# IN THE HIGH COURT OF FIJI AT SUVA

# CIVIL JURISDICTION

**Civil Action No. HBC 94 of 2015**

BETWEEN

**JAGDISH SINGH** of Wailoku, Tamavua, Suva, Civil Engineer.

**PLAINTIFF**

AND

**SUVA CITY COUNCIL** a statutory body established pursuant to the Local Government Act whose Head Office is located at 196 Victoria Parade, Suva.

**DEFENDANT**

| | | |
|---|---|---|
| **Counsel** | : | Ms. Jackson L. for the Plaintiff.<br>Mr. Sharma D. with Mr. Deo S. for the Defendant. |
| **Date of Hearing** | : | 11th October 2019 |
| **Date of Ruling** | : | 01st November 2019 |

# RULING

***(On the Application for leave to appeal)***

[1] The plaintiff instituted these proceedings in the High Court (Civil) seeking the following reliefs:

1. Special Damages in the following sums:

   (a) Balance of the contract period with effect from 02 February 2010 to 01 September, 2011 in the total sum of $89,762.59;

   (b) Balance of Housing allowance entitlement with effect from February 2010 to August 2011 in the total sum $9500.00;

   (c) Loss of Employer's contribution of Fiji National Provident Fund calculated at the rate of 8% of the

   (d) Plaintiff's annual basic salary with effect from 02 February 2010 to September 2011 in the total sum of $7,182.00.

2. General damages in respect of breach of contract to be assessed.

3. Damages for injury to feelings, humiliation, embarrassment and emotional distress in the sum of $30,000.00.

4. Aggravated Damages in the sum of 15,000.00.

5. Exemplary Damages in the sum of in the sum of 20,000.00.

6. Interest on the judgment sum at the rate of 10% per annum from the date of termination of employment to the date of judgment pursuant to section 3 of the Law reform (miscellaneous Provisions)(death and Interest) Act.

7. Post judgment interest at the rate of 6% per annum from the date of judgment to the date of full payment.

8. Costs of this action on an indemnity basis.

[2] The defendant filed an application to have the matter struck out on the following grounds:

1. At the time the plaintiff filed his writ of summons and statement of claim on 11th February, 2015 such a claim was statute barred under the Essential National Industries Employment Decree No. 35 of 2011.

2. The defendant was deemed to a designated corporation under the Essential National Industries & Designated Corporations Amendment Regulations 2013.

3. The defendant became a designated corporation from 18th December, 2013 under the Essential National Industries Employment Decree No. 35 of 2011 and an essential service pursuant to the Employment Relations Amendment Act No. 4 of 2015.

4. The plaintiff's employment grievance arose on 04th February, 2010 when the plaintiff's employment contract was terminated and on 11th February, 2015 the plaintiff brought the claim in the High Court by which time the defendant was already decreed a Designated Corporation.

[3] The court after hearing the parties struck out the claim of the plaintiff and he filed the present application seeking leave to appeal the decision of this court on the following grounds:

1. The learned Judge erred in law and in fact when he concluded at paragraph 2 that the basis of the plaintiff's claim was for termination of his employment contract when the plaintiff's sole cause of action against the defendant is for breach of contract.
2. The learned Judge erred in law and in fact when he held at paragraph 5 of his ruling that the "plaintiff's position is that he is suing the defendant on a common law contract between them" when the plaintiff's claim is in fact and in law for damages for breach of contract under the common law.
3. The learned Judge erred in law and in fact when he disregarded the doctrine of *stare decisis* by failing to follow the earlier decision of Hazelman v Fiji Hardwood Corporation Limited, Civil Action No. HBC 79

of 2019, a case that had almost identical factual and legal issues as the instant matter, without providing proper or adequate reasons.

4. The learned Judge erred in law and in fact when he relied on the Case of Vucago v Fiji Hardwood Corporation Ltd [2016] FJHC 91; HBC 239.2015 (12 February 2016) and Vinod v Fiji National Provident Fund, Civil Appeal No. ABU 0016 of 2014 when the facts of Vucago and Vinod were clearly distinguishable from the facts of the instant matter.
5. The learned Judge erred in law and in fact when he concluded that since the plaintiff was terminated on the directive of the Prime Minister, the plaintiff's claim is governed by the provisions of Section 30 of the Essential National Industries (Employment) Decree 2011 (Decree No. 35 of 2011).
6. The learned Judge erred in law and in fact when he held that the dispute between the plaintiff and the defendant was governed by the provisions of the Employment Relations Promulgation 2007.
7. The learned Judge erred in law and in fact when he held that the court has no jurisdiction to deal with the plaintiff's claim as it is barred by section 30 of the Essential National Industries (Employment) Decree 2011 (Decree No. 35 of 2011).

[4] In the case of **Bank of Hawaii v Reynolds** [1998] FJHC 226 the court referred to the following passage from **Ex parte Bucknell** [1936] HCA 67; (1936) 56 C.L.R. 221 at 225 which are pertinent:-

> "At the same time, it must be remembered that the prima facie presumption is against appeals from interlocutory orders, and, therefore, an application for leave to appeal under s 5(1)(a) should be granted as of course without consideration of the nature and circumstances of the particular case. It would be unwise to attempt an exhaustive statement of the considerations which should be regarded as a justification for granting leave to appeal in the case of an interlocutory order, but it is desirable that, without doing this, an indication should be given of the matters which the court regards as relevant upon an application for leave to appeal from an inter interlocutory judgment."

[5] In **Kelton Investment Limited and Tappoo Limited v Civil Aviation Authority of Fiji & Anr** [1995] FJCA 15; Abu0034d.95s (18 July 1995) it was held:

> The Courts have thrown their weight against appeals from interlocutory orders or decisions for very good reasons and hence leave to appeal are not readily given. Having read the affidavits filed and considered the submissions made I am not persuaded that this application should be treated as an exception. In my view the intended appeal would have minimal or no prospect of success if leave were granted. I am also of the view that the Applicants will not suffer an irreparable harm if stay is not granted.

[6] In **Niemann v. Electronic Industries Ltd.** [1978] V.R. 431 at page 441 where Supreme Court of Victoria (Full Court) held as follows:

> ".....leave should only be granted to appeal from an interlocutory judgment or order, in cases where substantial injustice is done by the judgment or order itself. If the order was correct then it follows that substantial injustice could not follow. If the order is seen to be clearly wrong, this is not alone sufficient. It must be shown, in addition, to affect a substantial injustice by its operation.
>
> It appears to me that greater emphasis is therefore must be on the issue of substantial injustice directly consequent on the order. Accordingly if the effect of the order is to change substantive rights, or finally to put an end to the action, so as to effect a substantial injustice if the order was wrong, it may be more easily seen that leave to appeal should be given.

[7] In the case of **Khan v Suva City Council** [2011] FJHC 272; HBC406.2008 (13th May 2011) the following observations were made in regard to applications for leave to appeal;

> It is trite law that leave will not generally be granted from an interlocutory order unless the Court sees that substantial injustice will be done to the applicant.
>
> Further in an application for leave to appeal, it is incumbent on the applicant to show that the intended appeal will have some realistic prospect of succeeding.

[8] However, in that in this instance the court will bear in mind that the ruling made by this court on the application for striking out brought the substantive matter to an end.

[9] Although the plaintiff relies on diverse grounds of appeal the two main issues to be determined in the application for leave to appeal are whether the plaintiff's claim was based on a contract of employment and if so, had the High Court jurisdiction to hear and determine the matter.

[10] This court in its ruling which is sought to be challenged in appeal, held that the claim of the plaintiff is based on the employment contract between him and the defendant and therefore the High Court has no jurisdiction to hear and determine the matter.

[11] In his claim the plaintiff was seeking to recover all what he was entitled to under the employment contract. I have, at the commencement of this ruling reproduced the reliefs prayed for by the plaintiff. The plaintiff cannot give a different interpretation to the contract and say that it was not a contract of employment. If he did not enter into this contract and become an employee of the defendant there could not have been a cause of action for him to sue the defendant.

[12] Essential National Industries & Designated Corporation (Amendment) (No. 2) Regulation 2013, Essential National Industries (Employment) Decree 2011 and Employment Relations Promulgation 2007 and Employment Relations Amendment Act No. 1 of 2016 have been enacted by the parliament with the intention of establishing a separate body to hear and determine the disputes between employer and employee. If a worker has the freedom to select the court or tribunal to pursue his or her grievance there is no reason for the legislature to enact the above statutes. As I said in my ruling the law is very clear that is any employment grievance must necessarily be pursued in the Employment Relations Court.

[13] The plaintiff submitted that the court erred in not following the decision of the High Court in the case of **Hazelman v Fiji Hardwood Corporation Ltd** [2014] FJHC 101; HBC79.2010 (25 February (2014). In that case the court held:

> It is admitted fact that the Defendant had been included as designated corporation in Essential National Industries & Designated Corporations (Amendment)(No.2) Regulation 2013. Prima facie the Defendant is governed by Section 30 of the Essential National Industries (Employment) Decree 2011 (Decree No. 35 of 2011). So the section is applicable to the Defendant, but that is not sufficient to terminate this proceedings. The mere fact that application of

Section 30 to the Defendant not necessarily terminates all the actions against the Defendant. If that was the intention that could have been stated in the said provision, but it is not. Only a designated types of actions are ousted from the jurisdiction of courts, tribunals etc. As the heading of the Section 30 of Essential National Industries (Employment) Decree 2011 (Decree No. 35 of 2011) indicates only 'Certain decisions' of the Defendant will 'not to be challenged'. **The types of actions or decisions are exclusively spelt out in the said Section 30 and if the present action cannot be included in any of them this action cannot be terminated, despite the Defendant being named as a Designated corporation under the Essential National Industries (Employment) Decree 2011 (Decree No. 35 of 2011).**

The counsel for the Defendant has to satisfy that the present action can be in included under the Section 30 of the Essential National Industries (Employment) Decree 2011 (Decree No. 35 of 2011). For that it needs to be established that this action was instituted or involved with Employment Relations Promulgation 2007. (Emphasis is mine).

[14] The plaintiff cited some foreign judgment and submitted that this court is bound by the decision in **Hazelman v Fiji Hardwood Corporation Ltd** (*supra*). The law on *stare decisis* or binding precedent is clear and well settled. A court is not bound by a decision of a parallel court. Those decisions are only of persuasive value. The same principle is also applicable to the judgments of other jurisdictions.

[15] This court gave its reasons for not following the decision in **Hazelman v Fiji Hardwood Corporation** (*supra*). The basis on which the court declined to rely on the said decision is as follows:

> As I stated earlier in this judgment it is a fact admitted by the parties that the defendant is a designated corporation. The words "Certain decisions" contained in the subheading of section 30 is not the law. The law is found in the section itself. Subheading is only a brief introduction of the section. What section 30 of the **Employment Relations Promulgation 2007** says is any decision of any Minister, the Registrar or any State official or body, or any decision of any designated corporation made under this Decree. It is also important to note that the purpose of enacting these provisions are clearly spelt

out in the Decree which says "**A DECREE TO PROVIDE FOR THE GOVERNING OF RELATIONS BETWEEN EMPLOYEES AND EMPLOYERS IN ESSENTIAL NATIONAL INDUSTRIES IN FIJI**". I do not think the court needs anything more to decide whether a particular matter or dispute comes within the purview of these provisions.

[16] Since the parties admitted that the defendant is a designated corporation there cannot be any dispute as to the court where the matter should be heard and determined. The intention of the legislature in enacting these provisions is clearly set out by the Court of Appeal in **Vinod v Fiji National Provident Fund** [2016] FJCA 23; ABU0016.2014 (26 February 2016).

[17] The Court of Appeal said:

> 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.

[18] The plaintiff's submission is that the court erred in relying on this judgment since the facts of that matter are different to that of the matter before this court. There are mainly three categories of findings of court. They are, findings of fact, findings of and findings of law and fact. Finding of fact of a superior court cannot be relied on by the lower court unless the facts of both cases are similar. However, if it is a finding of law the lower court can rely on it although the facts are different. In **Vinod v Fiji National Provident Fund** (*supra*) the Court of Appeal arrived at a finding as to the intention of the legislature in enacting the **Essential National Industries (Employment) Decree 2011.**

[19] There is absolutely nothing wrong in following the interpretation of the Court of Appeal in **Vinod v Fiji National Provident Fund** case.

[20] If any injustice has been caused to the plaintiff as submitted by his counsel that is due to his own mistake of bringing this action before a court that has no jurisdiction hear and determine it when there was a special court established solely for that purpose by the legislature.

[21] The defendant submitted that the only dispute resolution process allowed for any employment issue and a Designated Corporation was through section 26 of the **Essential National Industries (Employment) Decree 2011.**

Section 26 provides:

> (1) As part of any collective agreement negotiated or imposed under this Decree, there shall be included a process for the resolution of disputes over discipline and discharge, and the interpretation or application of that collective agreement.
>
> (2) The process for resolution of disputes noted in subsection (1) shall provide that all such disputes must be processed and resolved internally or by reference of such disputes to the employer's designated reviewing officer, and no recourse shall be available to any party to any court, tribunal, commission or any other person or body exercising a judicial or quasi-judicial function.
>
> (3) The process for resolution of disputes mentioned in subsection (1) shall provide that any such dispute which remains unresolved internally or by reference to the employer's designated reviewing officer, shall be referred to the Minister for a final and binding determination; provided however, that only disputes involving an issue of over $5 million in value in one (1) year may be referred to the Minister.

[22] The plaintiff objected to referring to these provisions on the ground that they were not referred to in the ruling and therefore they are no relevant. Whether a particular statutory provision is referred to in a judgment or not it remains applicable and relevant. Section 26 above clearly lays down the manner in which how an employment

dispute should be resolved and it confirms the position taken by this court that it has no jurisdiction over dispute between the plaintiff and the defendant.

[23] For the reasons aforementioned the application for leave to appeal of the plaintiff must necessarily fail and therefore the other two applications for stay and extension of time to file notice and grounds of appeal do not arise for consideration.

**ORDERS**

1. The application for leave to appeal is refused.
2. The plaintiff is ordered to pay $2000.00 as costs of this application.


Lyone Seneviratne

**JUDGE**

01st November 2019