

**IN THE COURT OF APPEAL, FIJI**  
**[On Appeal from the High Court]**

**CIVIL APPEAL NO. ABU 012 of 2020**  
**[In the High Court at Suva Case No. HBC 025 of 2008]**

**BETWEEN** : **ESAVA CAKAUNITAVUKI**

***Appellant***

**AND** : **BSP LIFE (FIJI) LIMITED and BSP HEALTH CARE (FIJI) LIMITED**

***Respondents***

**Coram** : **Mataitoga, RJA**  
**Clark, JA**  
**Andrée Wiltens, JA**

**Counsel** : **Ms L. Vaurasi for the Appellant**  
**Mr J. Apted for the Respondents**

**Date of Hearing** : **10 September and 18 September 2024**

**Date of Judgment** : **27 September 2024**

**JUDGMENT**

**Mataitoga, RJA**

1. I concur.

**Clark, JA**

2. I have read in draft the decision of Andrée Wiltens JA and for the reasons he gives. I agree the appeal should be dismissed with the costs ordered.

**Andrée Wiltens, JA**

**A. Introduction**

3. This is an appeal against (i) the dismissal of a Claim for an alleged wrongful termination of employment based on continued non-compliance of the Plaintiff's discovery obligations, and (ii) against the award of \$7,500 costs against the Plaintiff.
4. The dismissal of the Claim was ordered on 27 April 2019. The Notice and Grounds of Appeal were filed in March 2020. Both parties have filed written submissions, supplemented by oral submissions at the hearing of the appeal.
5. A preliminary point was taken by Mr Apte for the Respondents, namely as to this Court's jurisdiction to hear the matter, which I will deal with later.

**B. Background**

6. On 24 January 2002, Mr Esava Cakaunitavuki was dismissed from his position as a District Sales Manager by his employer, then trading under the styles of Colonial Fiji Life Limited and Colonial Healthcare (Fiji) Limited – they are now respectively known as BSP Life (Fiji) Limited and BSP Health Care (Fiji) Limited. They will henceforth collectively be termed “the BSP companies”.
7. Mr Cakaunitavuki filed his Statement of Claim alleging wrongful dismissal on 22 January 2008, seeking damages of \$1.576 million. An Amended Statement of Claim was filed on 16 July 2010, correcting the names of the parties.
8. A further Amended Statement of Claim was filed on 7 December 2010, without leave of the Court, and allegedly in breach of an oral direction by the Court to seek leave prior to filing any amendment. The Second Amended Statement of Claim sets out that numerous attempts to find alternative employment were made, resulting in part-time employment from 2010 as

a Purchasing Officer, and it acknowledges that income so earned would need to be set off against the Claim by way of mitigating the damages arising.

9. Attempts between the parties to resolve the dispute did not succeed. Accordingly, the BSP companies filed an Amended Statement of Defence on 7 June 2011, reserving the right to rely on income earned following the dismissal by way of mitigating the damage "...following necessary discovery of documents and interrogatories".
10. On 13 August 2012, Master Sharma ordered Mr Cakaunitavuki to file an affidavit verifying his list of documents by 27 August 2012. Mr Cakaunitavuki did not comply. On 18 February 2014, Master Sharma granted further time to comply, namely until 4 March 2014, with an order in favour of the BSP companies for wasted costs. Compliance with this latest order was only completed, after 2 further such orders had been breached, with the First List of documents being produced on 18 July 2014. The Defendants' affidavit verifying this List of Documents was filed and served on 21 July 2014.
11. The BSP companies contended the First List of documents to be deficient, for several reasons. They sought further particulars, following which a Second List of documents was provided on 12 December 2014. However, the BSP companies remained dissatisfied and sought further details on 3 occasions in January and February 2015. Due to no appropriate response being received, on 9 March 2015, the BSP companies made formal application to the Court for further and better discovery.
12. Master Sharma next ordered Mr Cakaunitavuki to file his affidavit in response by 8 May 2015, and scheduled the application to be heard on 20 July 2015. On 16 July 2015, Mr Cakaunitavuki advised the BSP companies that he intended to file a late affidavit. On 20 July 2015, Mr Cakaunitavuki claimed he was unwell, without however producing a medical certificate. This led to the hearing being vacated, with Master Sharma making further time-tabling orders and awarding costs to the BSP companies. Mr Cakaunitavuki finally filed his affidavit in response on 20 August 2015, indicating that he was seeking tax returns from the appropriate authorities.

13. On 26 July 2016, Master Sharma granted the application by the BSP companies for further and better discovery, accepting that the First and Second Lists of documents were insufficient for proper disclosure purposes. He ordered Mr Cakaunitavuki to: (i) file and serve a List verifying his 2002-2014 Tax Returns and Notices of Assessments, (ii) file an affidavit annexing all salary slips, evidence of income, contracts or letters and advertisements of his part-time employment in 2010, and (iii) if unable to discover any document, to set out clearly what attempts had been made to do so and why he was unable to discover including details of when he parted with any of the documents and what became of them.
14. Mr Cakaunitavuki filed an affidavit on 26 September 2016, providing a Third List of documents. It was not served on the BSP companies, however, until 27 October 2016. This Third List of documents itemized as discoverable (i) annual PAYG (“Pay As You Go”) summaries for the years 2006 to 2016, (ii) Income Tax Return for 2002, (iii) annual Notices of Assessment for the years 2003 to 2015 (but not for 2005 year), (iv) a September 2016 letter to Stamford Plaza, (v) an April 2016 letter to CID, Suva and a reply thereto, and (vi) an application to Stamford Plaza dated 1 January 2015.
15. The BSP companies did not consider this to be compliance with Master Sharma’s orders. They wrote, on 28 October 2016, to the solicitors acting for Mr Cakaunitavuki, pointing out the deficiencies they asserted, and requested full compliance. They repeated this request on 23 November 2016.
16. On 2 December 2016, Mr Cakaunitavuki filed a Bundle of Documents (comprising 40 documents) with the Court as evidence supporting his Claim, in accordance with the Third List of documents, despite the BSP companies having sought further discovery.
17. This caused the BSP companies, on 6 December 2016, to make an application to strike out the Claim for non-compliance with 26 July 2016 Court orders as to discovery; in the alternative seeking an “unless order” requiring compliance with the orders made by Master Sharma. The application was scheduled for a hearing and Mr Cakaunitavuki was ordered to file an affidavit in response to the application by 6 March 2017. He did so, a day late,

appending a Fourth List of documents, asserting that he did not have (i) the Tax Returns for the period 2002 to 2014, (ii) the Notice of Assessment for the year 2005, and (iii) salary slip, evidence of income, contracts, advertisements of employment as a part-time Purchasing Officer during the 2010 period apart from the letter of the employer dated 15 September 2016.

18. The BSP companies contended that the Fourth List of documents did not comply with the orders made by Master Sharma. On 5 April 2017, Master Sharma did not accept that Mr Cakaunitavuki had made full disclosure but allowed more time for him to do so. As a result, a further affidavit was filed by Mr Cakaunitavuki on 12 April 2017.
19. On 12 June 2018, Master Sharma delivered his ruling on the application by the BSP companies to strike out the Claim, or alternatively make an “unless order” as to compliance. Master Sharma determined that full disclosure had not been made but allowed yet more time for compliance rather than dismissing the Claim, ordering Mr Cakaunitavuki to (i) comply with the previous 26 July 2016 orders within 14 days, and (ii) make full discovery and give inspection. He further directed that if there was not compliance with these orders an “unless order” would follow.
20. On 21 June 2018, Mr Cakaunitavuki filed a Fifth List of documents, asserting that the 2002-2014 Tax Returns, the Notice of Assessment for 2005 and salary slips, evidence of income, contracts, advertisements of employment as part-time purchasing officer were no longer in his possession as “...it is lost or misplaced due to moving house several times, documents with previous lawyers were not retained by firm, inability to retrieve documents from computer due to volatile storage in computers”.
21. This too is submitted to be inadequate compliance by the BSP companies. They raised their assertions with the new Master, Ms Lal.
22. Master Lal delivered her decision on 22 March 2019. She concluded, having considered the Bundle of Documents filed with the Court, that there was no need for further discovery other

than disclosure of the 2005 tax assessment. She considered the Bundle of Documents filed on 2 December 2016 to be sufficient discovery to comply with Master Sharma’s 26 July 2016 orders; and she allowed Mr Cakaunitavuki further time to obtain the missing 2005 Assessment from the Australian Taxation office and file a further affidavit. She determined that an “unless order” was not warranted, and accordingly declined to make such an order.

23. The BSP companies were dissatisfied and sought leave to appeal as the orders related to interlocutory issues. Justice Seneviratne duly granted leave to appeal on 15 October 2019. The appeal was heard on 27 November 2019, with the decision released on 27 January 2020, striking out the Claim and awarding costs against Mr Cakaunitavuki as earlier explained.
24. On 6 March 2020, Mr Cakaunitavuki appealed the decision of Seneviratne J to strike out the Claim and the award of costs, which is the matter for decision before this Court.
25. An application to strike out the appeal was made by the BSP companies on 20 March 2020, but was unsuccessful as per a decision of Guneratne J. of 7 January 2021. The application was made on the basis that leave had not been sought, despite the appeal being against an interlocutory order. His Honour determined that leave was not required on the basis that while the issue being appealed was interlocutory in nature, the outcome was final in that the decision completely ended Mr Cakaunitavuki’s Claim. Despite citing several authorities which supported that view, he did so contrary to the full Court of Appeal’s decision in *Goundar v Minister of Health* [2008] FJCA 40, which followed the reasoning in *Suresh Chand v Shah* (1995) 41 FLR 65 in settling the law as to the “applications approach” being the law in Fiji.

### **C. The Decision Appealed**

26. Seneviratne J commented that he saw no ambiguity in the directions of the learned Master of 12 June 2018. He noted the same learned Master had found that Mr Cakaunitavuki had failed to comply with the orders, and had imposed a time limit by which compliance was to be made, failing which an “unless order” was signalled. In relation to the application to

dismiss the Claim, His Honour considered the issue to turn on whether Mr Cakaunitavuki had complied with the orders. He set out in some detail the explanation Mr Cakaunitavuki had provided for not providing the Tax Returns for 2002 to 2004. His Honour considered it important that after the 12 June 2018 ruling, Mr Cakaunitavuki had not tendered any further documents, but only provided an explanation for not disclosing documents. He concluded that Master Lal, in her ruling of 22 March 2019, had disregarded the findings of her predecessor making orders contrary to the previous orders, and doing so without giving reasons.

27. Seneviratne J noted that Mr Cakaunitavuki had not challenged Master Sharma's decision of 12 June 2018, which decision had issued after the learned Master had considered the Lists of documents filed by then by Mr Cakaunitavuki. In the circumstances, he concluded that Master Lal did not have jurisdiction to deviate from the ruling and make different findings based on the same core facts. He then identified matters which he considered demonstrated non-compliance with the 12 June 2018 orders, as follows:

- (i) One of the PAYG payment summaries related to a Liong Louis; and several of the other PAYG payments summaries were missing the second pages from the disclosure;
- (ii) Although the volatile nature of computer storage was proffered as explaining why documents could not be disclosed, Mr Cakaunitavuki did not elaborate which documents this related to, and why he could recover some documents but not others; he also did not elaborate if he had sought technical assistance. His Honour concluded that he did not consider Mr Cakaunitavuki had made a genuine effort to disclose the documents required;
- (iii) Another explanation related to loss or misplacement. His Honour considered that Mr Cakaunitavuki could have obtained copies of tax documents from the Fiji Revenue and Customs Authority, but he had not even deposed to having attempted to do this. [The Court notes that Mr Cakaunitavuki had advised the Master he would seek the tax returns – but no further information in relation to that have been forthcoming].

28. His Honour went on to consider his jurisdiction, as set out in Order 24 rule 16(1) of the High Court Rules 1988, which enables the Court, where failure to comply with an order is established, to make such order as it thinks just, including an order that the action be dismissed. He considered the precedent case of *Safari Lodge (Fiji) Ltd v the TIKI (Fiji) Ltd* [2018] FJHC 29, and recognized the normal pre-requisite for striking out was the existence of a real or substantial or serious risk that a fair trial was no longer possible, although contumacious conduct such as the deliberate suppression of a document would justify striking out even if a fair trial was still possible.

29. His Honour went on to say:

*“The plaintiff in this case is claiming damages for loss of employment. In calculating the special damages sought by the plaintiff it is necessary to have some proof of the plaintiff’s earning during the relevant period. The plaintiff therefore, cannot suppress such documents from the defendant which are in his personal custody.”*

30. Seneviratne J went on to discuss “unless orders” in the exercise of the Court’s inherent jurisdiction, but declined to issue the same given the history of the matter. He instead, as Mr Cakaunitavuki had failed to give an acceptable explanation to the Court for not disclosing relevant documents, struck out the Claim, with costs.

#### **D. The Appeal**

31. The appeal is brought on several grounds as follows:

- That there was no deliberate and persistent non-compliance of Court orders on the part of Mr Cakaunitavuki, and that His Honour erred in finding that the Fifth List of documents was not compliant with the orders of Master Sharma of 26 July 2016;
- That to strike out the Claim for non-compliance was an error of law in the particular circumstances of this case;



- That the primary judge erred in law in finding Master Lal did not have jurisdiction to deviate from the previous ruling by Master Sharma of 12 June 2018;
- That His Honour had erred in law in failing to consider an “unless order” as harsh, unjust and disproportionate to the default found;
- That His Honour had erred in granting the BSP companies leave to appeal the decision of Master Lal; and
- That His Honour erred in law in awarding \$7,500 costs.

**E. The Preliminary Point**

32. A preliminary point was raised by Mr Apted for the BSP companies at the commencement of the hearing on 10 September 2024, namely that counsel for Mr Cakaunitavuki had not, as required pursuant to s 12(2)(f) of the Court of Appeal Act 1949 and the decision of *Goundar v Ministry of Health* (supra), sought or obtained leave to appeal, the matter at hand being interlocutory. Rather than deal with the appeal on this basis, this Court determined to “be generous” and adjourned the hearing so that applications for leave and for leave to appeal out of time could be filed and served, and the matter further considered. The applications were directed (orally) to be filed and served by 2.30pm on 13 September 2024. Mr Apted was permitted leave to respond prior to the resumed hearing.
33. Ms Vaurasi, for Mr Cakaunitavuki, did not avail herself of the opportunity provided. Instead, she filed and served further submissions, addressing whether leave was required. She further addressed those submissions orally at the resumed hearing. I summarise counsel’s submissions.
34. The decision by Guneratne J declining to strike out the appeal is submitted to be determinative of whether leave is required. The decision is submitted to support Ms Vaurasi’s submission in that hearing that Seneviratne J’s order was a final determination and not an interlocutory determination – counsel accepting that the former did not require leave,

the latter requiring it pursuant to s 12(2)(f) of the Court of Appeal Act 1949. Accordingly, it was submitted that the appropriate step for Mr Apted to have taken was to have appealed the decision by Guneratne J and it was impermissible for Mr Apted to seek to re-litigate the issue of leave by raising it as a preliminary issue on the appeal.

35. The background for the submission is that the jurisprudence, as to what is interlocutory and what is final, is submitted to be quite unsettled. This refers to what is known as the “order approach” as opposed to the “application approach” – the former being determinative and accordingly not interlocutory, the latter being clearly interlocutory. Ms Vaurasi submitted that the case of *Goundar v Minister of Health* [2008] FJCA 40 which is referred to with approval in *Wong v Evans* [2023] FJCA 245 is not the leading authority on the point. She referred to the authorities cited by Guneratne J in his decision as supporting this submission, as well as a Supreme Court decision of *Metuisela Railumu and Others v Commander Republic of Fiji Military Forces and 2 Others* [2004] FLR 418 which she submitted was binding on this Court.
36. In the *Railumu* decision, the Court considered, inter alia, whether an application in the Court of Appeal for an extension of time to file an appeal was an interlocutory matter or a final determination. The court concluded that the decision effectively ended the petitioners’ rights of appeal and disposed of the proceeding and it was accordingly a “final judgment of the Court of Appeal” for the purposes of s 122 of the 1997 Constitution
37. Mr Apted tendered written submissions, which he then addressed orally. He submitted that the *Railumu* case dealt with the Supreme Court’s jurisdiction in conjunction with a previous Constitution and it was accordingly distinguishable. The decision was regarding the meaning of “final judgment” as opposed to the meaning of “interlocutory”. He invited the Court to uphold the very clear words in the *Goundar* decision. He referred the Court to *Leslie Gee Way Wong v Evans* [2023] FJCA 245 where *Goundar* was followed but the reasoning of Guneratne J’s decision in this matter was not.

38. Mr Apted quite properly stressed the importance of this preliminary point, as it goes to the Court's jurisdiction. If leave has been not sought or obtained in respect of an interlocutory matter, this Court cannot proceed to hear the matter – it simply does not have jurisdiction to do so, and the application is incompetent: *White v Brunton* [1984] 2 All ER 606. This case is authority also for the proposition that the point must be taken, if not raised by counsel, then by the Court itself. He contended that this answered Ms Vaurasi's submission that the issue could not again be raised following the decision on the point by Guneratne J. He went on to submit that the doctrine of res judicata does not apply as Guneratne J's decision was itself an interlocutory ruling: *Ocean Holdings Ltd v Olympic Fiji Ltd* [2004] FJCA 35.
39. Mr Apted concluded that time to apply for leave has long expired. Despite being given the opportunity to regularize the appeal, Ms Vaurasi did not do so. In the circumstances, he submitted this Court did not have jurisdiction to hear the appeal as it is incompetent.

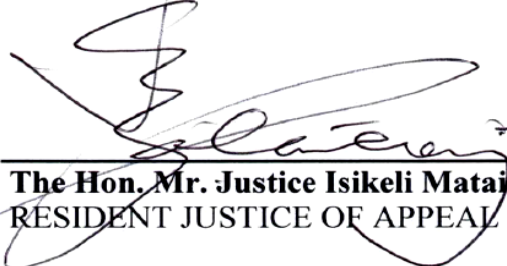
#### **F. Result**

40. I agree with Mr Apted's submissions.
41. The law in Fiji regarding whether a matter is interlocutory or final follows the "application approach", as determined in *Goundar v Evans*. This is the well settled position and is to be followed. The decision in *Railumu* is distinguishable and not binding. Accordingly, in my view, the decision by Guneratne J in this matter was erroneous, not that that is determinative.
42. The position as I find it to be is that Mr Cakaunitavuki's appeal from the decision of Seneviratne J is an appeal in relation to an interlocutory matter, which according to s 12 (2)(f) of the Court of Appeal Act 1949 and *Goundar v Evans* required leave to appeal to be obtained; and at this point in time, also leave to appeal out of time.


43. Such applications have not been made, and leave has not been granted. It is unfathomable to me that this is the situation, given the very clear directions made by this Court when the matter was first called that such applications were to be filed and served.
44. In the absence of leave having been granted, it follows, that the appeal is incompetent and this Court has no jurisdiction to hear the matter.
45. The appeal is accordingly dismissed.
46. Costs are to follow the event. I set them at \$5,000.

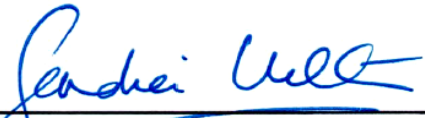
**Orders of the Court:**

1. The appeal is incompetent and accordingly dismissed for want of jurisdiction.
2. Costs are to follow the event, in the sum of \$5,000.

  
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**The Hon. Mr. Justice Isikeli Mataitoga**  
RESIDENT JUSTICE OF APPEAL



  
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**The Hon. Madam Justice Karen Clark**  
JUSTICE OF APPEAL

  
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**The Hon. Mr. Justice Gus Andrée Wiltens**  
JUSTICE OF APPEAL

**Solicitors:**

Shekinah Law for the Appellant  
Munro Leys for the Respondents