

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. 331 of 2018

BETWEEN

KASABIAS LIMITED a limited liability company having its registered office at
Suva in the Republic of Fiji.

PLAINTIFF

AND

CHAMINDA BANDARA WANNINAYAKE of 4 Adi Davila Road, Suva, Fiji,
Former Chief Executive officer.

DEFENDANT

Counsel : Mr. Singh R. & Mr. Fatiaki S. for the Plaintiff.
Mr. Singh R. for the Defendant.

Date of hearing : 27th May, 2019.

Date of Ruling : 02nd July, 2019.

RULING

(On the application to transfer the matter to ERC)

- [1] The plaintiff instituted these proceedings against the defendant who was an employee of the plaintiff to recover \$115,000.00.
- [2] The basis of the plaintiff's claim is that on or about 25th August, 2017 the defendant unlawfully and without the consent or knowledge of the plaintiff used this \$115,000.00 to pay a deposit for the purported purchase of a property situated at Lot 7 Herrick Place, Domain, Suva under the name of Kasabias Trust.
- [3] The defendant in his statement of defence claimed \$174,690.42 as damages for unfair dismissal.
- [4] The defendant on 11th January, 2019 filed summons seeking the following orders:
 1. That the proper court in which this matter ought to be heard is the Employment Relations Court.
 2. That the matter be transferred to Employment Relations Court.
 3. That the plaintiff pay the defendant the costs of this application and all incidental costs on an indemnity basis.
- [5] Section 220 of the Employment relations court provides:
 - (1) The Employment Relations Court has jurisdiction—
 - (a) to hear and determine appeals conferred upon it under this Act or any other written law;
 - (b) to hear and determine offences against this Act;
 - (c) to hear and determine all actions for the recovery of penalties under this Act;
 - (d) to hear and determine questions of law referred to it by the tribunal;
 - (e) to hear and determine matters transferred to it under section 218(2);
 - (f) to hear and determine applications for leave to have matters before the tribunal transferred to it under section 218(3);

- (g) to hear and determine a question connected with an employment contract which arises in the course of proceedings properly brought before it;
 - (h) to hear and determine an action founded on an employment contract;
 - (i) subject to subsection (2) and in proceedings founded on an employment contract to make any order that the tribunal may make under any written law or the law relating to contracts;
 - (j) to hear and determine a question connected with the construction of this Act or of any other law, being a question that arises in the course of proceedings properly brought before the court, notwithstanding that the question concerns the meaning of this Act under which the court is constituted or under which it operates in a particular case;
 - (k) to order compliance with this Act;
 - (l) to hear and determine an application for a discontinuance of an order in respect of an unlawful strike or lockout under this Act;
 - (m) to hear and determine proceedings founded on tort relating to this Act; or
 - (n) to exercise other functions and powers as are conferred on it by this or any other written law.
- (2) In exercising its jurisdiction under subsection (1)(i) to make an order cancelling or varying an employment contract or a term of an employment contract, the court must, notwithstanding anything in subsection (1)(h), make an order only if an order should be made and any other remedy would be inappropriate or inadequate.
- (3) In all matters before it, the court has full and exclusive jurisdiction to determine them in a manner and to make decisions or orders not inconsistent with this Act or any other written law or with the employment contract.
- (4) No decision or order of the court, and no proceedings before the court, may be held to be invalid for want of form, or be void or in any way vitiated by reason of an informality or error in form.

- [6] The learned counsel for the defendant relied on the following paragraph in **Sharma v Morris Headstrom Ltd** [2009] FJHC263; HBC116.2009L (26 November 2009):

I am unable to find any provision in the Promulgation which expressly reserves to the exclusive jurisdiction of the Employment Relations Court and Tribunal all claims relating to employees and employers. Section 3, which provides that "this Promulgation applies to all employers and workers in workplaces in Fiji", with certain exceptions which do not apply here, seems to suggest that the Tribunal and Employment Relations Court have exclusive jurisdiction. There can be no doubt that where the claim is wholly "founded on" the employment relation between the party, the Employment Relations Court and Tribunal have exclusive jurisdiction. But the position, in my view, is not clear where the claims are mixed, as is the case here.

- [7] In *Sharma v Morris Headstrom* (supra) the Plaintiff pleaded in her Statement of Claim that she was employed as a variety supervisor at Morris Hedstrom Limited. The Second Defendant was the acting manager of MHs at Sigatoka. On 9 May 2009, the Second Defendant issued a letter terminating the Plaintiff's employment, accusing her of being dishonest, unreliable and unfaithful. The Plaintiff said that the allegations were false and that her reputation has been tarnished. She claimed loss of salary, damages for unlawful dismissal and damages for defamation.

- [8] In the same judgment in paragraph 15 the court says:

I think it would be unwise to separate the claims into their employment based and non-employment based components to be adjudicated in two separate tribunals. Both tribunals could come to different and contradictory conclusions of fact. Cases on unfair dismissal have been decided in this Court over many years now and the provisions of the Promulgation do not affect the substantive law in that area. It seems to me therefore, that the High Court in its civil jurisdiction is the proper forum in this case.

- [9] In **Hazelman v Fiji Hardwood Corporation Ltd** [2014] FJHC 101 the Plaintiff instituted an action in 2010 against the Defendant in the High Court for a claim based on breach of employment contract. In the statement of claim no mention of Employment Relations Promulgation and the claim is based on the common law contractual obligation between

the parties. At the hearing the counsel for the defendant raised a preliminary objection to the jurisdiction.

[10] His Lordship Justice Amaratunga said (paragraphs 8, 9 & 10):

The Section 220(1)(h) confers general jurisdiction of the Employment Relations Court regarding the 'actions founded on employment contract'. The jurisdiction of matters found in Section 220(1)(a) to (n) spelt out the jurisdiction of the Employment Court but more importantly, it does not confer exclusive jurisdiction regarding any of the matters stated in Section 220(1)(a) to (h).

The exclusivity given in Section 220(3) is only when a matter is before the Employment Tribunal and not prior to that. That means the matters that confer jurisdiction to the Employment Court are not exclusive and the person instituting the action can either file an action under Employment Relations Court or under common law in any court that exercises civil jurisdiction if it involves a breach of employment contract. If he had already filed an action in Employment Relations Court, then the jurisdiction of the said court becomes exclusive for that matter before it, and that exclusivity is confined to that matter which is before the Employment Relations Court only. This exclusivity to deal with specific matter is gained after the matter is before the said court and not prior to the matter is brought before the Employment Relation Court. If not, there is no reason to restrict the exclusive jurisdiction of the Employment Relation Court in the manner of Section 220(3) only to 'matters before it'.

So, I reject the Defendant's contention that Section 220(h) confers an exclusive jurisdiction to Employment Relations Court, so that all the matters instituted in High Court by virtue of said provision is deemed an action instituted under Employment Relations Promulgation 2007.

[11] The learned counsel for the defendant also relied on the decision in **Lal v Chand** [20102] FJHC 859; HBC160.2011 (7 February 2012) where it was held:

"I agree with the submissions of Mr Patel, learned counsel for the 1st and the 2nd defendants that this court had ceased to have jurisdiction over the employment-related matters with the enactment of the Employment Relations Promulgation 2007...."

- [12] In **Lal v Chand** the action was brought before the High Court (Civil) with the allegation that her services were unlawfully terminated by the defendant by the second defendant and that was the main cause of action. Of course the plaintiff sought damages for unlawful termination of employment. The facts of the matter before this court are quite different from the facts of *Lal v Chand*. In this matter the plaintiff came to court to recover the monies that were taken unlawfully by the defendant.
- [13] The learned counsel for the defendant submitted that if High Court is allowed to adjudicate claims founded on employment contracts then this would invariably lead to forum shopping and an abuse of process and litigants would often find a way of escape from the Employment Court and resort to High Court.
- [14] From 1st May, 2018 which was the last day at work the defendant did not take any step until the action was instituted by the plaintiff institute proceedings before the Employment Relations Court. In whatever the court the proceedings are instituted the same principles of law will apply. It would have been abuse of the process of the court if the plaintiff instituted these proceedings recover the money alleged to have been taken by the defendant in the Employment Relations Court and not otherwise.
- [15] In view of the principles laid down in the decisions cited above and for the reasons given I am of the view that this court has jurisdiction to hear this matter.
- [16] Accordingly I make the following orders.

ORDERS

1. The application to transfer this matter to the Employment Relations Court is refused.
2. The defendant is order to pay \$1000.00 to the plaintiff as costs of this application.




Lyone Seneviratne

JUDGE

02nd July, 2019