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

CIVIL APPEAL NO. ABU 091 of 2023
[In the Employment Relations Court of Fiji at Suva No. ERC 10 of 2020]

BETWEEN	:	**CAPITAL INSURANCE LIMITED** a limited liability company having its registered office at 231 Waimanu Road, Suva. Fiji.
		Applicant *[Original Defendant]*
AND	:	**VIKASH DEEPAK KUMAR** of Lot 2, Savura Creek Valley Road, Wailoku, Suva, Fiji.
		Respondent *[Original Plaintiff]*
Coram	:	**Prematilaka, RJA**
Counsel	:	**Mr. R. Singh for the Appellant** **Ms. N. Choo for the Respondent**
Date of Hearing	:	**31 March 2025**
Date of Ruling	:	**22 April 2025**

RULING

[1] The appellant on 29 September 2023 had filed summons supported by an affidavit primarily seeking leave to appeal consent orders on 23 May 2023 (sealed on 01 June 2023) in the Employment Relations Court and stay of execution of the said orders pending appeal. The respondent has filed an affidavit-in-opposition followed by the appellant's affidavit-in-reply. Both parties have filed written submissions and reply submissions on leave to appeal and stay pending appeal as well as the applicability of **ANZ Banking Group Pte Ltd v Sharma** [2024] FJCA 29; ABU030.2022 (29 February 2024)[1]. An interim stay order had been granted and extended by this court from time to time, and finally extended on 05 June 2024 until discharged. The hearing had been concluded before former President of this

[1] **ANZ Banking Group Pte Ltd v Sharma** [2024] FJCA 29; ABU030.2022 (29 February 2024)

Court Justice Jitoko who, however, could not deliver the ruling due to his retirement. Therefore, there was a rehearing before me on 31 March 2025.

[2] The applicant (original defendant) seeks leave to appeal from the orders of the High Court entered by consent between the parties on 23 May 2023 (and sealed on 01 June 2023) wherein it was *inter alia* ordered as the main relief that the applicant shall pay to the respondent (original plaintiff) a sum of F$250,000 in full and final settlement within 30 days from the date of the Order. The appellant has submitted that this is a renewed application for leave to appeal to the Court of Appeal as the initial leave application filed in the Employment Relations Court (ERC) on 20 June 2023 was dismissed on 20 September 2023. The appeal ground urged by the applicant are as follows:

> *'The Learned Judge erred in law in granting the Orders when –*
>
> *(i) there is no cause of action for "unlawful dismissal" whether under the ERA or otherwise; and/or*
> *(ii) the Employment Relations Court has <u>no jurisdiction</u> over unfair and unjustified dismissal claims, and that such claims may only be made by way of an employment grievance that must first be reported to Mediation Services and which, if not settled, may only be referred to the Employment Relations Tribunal; and*
> *(iii) as such, the Learned Judge did not have jurisdiction to grant the Orders (albeit by consent) between the parties.'*

[3] The appellant seeks leave to appeal against consent orders by virtue of section 12(2)(e) of the Court of Appeal Act read with Rule 26(3) of the Court of Appeal Rules. The power of granting stay of execution is given to this court by section 20(1)(e) and Rule 34(1) and Rule 26(3). The central issue involved in the proposed appeal would be the question of jurisdiction of the ERC to grant the consent orders. The question of want of cause of action based on 'unlawful dismissal' is only incidental to that issue. In pursuing these grounds of appeal, the applicant relies heavily on ***ANZ Banking Group Pte Ltd*** which the Court of Appeal delivered on 29 February 2024 prior to the said consent orders and even before the refusal of the leave to appeal application. Therefore, the High Court did not have the benefit of ***ANZ Banking Group Pte Ltd v Sharma*** at any stage. However, in ***ANZ Banking Group Pte Ltd v Sharma*** when it was still in the High Court the same judge on 01 April 2022 had granted leave to

appeal and a stay of proceedings pending the Court of Appeal hearing and determination on the issue of jurisdiction by stating that:

> *"I am of the view that given the situation of two different decision ruling contrary to each other reference ERCC: 2/2019 Bred Bank Decision, it is legally sound to grant leave to appeal this decision for me to know the correct legal position on the question of Jurisdiction. Even if I do not grant leave, this matter will end up in Court of Appeal for leave and stay. On that basis there is no sense in declining leave. I grant leave to appeal and stay the proceedings until such time to clear direction and verdict is granted by Court of Appeal. I will however keep the matter live by giving a date to monitor the progress of the Court of Appeal case."*

[4] What prompted the High Court judge to grant leave to appeal and stay of proceedings was the conflicting view taken by another division of the ERC on the question of jurisdiction. I shall briefly examine the two contradictory strands of the prevalent view in the High Court at that stage before it was resolved in ***ANZ Banking Group Pte Ltd v Sharma*** by the Court of Appeal.

[5] In ***ANZ Banking Group Pte Ltd v Sharma***, Mr. Sharma first lodged an employment grievance and engaged in mediation failing which he had the matter referred to the Employment Relations Tribunal (ERT). However, he decided to discontinue his grievance at the ERT and filed instead an action in the ERC. ANZ being the respondent applied to strike out Mr Sharma's action where ANZ's first argument was that the ERC had no jurisdiction to hear and determine Mr Sharma's action because the action was an *employment grievance* brought by an employee in an essential service and industry and the Employment Relations Act (ERA) did not provide for employment grievances to be heard and determined by the ERC. In dismissing ANZ's application to strike out, the High Court concluded that while the ERT *"...has jurisdiction to hear employment cases for claims up to $40,000 ... [b]eyond that, the claims must be filed in the Employment Court"*.[2]

[2] **Sharma v Australia and New Zealand Banking Group Ltd** [2020] FJHC 650; ERCC 02 of 2017 (14 August 2020)

[6] On the other hand, Mansoor J in **Buksh v Bred Bank (Fiji) Ltd [2023]** FJHC 805; ERCC02.2019 (25 October 2023) (to be followed by many other similar decisions by him) took a contrary view of the ERC's jurisdiction by stating:

> *26. 'Section 211 (1) (a) confers the Employment Relations Tribunal with jurisdiction to adjudicate on employment grievances. Section 110 (3) of the Act requires all employment grievances to be first referred for mediation services. Section 194 (5) of the Act states that if a mediator fails to resolve an employment grievance or an employment dispute, the mediator shall refer the grievance or dispute to the Employment Tribunal. Parliament has mandated mediation procedures and vested the tribunal with features that are meant to assist in the effective resolution of or adjudication of grievances. Mediation services, the tribunal and the court have been established to carry out their different powers, functions and duties. The statutory scheme is such that an employment grievance must be referred for mediation and adjudicated in the tribunal in the first instance.*
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> *27. The court's original jurisdiction is set out in sections 220 (1) (h), (k), (l) and (m) of the Act. Proceedings can also be transferred from the tribunal to the court under section 218 and section 221 allows the court to order compliance. The Act does not confer on this court the original jurisdiction to hear an employment grievance excepting in the way allowed by the Act. The monetary limitation placed on the tribunal will not of itself permit the court to hear an employment grievance. The court, however, is not impeded by the monetary limit.*
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> *28. The plaintiff referred to section 230 (1) of the Act in saying that the remedies specified by that enactment show that the court has original jurisdiction. The provision must be read to mean that a court can grant those remedies where a matter is properly brought before the court under the Act.*

[7] On earlier occasion in the same case, Mansoor J had said[3] :

> *22. Mr. Gordon submitted that the Court as a division of the High Court had unlimited original jurisdiction, and that the Court has power to hear the case as the Tribunal did not have the jurisdiction to pay compensation in excess of $40,000. His reference is to the limitation contained in section 211 (2) (a) of the Promulgation which states that the Tribunal has power to adjudicate on matters within its jurisdiction relating to claims up to $40,000. I agree with the plaintiff that the monetary limitation could pose a difficulty in some cases, particularly where the claims are of a large value. However, the Tribunal's jurisdictional limit alone is not a sufficient ground for the Court to assume jurisdiction when Parliament has not expressly given the Court the right to hear an employment grievance.*

[3] **Buksh v Bred Bank (Fiji) Ltd** [2021] FJHC 259; ERCC02.2019 (27 August 2021)

[8] The Court of Appeal in ***ANZ Banking Group Pte Ltd v Sharma*** recognized that there are conflicting decisions of the ERC on the question whether it has jurisdiction to hear and determine employment grievances and identified the following two questions of law for determination:

> *(i) Under Part 19 and Parts 13 and 20 of the Employment Relations Act 2007,* ***can a worker in an Essential Service and Industry*** *bring an Action or employment grievance in the Employment Relations Court or is s/he restricted to reporting an employment grievance to Mediation Services which can only refer this to the Employment Relations Tribunal if the grievance is not settled in mediation?*
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> *(ii)* ***Can any worker in Fiji (whether or not employed in an Essential Service and Industry)*** *bring a claim of unjustified dismissal or unfair dismissal directly to the Employment Relations Court (which has unlimited jurisdiction) or must those claims only be made in an employment grievance that can only be reported to Mediation Services and the Employment Relations Tribunal (which has jurisdiction not exceeding $40,000).*

[9] The Court of Appeal answered the two questions at paragraph [64] as follows:

> *'Answer:* ***The Employment Relations Court has no jurisdiction to hear and determine an employment grievance brought by a worker in an essential service and industry***[4]*. Such a worker is bound to pursue their employment grievance first, by lodging it in accordance with s 188(4) and secondly, in accordance with Part 13 pursuant to which the employment grievance will "first be referred for mediation services…"*
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> *'Answer:* ***The ERC has no jurisdiction to hear employment grievances but if a claim for unjustified or unfair dismissal is "founded on a contract of employment", and properly pleaded as such, the ERC has jurisdiction under s 220(1)(h) to hear and determine such a claim***.
> (emphasis mine)

[10] Earlier, the Court of Appeal had said[5] in a somewhat different context and in response to a different argument by the appellant that the Employment Relations Act (ERA) does not remove the jurisdiction of High Court (as opposed to ERC) to entertain claims involving employment contracts, the jurisdiction of the High Court in such matters has not been excluded by the ERA, and *it is a claimant's choice whether to institute an action under the*

[4] With the exceptions set out at paragraph 34 of the judgment.
[5] **Suva City Council v Saumatua** [2023] FJCA 131; ABU056.2020 (28 July 2023)

ERA or under the Common Law and the applicant is not precluded from bringing an action in common law in the High Court for breach of the employment contract. The Court agreed that an action filed under common law for breach of contract is not governed by the ERA hence the ratio of ***Vinod***[6] has no application to a situation contemplated in ***Suva City Council***. It appears that in ***Suva City Council*** following respondent's dismissal she had filed a Writ of Summons and Statement of Claim in the High Court (not in the ERC) against the appellant alleging *breach of contract and unlawful termination* and claiming typical common law reliefs such as damages etc.

[11] Thus, taken both ***ANZ Banking Group Pte Ltd v Sharma*** and ***Suva City Council*** together, the legal position appears to be that an action under common law based on breach of employment contract resulting in unlawful termination seeking common law remedies may be filed in any High Court. However, if and when the action is founded and properly pleaded as unjustified or unfair dismissal leading to breach of contract of employment, the ERC has jurisdiction under the ERA. If the action is based on an *employment grievance* and pleaded as such, the ERC has no jurisdiction. Therefore, the forum will be determined by the manner in which action is couched including the remedies sought. The difference of forum and jurisdiction of the High Court and ERC appears to depend on the true character or characterization of the action as pleaded. It is not just a matter of form but rather substance of the action.

[12] The appellant argued that this was an employment grievance and framed as such and therefore given the decision in ***ANZ Banking Group Pte Ltd v Sharma*** the ERC had no jurisdiction whereas the respondent contended that he had pleaded breaches of the employment contract by the appellant and therefore the ERC had jurisdiction to entertain and record the consent orders.

[13] The appellant has elaborated his contention by stating that the respondent in his Writ of Summons had sued the appellant for unlawful and unfair dismissal and although he at certain paragraphs in the claim makes references to an employment contract, he has not pleaded any

[6] **Vinod v Fiji National Provident Fund** [2016] FJCA 23; ABU0016.2014 (26 February 2016)

specific term or any breach of any term of his *own* contract (but only breaches of a 'standard employment contract') that allegedly *resulted in* his "unlawful and unfair dismissal". Further, the appellant has argued that although prayer (i) seeks "general damages for breach of contract", no breaches of his contract are properly pleaded in a manner that could bring it within the original jurisdiction of the ERC under section 220(1)(h) of the ERA and in addition, he had claimed *inter alia* several remedies that are available only on an employment grievance *i.e.*

> *(a) an order that the Defendant's termination letters dated 25th April 2019 be set aside and dismissed (essentially, his reinstatement, which is an employment grievance remedy under section 230(1)(a) of the ERA); and*
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> *(b) remedial orders pursuant to section 230 of the ERA, including but not limited to reimbursement and compensation (which are employment grievance remedies under section 230(1)(b) and (c) of the ERA).*

[14] According to the appellant, on 30 March 2021, the ERC had delivered an interlocutory ruling on an application for further discovery by the respondent wherein it said that *the respondent had brought a claim against its former employer for unlawful and unfair dismissal* alleging that the main reason for his termination was that in his position as the claims manager, he had under reserved claims for 6 clients which the appellant alleged had affected its solvency position.

[15] The appellant has also argued that ***ANZ Banking Group Pte Ltd v Sharma*** is applicable to this case in as much as the Court of Appeal held that (i) only the ERT has original jurisdiction to hear *employment grievances* of a worker in an essential service/industry **or** any other worker such as the respondent who, of course, was not employed in an essential service and industry (ii) a worker employed in an essential service/industry must file the *employment grievance* within 21 days and after filing the claim, cannot withdraw it and file a "fresh action" over the same subject matter in the ERC after the 21 days limitation period (iii) **all** *employment grievances* (workers in an essential service/industry and otherwise) must commence with a report to Mediation Services under section 110(3) of the ERA and, if not settled, can only be referred to the ERT (iv) the ERT can adjudicate matters (of essential service and industry workers and others) relating to claims up to $40,000 and **all** *employment grievances* (by workers in an essential service/industry as well as other workers) are therefore limited to a maximum of $40,000 and (v) the ERC has original jurisdiction to

determine an action founded on an *employment contract* but those claims must properly be pleaded as such .

[16] I am not sure whether the *ratio decidendi* of ***ANZ Banking Group Pte Ltd v Sharma*** is as wide-ranging as the appellant has argued and whether some propositions in the paragraph above are really part of *obiter dicta*. This is a matter for the Full Court to decide.

[17] On the other hand, the respondent has distinguished ***ANZ Banking Group Pte Ltd v Sharma*** in that as unlike Mr. Sharma (who was employed in an essential service and thus had no option but to file a claim with the ERT within 21 days) the respondent was not employed in an essential service. Mr. Sharma's claim did not make reference to an employment contract whereas the respondent's claim was primarily founded on breach of his employment contract *i.e. the respondent had referred and pleaded extensively to the breaches of his employment contract in his statement of claim* which makes only three references to the ERA which did not nullify his claim. The respondent in addition to special damages and contractual damages had prayed for *general damages for breach of contract*. The respondent has argued that he referred to those three instances to ERA in his claim because any worker summarily dismissed is entitled to a certificate of service, once the ERC is vested with jurisdiction it could grant any remedial orders as per section 230 of the ERA and unlawful termination and damages to the dignity and reputation were also breaches under the ERA.

[18] The appellant has responded that merely making references to clauses in the employment contract does not and cannot bring it within the scope of section 220(1)(h) of the ERA conferring jurisdiction on the ERC.

[19] The respondent too relies on the statement of the Court of Appeal in ***ANZ Banking Group Pte Ltd v Sharma*** that '…..*if a claim for unjustified or unfair dismissal is "founded on a contract of employment", and properly pleaded as such, the ERC has jurisdiction under s 220(1)(h) to hear and determine such a claim.'* and submits that ***ANZ Banking Group Pte Ltd v Sharma*** would not help the appellant as the respondent's claim was validly made to ERC and founded and pleaded properly on the basis of his contract of employment.

[20] Thus, to me it appears that the issue of jurisdiction of the ERC in this instance depends on the interpretation and application of ***ANZ Banking Group Pte Ltd v Sharma*** to the facts of this case which are not the same as in ***ANZ Banking Group Pte Ltd v Sharma***. This is not a task that should be attempted by me as a single judge but should necessarily be left to the Full Court which will have the benefit of reading the entire proceedings and documents available to the ERC. However, having considered the arguments of both parties, I cannot say that the primary appeal point being a mixed question of law and fact has no merit. Thus, I am inclined to hold that at the least there is an arguable case for the appellant despite that fact that the appeal is against consent orders.

[21] The matters that should be considered by this Court in an application for stay pending appeal were discussed in **Natural Waters of Viti Ltd –v- Crystal Clear Mineral Water (Fiji) Ltd** [2005] FJCA 13; ABU 11 of 2004 [18 March 2005]. It is of course not always necessary to consider all seven matters as their relevance will often depend upon the nature of the proceedings and the orders made by the court below[7]. A stay should not be granted unless the Court is satisfied that there are good reasons for doing so. Whether there are good reasons established will be determined by reference to the principles set out by this Court in the ***Natural Waters of Fiji***[8].

[22] This is an appeal against a money judgment. Generally a successful litigant should not be deprived of the fruits of successful litigation by withholding funds to which he is otherwise entitled, pending an appeal. For this Court to interfere with that right the onus is on the appellant to establish that there are sufficient grounds to show that a stay should be granted. Two factors that are mostly taken into account by a court are (1) whether the appeal will be rendered nugatory if the stay is not granted and (2) whether the balance of convenience and the competing rights of the parties point to the granting of a stay[9]. The power to grant a stay conferred by section 20 of the Court of Appeal Act gives the Court a wide discretion to grant a stay when the interests of justice so require[10]

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[7] See for example **Singh v Singh** [2019] FJCA 165; ABU 49 of 2018 (16 August 2019); **Prasad v Sagayam** [2019] FJCA 15; ABU82.2018 (22 February 2019)

[8] ***Singh v Singh*** (supra); **Neo (Fiji) Ltd v Ausmech Services (Australia) Ltd** [2019] FJCA 174; ABU39.2018 (11 September 2019)

[9] **Newworld Ltd v Vanualevu Hardware (Fiji) Ltd** [2015] FJCA 172; ABU76.2015 (17 December 2015)

[10] **Gallagher v Newham** [2003] FJCA 18; ABU0030.2000S (16 May 2003)

[23] This Court is required to consider the *bona fides* of the appellant in the prosecution of the appeal (which is often taken to be a reference to the chances of the appeal succeeding[11]) and whether the appeal involves a novel question of some importance. However, at the same time the authorities suggest that the merits of the appeal will rarely be considered in any detail. It is usually sufficient if an appellant has an arguable case. If the appeal is obviously without merit and has been filed merely to delay enforcement of the judgment then the application should be refused[12].

[24] Since the decision of this Court in **Attorney-General of Fiji and Ministry of Health v Dre** [2011] FJCA 11; Misc. 13 of 2010 (17 February 2011), the ability of the appellant to recover the judgment amount in the event that a stay is not granted is not decisive and is only one of a number of factors that must be considered[13]. In my view the appellant has not established that the appeal will be rendered nugatory in the event that a stay is not granted. However, I do consider the fact that if the money agreed between the parties is paid to the respondent pending appeal, the appellant may encounter difficulties in recovering them if the Court of Appeal judgment is in its favor, for the respondent has not said otherwise.

[25] The balance of convenience is not specifically pointing in the direction of either party but tilted slightly in favour of the appellant on the issue of recovery of the judgment sum if required after the Full Court judgment. Nevertheless, to safeguard the respondent's rights in the event the appellant fails in his attempt to get the consent orders reversed by the Full Court, I would direct the appellant to deposit the agreed sum of FJD 250,000.00 in the Court of Appeal pending the determination of the appeal. Given that there was no protracted trial in the ERC, the preparation of appeal records should not prove a difficult task and it means that the appeal could properly be brought before the Full Court in a short time paving the way for an early disposal. Thus, the stay order pending appeal would not prejudice the respondent's rights under consent orders, which has been extended up to this point.

[11] **Neo (Fiji) Ltd v Ausmech Services (Australia) Ltd** [2019] FJCA 174; ABU39.2018 (11 September 2019)
[12] ***Newworld Ltd v Vanualevu Hardware (Fiji) Ltd*** *(supra)*
[13] ***Neo (Fiji) Ltd v Ausmech Services (Australia) Ltd*** *(supra)*

[26] As for the success of the appeal, I have already concluded that there is at least an arguable case for the appellant even against consent orders. With regard to the summons for leave to appeal, given the discussion above on the main contentious issue arising from the grounds of appeal, I could form a *provisional* view that the appeal also has a realistic chance of success[14]. Therefore, at this stage, leave to appeal should also be granted without which no stay of execution could be granted.

Orders of the Court:

1. *Leave to appeal is granted for the appellant on the three grounds of appeal as prayed for in the summons filed on 29 September 2023.*
2. *Appellant must file and serve the notice of appeal, a draft copy of which is attached to the affidavit of Paulo Ralulu signed on 29 September 2023, within 21 days hereof.*
3. *The execution of the consent orders between the parties on 23 May 2023 (sealed on 01 June 2023) is stayed pending the determination of the appeal.*
4. *Order 3 above is conditional upon the appellant depositing into the Court of Appeal Registry a sum of FJD $250,000.00 within 21 days hereof.*
5. *Appellant is directed to pay to the respondent FJD $3000.00 as the costs of the applications for leave to appeal and stay of execution within 21 days hereof.*
6. *If the appellant fails to comply with Orders 4 and 5 above, the summons/application for stay of execution is deemed to be dismissed and stay order granted is deemed to be vacated forthwith.*
7. *The appellant is directed to act expeditiously to have the appeal ready for hearing before the Full Court in terms of the Court of Appeal Act and Practice Directions.*

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL

Solicitors:

Munro Leys Lawyers for the Appellant
R. Patel Lawyers for the Respondent

[14] **Devi v Samy** [2025] FJCA 44; ABU032.2024 (24 March 2025)