

IN THE COURT OF APPEAL
AT SUVA

MISCELLANEOUS ACTION NO. 34 OF 2011

BETWEEN : 1. HANSONS SUPERMARKET LIMITED
2. SURESH KANT
Appellants

AND : 1. THE EMPLOYMENT RELATIONS TRIBUNAL
2. JOELI POLU
3. THE MINISTRY OF LABOUR, INDUSTRIAL
RELATIONS & EMPLOYMENT
Respondents

Coram : Chandra RJA

Counsel : Mr. S. Singh for the Appellants
Mr. R. Greene and Mr. J. Ditoka for the 1st and 3rd
Respondents
Ms. S. Daunabuna for the 2nd Respondent

Date of Hearing : 28 October 2013

Date of Ruling : 17 April 2014

RULING

1. This is an application for leave to appeal against the judgment of the High Court at Suva dated 18 August 2011 refusing leave to appeal to the Court of Appeal in terms of section 12(2)(f) of the Court of Appeal Act and Rule 16 of the Court of Appeal Rules.

2. The following grounds of appeal have been set down by the Appellants in the application seeking leave to appeal to the Court of Appeal:

1. *The Learned Judge erred in law in holding that the order of the Employment Relations Tribunal is not amendable to Judicial Review.*
2. *The Learned Judge erred in law and fact in holding that the second Appellant was a party to the proceedings before the Employment Relations Tribunal.*
3. *The Learned Judge erred in law and fact in holding that the second Appellant had an alternative remedy of appeal to the Employment Relations Court.*
4. *The Learned Judge erred in law in holding that the first Respondent is empowered to issue bench warrants.*
5. *The Learned Judge was wrong to finally determine a substantive issue at leave stage without hearing full arguments on it.*
6. *The Learned Judge failed to consider the other grounds advanced for leave which raised an arguable case for the Appellants namely:*
 - (a) *Proceedings before the Employment Relations Tribunal were for lawful dismissal. The relief in such cases if proved to the satisfaction of the Tribunal is damages. This was a grievance for which the Employment Relations Promulgation 2007 provides that the Respondents could have entered default judgment against the first Appellant as opposed to the procedure adopted by the Respondents.*
 - (b) *The Appellants were not served with any process requiring their presence before the first Respondent and the order for bench warrant made it breach of principles of natural justice.*

7. *The Learned Judge failed to appreciate that if any Applicant were to show that "on quick perusal of the material then available the Court thinks it discloses what might on further consideration turn out to be an arguable case in favour of granting to the Applicant relief claimed, it ought, in the exercise of the judicial discretion to give him leave to apply for that relief". (IRC v. National Federation of Self Employed (1981) 2 All ER 93 at 108)*

3. Viliame Naseicagi had reported to the Mediation Unit about his employment grievance against Hansons Supermarket (1st Appellant) on 03rd March 2010.
4. As the matter had not been resolved at mediation the same had been referred to the Employment Relations Tribunal on 3rd June 2010.
5. The matter naming the 1st Appellant as the Employer had been called before the Employment Relations Tribunal on 17th June 2010, 7th June 2010, 20th July 2010 on which dates there had been no appearance for the Employer.
6. On 20th July 2010 it was directed that a sub-poena be issued and it had been issued in the name of the Director of the Company, the 2nd Appellant, to appear before the Tribunal on 10th August 2010.
7. On 10th August 2010 the matter had been vacated for 8th September 2010 and on that date a further mention date had been given as 21st September 2010 as there was no appearance for the Employer.
8. When the matter was called on 21st September 2010 the Employer was not present and the Chief Tribunal had ordered that a bench warrant be issued against the Employer.

9. On 4th October 21010 a bench warrant had been issued to bring the 2nd Appellant before the Tribunal for not appearing before the Tribunal when summoned.
10. On 5th October 2010 the 2nd Appellant who had been arrested in consequence of the Bench Warrant appeared before the Tribunal with his Counsel and the bench warrant had been discharged.
11. The Appellants made an application to obtain leave for judicial review and/or certiorari in respect of the order for bench warrant made against him to the High Court on the basis that he had been detained for more than 12 hours regarding a matter which he did not know as he had not been served with any notice regarding his appearance before the Employment Relations Tribunal.
12. The High Court by its decision dated 4th February 2011 refused the said application.
13. The Appellants thereafter sought leave to appeal the said judgment from the High Court which too was refused by the High Court on 8th August 2011.
14. The present application made on 24th August 2011 is an application under section 12(2) (f) of the Court of Appeal Act for leave to appeal the interlocutory judgment of the High Court refusing leave to apply for judicial review. Both parties filed their written submissions and made oral submissions.
15. The main contention of the 2nd Appellant is that judicial review was available to him to canvas the order made in respect of the bench warrant issued against him as he was not a

party to the matter before the Employment Relations Tribunal and that he had not been noticed to appear.


16. The learned High Court Judge had refused to grant leave to appeal on the basis that the 2nd Appellant had failed to exercise the right of appeal to the Employment Relations Court which was a right he had. The said decision was based on the decision in State –v- Air Pacific Ltd (HBJ 01 of 2009).
17. The right of appeal from a decision of the Employment Relations Tribunal to the Employment Relations Court is available to a party in respect of a decision of the Tribunal regarding ‘a dispute relating to employment’.
18. The question that arises in the present application is as to whether the decision regarding the issuing of a Bench Warrant by the Employment Relations Tribunal would come within the consideration of ‘a dispute relating to employment’. If it does not come within such dispute, then an appeal may not be available. Further, if such person was not a party to the matter before the Employment Relations Tribunal, the question of locus standi regarding the right of appeal also would arise. The availability of Judicial Review would then come in to question.
19. Although an appeal lies from the decision of the Employment Relations Tribunal to the Employment Relations Court which is a right granted by Statute, it would be in relation to an appeal in respect of an order of such Tribunal in relation to ‘a dispute relating to employment’. An order where a Bench Warrant was issued on a person who was not a party to the proceedings before the Tribunal would not be appealable as such person would not have the locus standi to exercise such right of appeal. Therefore the question whether the right of appeal is an alternative remedy is an arguable matter.

20. It was also argued that the learned High court Judge had determined a substantive issue at leave stage without hearing full arguments on it. By denying leave to the 2nd Appellant the learned High Court Judge had in fact determined the substantive issue placed before Court which was on the questions of the issuing of the bench warrant which issue was arguable.
21. The Appellants also raised the question in relation to the power of the Tribunal to issue bench warrants in the circumstances of this case which was a dispute regarding termination of employment, and the Employer had been absent when the matter was called before the Tribunal. This too would be an arguable matter as it was possible for the Tribunal to enter a default judgment when the employer named was absent.
22. The learned High Court Judge should have considered whether the 2nd Appellant has satisfied the criteria required at the leave stage procedure provided by Order 53 Rule 3 of the High Court Rules, which are whether the Applicant had a sufficient interest in the matter to which the application relates, whether there has been a delay and whether the Applicant has established on the affidavit material before the Court that he has an arguable case to obtain leave to apply for judicial review.
23. On a perusal of the material placed before the High Court, the 2nd Appellant had satisfied the criteria required.
24. In view of the above reasoning the application for leave is granted.
25. The parties to bear their own costs.

Orders of Court

- (1) Leave to appeal to the Court of Appeal is granted to the 2nd Appellant.
- (2) The parties to bear their own costs.




Hon. Justice S. Chandra
Resident Justice of Appeal