IN THE COURT OF APPEAL, FIJI

[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 056 of 2020

[Suva High Court Civil Case No. HBC 88 of 2012]

BETWEEN : **SUVA CITY COUNCIL**

Appellant

AND : **SETAVANA SAUMATUA**

Respondent

Coram : **Jitoko, VP**
Dayaratne, JA
Morgan, JA

Counsel : **Ms N. Choo for the Appellant**
Mr I. Fa for the Respondent

Date of Hearing : **06 July 2023**

Date of Judgment : **28 July 2023**

JUDGMENT

Jitoko VP

[1] I have had the advantage of reading in draft the judgment of Morgan JA. I concur with his opinion that the Orders of the Court below ought to be affirmed.

Dayaratne JA

[2] I have read the judgment in draft of Morgan JA and agree with his reasons and conclusion.

Morgan JA

Introduction and Facts

[3] This appeal is filed by the Appellant (the original defendant) for orders inter alia that an Interlocutory Judgement of the Honourable Justice Amaratunga delivered in the High Court on the 28 February 2020 be wholly set aside and that Civil Action No 88 of 2012 be dismissed.

[4] The facts of the matter are not disputed. The brief facts were set out by Amaratunga. J in his judgment as follows:-

> *"2. The facts of this matter are not disputed.*
>
> 3. *The Plaintiff was employed by the Defendant under an employment contract. The said contract was a contract of service.*
>
> 4. *On 8.01.2010 the Defendant received a directive from the Permanent Secretary of the Prime Minister to immediately dismiss the employment of a number of persons. The reason was alleged anti-Government blogging activities during office hours.*
>
> 5. *Defendant received a directive from its line Minister on 2.2.2010 to terminate employment of employees including Plaintiff.*
>
> 6. *Defendant terminated the employment of the employees on 4.2.2010 acting on the directive given on 8.1.2010 and in accordance with the directive and decision given by line Minister on 2.2.2010.*
>
> 7. *Plaintiff filed a civil action against the Defendant on 15.3.2012, inter alia for breach of contract, by Defendant.*
>
> 8. *Summons for strike out is based on interpretation of section 30 of Essential National Industries (Employment) Decree No 35 of 2011.*

9. *As an alternative ground of strike out Defendant states that section 188 (4) of Employment Relations Act 2007, was not complied with, hence statement of claim needs to be struck off."*

Background

[5] Following the Respondent's dismissal, as quoted above, she filed a Writ of Summons and Statement of Claim (*"the Respondent's Claim"*) in the High Court on 15 March 2012 against the Appellant wherein she claimed the following reliefs:-

> *(a) Damages against the Defendant for breach of contract for the unlawful termination (as a City Lawyer) whereby the Plaintiff claims for the following:*
>
> *(1) Balance of the Contract Salary as at the 8 January 2012 amounting to $92,316.00 (Ninety Two Thousand Three Hundred and Sixteen Dollars); and*
>
> *(2) Balance of the Housing Allowance as at 8 January 2012 amounting to $8,809.00 (Eight Thousand Eight Hundred and Nine Dollars)*
>
> *(b) Exemplary Damages against the Defendant in the manner of the abrupt, unfair, and wrongful dismissal, and for slander in the sum of $100,000.00 (One Hundred Thousand Dollars);*
>
> *(c) General Damages;*
>
> *(d) Costs of this action;*
>
> *(e) Any other relief this Honourable Court deems just.*

[6] The Appellant filed its Statement of Defence on 15 May 2012 and the Appellant filed its Reply to Defence on 15 June 2012.

[7] The usual pleadings were thereafter filed by the parties and a Pre-Trial Conference was held and minutes of that conference were filed on 11 July 2015.

[8] On 10 February 2016 when the matter was ready to proceed to hearing, the Appellant filed a summons in the High Court seeking an order that the Respondent's action be struck out and dismissed on the basis that the High Court had no jurisdiction to adjudicate on the matter by virtue of section 173 (4) of the Constitution.

[9] On 25 May 2016 the Appellant's said summons to strike out was dismissed by Hamza.J.

[10] On 13 June 2016 the Appellant filed a Summons in the High Court for leave to appeal the above decision and Hamza J dismissed the said Summons and refused leave to appeal on 24 November 2016.

[11] The Appellant then filed a summons in the Court of Appeal appealing the above decisions of Hamza J.

[12] On the 8 March 2019 the Court of Appeal dismissed the Appellant's summons and affirmed the rulings of Hamza J of 25 May 2016 and ordered that the case be sent back to the High Court for further trial.

[13] A trial date was set for 30 September 2019 however on 28 August 2019 the Appellant filed the current Summons to strike out the Respondents Statement of Claim pursuant to section 30 of the Essential National Industries (Employment) Decree 2011.

[14] After considering the Affidavits filed in support of and in opposition to the Summons and hearing the parties, the Appellant's summons was dismissed by Amaratunga J on 28 February 2020 and an application to the High Court for leave to appeal this decision was also dismissed.

[15] The Appellant then filed notice and grounds of appeal in this court on the 28 September 2020 wherein it sought orders inter alia that the Interlocutory Order of the High Court delivered on 28 February 2020 by Amaratunga J be wholly set aside and Civil Action No. 88 be dismissed.

Appellants Grounds of Appeal:-

[16] In its Notice and Grounds of Appeal, the Appellant relies on six grounds of appeal which I summarise as follows:-

1. *That the learned Judge erred in law in not holding that the Respondent's claim for breach of employment contract was not caught by section 30 of the Essential National Industries (Employment) Decree 2011 ("ENI") and in doing so misapplied the principles set out by the Court of Appeal in* ***Vinod v Fiji National Provident Fund*** *(2016) FJCA 23, ABU 0016 of 2014. ("VINOD")*

2. *That the learned judge erred in law when he failed to consider the effect of section 28 of the ENI and in particular that it precluded not only cases under the Employment Relations Act 2007 ("ERA") but also under other law.*

3. *That the learned judge erred in law when he held that there was nothing in the ERA which precluded an employee from seeking a civil remedy for breach of contract in the High Court for termination of employment and that the common law remedy for breach of contract was not expressly excluded by the ERA and that where a party elected to institute a civil action in the High Court such action couldn't be terminated by section 30 (2) of the ENI which applied only to proceedings commenced under the ERA.*

4. *That the learned judge erred in law in holding that section 266 (1) of the ERA (as amended) did not apply because the employer was not a Minister of the government of Fiji.*

5. *That the learned judge erred in law in holding that section 188 (4) of the ERA (as amended) could not apply to the present civil litigation.*

6. *That the learned judge erred in law when he failed to address and consider a further relevant ground that was set out in paragraph 26 of an affidavit of Azam Khan sworn on the 28 August 2019 and filed in the High Court in support of the Appellants application to strike out.*

Issues

[17] The issues in this appeal are:-

a. Does Section 30 of ENI apply to the Respondent's claim?

b. Does VINOD unequivocally *"oust"* the jurisdiction of the High Court to hear the Plaintiff's claim?

c. Does Section 28 of ENI preclude actions in the High Court against a designated corporation for breach of employment contract?

d. Does Section 266 (1) of the ERA apply to the Respondents claim?

e. Does Section 188(4) of the ERA apply to the Respondent's claim?

Consideration of Appellants Grounds

[18] Grounds one and three cover the same issues and I will deal with them together.

[19] *Section 30 of the ENI states:-*

"Certain decisions not to be challenged

30-(1) No court, tribunal, commission or any other adjudicating body shall have the jurisdiction to accept, hear, determine or in any other way entertain any proceeding claim, challenge or dispute by any person or body which seeks or purports to challenge or question-

(a) The validity, legality or propriety of this Decree;

(b) Any decision of any Minister, the Registrar or any State official or body made under this Decree; or

(c) Any decision of any designated corporation made under this Decree.

(2) Any proceeding, claim, challenge or dispute of any nature whatsoever in any court, tribunal, commission or before any other person or body exercising a judicial function, against any designated corporation that ***had been instituted under or involved the Employment Relations Promulgation 2007 before the commencement date of this Decree*** *(the highlighting is mine) but had not been determined at that*

date or is pending on appeal, shall wholly terminate immediately upon the commencement of this Decree and all orders whether preliminary or substantive made therein shall be wholly vacated and a certificate to that effect shall be issued by the Chief Registrar or the registrar of the Employment Relations Tribunal.

(3) Where any proceeding, claim, challenge, application or dispute of any form whatsoever, is brought before any court, tribunal, commission or any other adjudicating body in respect of any of the subject matters in subsection (2) then the presiding judicial officer, without hearing or in any way determining the proceeding or the application shall immediately transfer the proceeding or the application to the Chief Registrar or the registrar of the Employment Relations Tribunal for termination of the proceeding or the application and the issuance of a Certificate under subsection (2).

(4) A certificate under subsection (2), is for the purposes of any proceedings in a court, tribunal, commission or any other person or body exercising a judicial function conclusive of the matters stated in the certificate.

(5) A decision of the Chief Registrar or the registrar of the Employment Relations Tribunal to issue a certificate under subsection (2) is not subject to challenge in any court, tribunal, commission or any other adjudicating body.

[20] The Appellant contends that any action instituted by an employee in a designated corporation was caught by Section 30 of the ENI and it did not matter whether the action was instituted in the Employment Relations Court (under the ERP) or the High Court.

[21] The Appellant further contends that the Court of Appeal in **VINOD** had unequivocally ousted the jurisdiction of the High Court to hear the Plaintiff's claim against a designated corporation if the action was founded on an employment contract irrespective of whether the action was filed in the Employment Relations Court or in the High Court Civil jurisdiction.

[22] Section 30 (2) only applies to actions that had been instituted under or involved the ERA before the commencement date of the ENI. The language in the section is clear and unambiguous. If it was the intention of the legislature that all actions including civil actions

were to be caught by section 34 then this would have been stated in the provision however Section 34 does not say this. The section only terminated proceedings, claims challenges or disputes that had been instituted under or involved the ERA. The Respondents claim is a common law action for breach of contract instituted in the High Court Civil jurisdiction.

[23] The ERA does not remove the jurisdiction of High Court to hear claims involving employment contracts. The Appellant contends that the Respondent's employment with the Appellant was governed by her contract of employment and the ERA. The contract does not say this. All it says is that the contract shall be construed and interpreted in accordance with the laws of Fiji which does not mean that it is governed by the ERA. The Appellant further contends but there was nothing in the Contract that provided that the terms and conditions of the contract would be governed by common law. This is a strange argument. The Contract provided that the contract would be construed and interpreted in accordance with the laws of Fiji. It is unquestionable that the laws of Fiji recognise the common law.

[24] The Appellant argues that the Employment Relations Court was created and provided for in the ERA to deal with employment matters. Therefore there is no need to invoke the general jurisdiction of the High Court for employment matters. I do not agree with this contention.

[25] The jurisdiction of the High Court in such matters has not been excluded by the ERA. It is a claimant's choice whether to institute an action under the ERP or under the Common Law. As the learned counsel for the Respondent pointed out at the hearing of this appeal there may be causes of action and remedies available under either of the processes that are not available under the other. The decision where to institute an action depends on the facts and circumstance of each case. For the reasons expressed herein, I determine that the Respondent was not precluded from bringing an action in common law in the High Court for breach of her employment contract.

[26] I do not agree with the Appellants contention that VINOD unequivocally ousted the jurisdiction of the Court to hear the Plaintiff's claim against a designated corporation if the claim was founded on an employment contract.

[27] As was pointed out by the Learned Judge in this case, VINOD was an appeal from a decision to terminate a matter before the Employment Relations Tribunal which was created and governed by the ERA, therefore the ERA clearly applied.

[28] The learned Judge in this case went on to say that an action filed under common law for breach of contract is not governed by the ERA hence the ratio of VINOD has no application to this case. The Learned Judge stated further that VINOD was not an appeal of an action filed in the High Court regarding a civil claim for breach of contractual obligations. There was therefore no determination before the Court of Appeal as to whether the jurisdiction of the High Court is ousted from all civil claims filed by employees against a designated organisation in terms of the ENI. No arguments were considered in the Court of Appeal as to civil claims before the High Court. I agree with this position.

[29] The Learned Judge then referred to the following two passages from Vinod.

> *"In the meantime, the Essential National Industries (Employment) Decree 2011 (ENI) came into operation on 9th September 2011 which provided for the concept of the 'designated corporation'. According to which any matter pending before any court, Tribunal, Commission or any other adjudicating body stood terminated with the coming in-to force of the new Act. It was the duty of the Chief Registrar under Section 30(2) of the ENI to issue a certificate of termination. Initially FNPF was not a 'designated corporation' at the time ENI Decree came into force on 9th September 2011. However, subsequently by Legal Notice 20 of 2013 i.e. by the amending regulations FNPF was also brought under designated corporations and such fact was published in the Gazette on 5th March 2013. At the time of FNPF was designated corporation i.e. on 5th March 2013, the inquiries into the grievance application and an application against dismissal of the Appellant had been pending before the ERT. By virtue of Section 30 (2)* ***all pending applications are terminated and upon such termination the Chief Registrar was obliged to issue a certificate of termination as per the requirements of the legislation."***

Further, at paragraph 11 stated;

> *"Hence it is manifestly clear that the legislature intended to end all matters pending before a Court against designated corporations. Such objective was propelled by the need to replace all the dispute related matters pending before courts or any other judicial body with a new mechanism to provide for the prompt and orderly settlement of all disputes. The necessity for urgency or the need to terminate proceedings with immediate effect arose as a corollary of introducing the new mechanism in order to prevent overlap of proceeding and to resolve matters urgently. The intention of the legislature was to replace the old system with a new mode of mechanism with immediate effect and therefore it is apparent that there was some urgency, as such the new law sought all the matters pending before the court also to be terminated with* ***immediate*** *effect."*

[30] The passages clarify that the dispute in VINOD had been pending before the Employment Relations Tribunal (ETA) which was a mechanism for determining disputes under the ERA. ENI introduced a new mechanism for determining such disputes therefore any matter pending before any court, Tribunal, Commission or any other adjudicating body against the designated corporation that had been instituted under or involved the ERA before the commencement date of the ENI had to be terminated which was achieved through Section 30 (2) of the ENI.

[31] The statement in Vinod that:-

> *".... it is manifestly clear that the legislature intended to end all matters pending before a court against designated corporations"* must be read in the context of the introduction of the new mechanism for the settlement of disputes against designated corporations under ENI. The statement cannot be read in isolation to support a proposition that VINOD had unequivocally ousted the jurisdiction of the High Court to hear the Plaintiffs claim against a designated corporation which was founded on an employment contract as the Appellant contends. As the learned Judge pointed out in his judgment this was not an issue of appeal in VINOD.

[32] The learned Judge concluded in paragraph 24 and 25 of his judgment as follows:-

> *"24. Counsel for Defendant contends that Defendant being a local authority is bound by provisions of Employee Relations Act 2007. There is no dispute as to application of Employment Relations Act 2007 to Defendant, but there is nothing in said Act that precluded an employee from seeking civil remedy for breach of contract in High Court for termination of employment.*
>
> *25. This is a common law remedy for breach of contract, which is not expressly excluded from jurisdiction through Employment Relations Act 2007. Hence a party who elected to institute a civil action cannot be terminated through Section 30(2) of ENT which applied only to proceedings commenced in terms of Employment Relations Act 2007."*

[33] I agree with this conclusion

[34] For the reasons stated above I consider that there is no merit in appeal grounds 1 and 3 and hold that the Judge has not erred.

Ground 2

[35] This ground avers that the learned Judge erred in law when he failed to consider the effect of Section 28 of ENI and in particular that it precluded not only cases under the ERA but under any other law.

[36] Section 28 of the ENI provides:

> *"28. This Decree has effect notwithstanding any provision of the Employment Relations Promulgation 2007 or any other law and accordingly, to the extent that there is any inconsistency between the Decree and the Employment Relations Promulgation 2007 or any other law, this Decree shall prevail."*

[37] The Appellant submits that the effect of the section precludes not only cases under the ERA but also under any other law. I understand from this that their argument is that the section has the effect of precluding the Respondents claim in common law. I cannot see how this can be argued. The section deals with inconsistencies between the ENI and the ERA

[38] Furthermore, the Appellant submitted that Section 28 fortified Section 26 of the Decree which provided for a dispute resolution process under the Decree. The Appellant contended that the effect of Section 26 was that the only dispute resolution process allowed in any employment issue between an employee and a Designated Corporation was through Section 26. Section 26 however provided for resolution of disputes under collective agreements and has no relevance to the present matter.

[39] Sections 26 and 28 of the ENI therefore have no relevance to the present matter. This ground has no merit and the Judge did not err.

Ground 4

[40] This grounds avers that the Learned Judge erred in law in holding that Section 266 (1) of the ERA did not apply in this case.

[41] In his decision the learned Judge held that the action was a claim for breach of contract by the Defendant and therefore outside the scope of Section 266(1) of the ERA. For the reasons contained in this judgment I agree with this holding. I hold that the Judge has not erred.

Ground 5

[42] This ground avers that the Learned Judge erred in law in holding that section 188(4) of the ERA (as amended) could not apply to the present litigation.

[43] Section 188(4) of the ERA provides:-

"188(4) Any employment grievance between a worker and an employer in essential services and industries that is not a trade dispute shall be dealt with in accordance with Parts 13 and 20, provided however that any such employment grievance must be lodged or filed within 21 days from the date when the employment grievance first arose, and –

(a) Where such an employment grievance is lodged or filed by a worker in an essential service and industry, the that shall constitute an absolute bar to any claim, challenge or proceeding in any other court, tribunal or commission; and

(b) Where a worker in an essential service and industry makes or lodges any claim, challenge or proceeding in any other court, tribunal or commission, then no employment grievance on the same matter can be lodged by that worker under this Act."

[44] The Learned Judge held that Section 188(4) cannot be applied to the present civil litigation for breach of contract. He then commented in respect of both grounds 4 and 5 above at paragraph 31 on page 6 of his Judgment as follows:

"31. The choice was with the Plaintiff to file an action under Employment Relations Act 2007 either in the Employment Relations Tribunal or Employment Relations Court regarding a breach of contract, or in a court that exercise civil jurisdiction (i.e High Court). Since this action was filed for breach of contract under common law this was not a matter instituted or involved with Employment Relations Act 2007 and provisions contained in repealed Sections 266 of Employment Relations Act 2007 and Section 188(4) of the same Act had no application."

[45] For the reasons contained in this Judgment I concur with this finding of the learned Judge and hold that the Judge has not erred.

Ground 6

[46] This ground avers that the Learned Judge erred in law when he failed to address and consider a further relevant ground that was set out in paragraph 26 of an affidavit of Azam Khan sworn on 28 August 2019 and filed in the High Court in this matter in support of

the Appellants application to strike out. This ground is vague. The Appellant does not identify the further relevant ground.

[47] The Appellant did not make submissions on this paragraph in the Affidavit in its written submissions filed in support of its summons to strike out so the Learned Judge was not required to address this specifically.

[48] In any event the said paragraph 36 in the main contains statements that are matters of argument and opinion that are covered in the Appellants grounds of appeal and legal arguments. As was held by Scott J., in **Peter Stinson v Miles Johnson** (1996) HBC 326/94S of the purpose of affidavits is to provide evidence, not vehicles for opinion, submissions or statements of the law.

[49] The affidavit was therefore defective. This ground has no merit and the Judge has not erred.

Cases Relied On By The Parties

[50] The Appellant relied on the Court of Appeal decision in Vinod to support its contention that section 30 (2) of the ENI ousted the jurisdiction of the High Court to hear the Respondent's claim. For the reasons stated above I do not agree with this contention.

[51] Both parties relied on a number of High Court decisions either to support their contentions that Section 30 (2) of the ENI ousted the jurisdiction of the court or that it did not. I have read those cases submitted and do not consider that it is necessary to analyse each case for the purposes of this judgment. I also note that one of the cases relied on by the Appellant **Singh v Suva City Council** (2019) FJHC 1059: HBC 94 of 2015 is on appeal to this court and it would therefore inappropriate to consider this decision.

Appellants conduct of the proceedings

[52] Paragraphs 5 to 15 above set out the history of these proceedings.

[53] It is evident that there has been considerable delay in this matter. 11 years have elapsed since the Respondent filed her claim and it remains unheard. The Respondent submits that the whole purpose of the Appellants application is to delay the determination of the Respondents substantive case. I note that the Appellant could have raised the matters they have raised in this case when they issued the summons in the High Court to strike out the Respondent's action pursuant to Section 173(4) of the Constitution on 10/02/16. The facts and issues raised in the current summons to strike out were in place at that time. The Appellant waited however until the Court of Appeal dismissed their first application to strike out before it issued the current summons to strike out. The Respondent contends that it is clear that the Appellant has tried to have several bites of the apple and each time it has failed to strike out the Respondent's claim. It is difficult to avoid this conclusion. Be that as it may, it is evident at the least that the Appellant's action in this regard have caused considerable and unacceptable delay to the conduct and conclusion of the substantive proceedings. This matter should be listed for hearing of the Respondent's Writ of Summons and Statement of Claim without further delay.

Conclusion

[54] For the reasons stated above, I affirm the orders made by Amaratunga J in the High Court on 28 February 2020 and order that the Respondent's Writ of Summons and Statement of Claim be listed for hearing in the High Court without further delay.

[55] I order that the Appellant pay the costs to the Respondent in the sum of $3,000.00.

[56] The Orders of the Court are:

1. *The High Court Judgment dated 28 February 2020 is hereby affirmed.*

2. *The case be listed for hearing in the High Court without further delay.*

3. *The Appellant pay costs to the Respondent in the sum of $3,000.00.*

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Hon. Justice Filimone Jitoko
VICE PRESIDENT, COURT OF APPEAL

COURT OF APPEAL
FIJI

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Hon. Justice Viraj Dayaratne
JUSTICE OF APPEAL

.....
Hon. Justice Walton Morgan
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