A declaration that Defendant and its agents and servants be restrained from adopting any part or parts on the 12th draft copy of the constitution of Fiji Dental Association until further order of the court.*
- c. *A declaration that an interim committee be appointed from Division of Dental practitioners in Fijian and the said Committee shall hold the power to prepare and finalize the Rules of the constitution and further had the power to hold special general meeting for electing office bearers.*
- d. *A declaration that duly registered individual members of the Plaintiff's entitled to full membership to Fiji Dental Association pursuant to section 108(2) of the Medical and Dental Practitioner Decree 2010.*
- e. *A Declaration that registered individual members of the Plaintiff entitled to full categories membership related to division of dental practice pursuant to section 111(1)(d) of the Medical and Dental Practitioner Decree 2010.*
- f. *The Defendants to pay the Plaintiff, costs of and incidental to this proceeding on a full indemnity basis.*
- g. *Further or such other relief....'*

7. On 19th June, 2012, the matter was adjourned till 28th September, 2012 for mention in order to allow the AGM to be held in the month of August 2013, but it was not held in the month of August as anticipated by all the parties to this action.

8. From the above order of the court, the injunctive orders sought against the intended AGM became futile and the amendment to the originating summons was a necessity. I cannot accept that the Defendants' contention that the Plaintiff's negligence was the main reason for the need of amendment, and it was consequential. It should also be noteworthy that Defendants had ample opportunity in 2010 AGM to address the issue of non-dentist members in FDA under the decree. The decree was gazette on 4th January 2010 but failed

to do so and even as late as 19th July 2011. There were no rules to admit members of Plaintiff to FDA.

9. The main reason for seeking amendment was said order of the court that postponed the hearing of the originating summons to a date after the AGM, when the said originating summons included a restraining order from the court to prevent the AGM being held.
10. The Defendant's position that the originating summons was premature fails as the said originating summons sought a restraining order from the court from conducting AGM, the reason was the delay in admission of non dentists to FDA under the Decree.
11. So the amendments were necessitated by the conduct of the all the parties and also not proceeding with the hearing relating to the restraining order sought in the originating summons. The originating summons in its initial form cannot be considered as premature considering the reliefs sought by the Plaintiffs at that time and FDA admitted delay on the part. I cannot consider the initial restraining order against AGM premature since there was a delay of more than 18 months for compliance with the Decree for allowing the members of the Plaintiff membership in the Defendant. Before litigation the Plaintiff had warned the Defendants of the intending action, and sought membership in FDA.
12. In the circumstances it may not be possible to say that the application for stay of the AGM was premature as the Plaintiff was not certain as to the rules of the intended AGM at that time and the draft rules were not acceptable to the Plaintiffs.
13. Since AGM was held and the new Rules adopted now, the Plaintiff cannot proceed with the originating summons filed initially seeking to restrain the AGM and the other orders sought before the adoption of the new rules.
14. The events have overtaken the proceedings in the court and I cannot consider the initial application as premature, but at the same time said originating summons needs amendments suggested due to the events that preceded.

15. Admittedly, there was delay in implementation of the provisions in the Decree. The Decree was gazette on 4th January, 2010 and even as late as 19th July 2011 there were no rules to accommodate the members of the Plaintiff membership in Defendant. The initial apprehensions and inordinate delay of more than 18 months and the draft rules resulted this action by way of originating summons. No injunctive orders were granted and Plaintiff had allowed the AGM to proceed.
16. In the case of Attorney General of Fiji v TupouTokaiwa Senirewa Draunidalo Fiji Court of Appeal No ABU0006 of 2008, (unreported) at paragraph 9 held
‘The award of indemnity costs would only be considered in exceptional cases where the conduct of a party (or, possibly, its legal representatives) was reprehensible to a significant degree’. (emphasis added)
17. I cannot consider the Plaintiff’s conduct as reprehensible so that it would warrant indemnity costs. All the costs incurred by the Defendant will not be wasted due to the amendment, but inevitably amendment will incur additional costs to the Defendants and for that a cost should be awarded. In the circumstances the amendment sought in the originating summons allowed subject to a cost of \$1,500. This cost should be paid within 14 days and if costs not paid amended originating summons will deemed struck off. The costs of this application is cost in the cause.

FINAL ORDERS

- a. The order in terms of the order 1 contained in the summons dated 28th June, 2013 subject to payment of \$1,500 as cost for the amendment within 14 days. If cost not paid amended originating summons is deemed struck off.
- b. The amended originating summons to be filed and served within 14 days from today.
- c. The cost of this application is cost in the cause.

Dated at Suva this 20th day of June 2014.



Amaratunga
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Justice Deepthi Amaratunga
High Court, Suva