

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO: HBC 88 of 2012

BETWEEN : **SETAVANA SAUMATUA** of Lot 7, Nirajan Place, Namadi Heights, Suva, Barrister and Solicitor.
PLAINTIFF

A N D : **SUVA CITY COUNCIL** a statutory body established pursuant to the Local Government Act Chapter 125 of the Laws of Fiji, whose registered office is located at the Main Office Civic Centre, 196 Victoria Parade, Suva.
DEFENDANT

BEFORE : Justice Riyaz Hamza

COUNSEL : Mr. Isireli Fa for the Plaintiff
Mr. Devanesh Sharma with Ms. Nancy Choo for the Defendant

Dates of Hearing : 5 & 6 April 2016

Date of Ruling : 25 May 2016

RULING

INTRODUCTION AND BACKGROUND

[1] This is an application made by the Plaintiff, by way of a Writ of Summons. The Writ of Summons together with a Statement of Claim was filed in Court on 27 March 2012.

- [2] In her Statement of Claim the Plaintiff claims the following reliefs:
- (a) Damages against the Defendant for breach of contract for the unlawful termination (as a City Lawyer) whereby the Plaintiff claims for the following:
- (1) Balance of the Contract Salary as at the 8 January 2012 amounting to \$92,316.00 (Ninety Two Thousand Three Hundred and Sixteen Dollars); and
 - (2) Balance of the Housing Allowance as at 8 January 2012 amounting to \$8,809.00 (Eight Thousand Eight Hundred and Nine Dollars)
- (b) Exemplary Damages against the Defendant in the manner of the abrupt, unfair, and wrongful dismissal, and for slander in the sum of \$100,000.00 (One Hundred Thousand Dollars);
- (c) General Damages;
- (d) Costs of this action;
- (e) Any other relief this Honourable Court deems just.
- [3] The Defendant filed their Statement of Defence, on 15 May 2012, whereas the Plaintiff filed her reply to the Statement of Defence, on 15 June 2012.
- [4] A Pre-Trial Conference had been held between the Solicitors for the Plaintiff and the Defendant and the Minutes of the said Pre-Trial Conference have been filed in Court on 16 July 2015.
- [5] On 10 February 2016, the Defendant filed a Summons seeking, inter alia, an Order that the Plaintiff's action be struck out and dismissed on the basis that this Court has no jurisdiction to adjudicate upon this matter. The Summons was supported by an Affidavit sworn by Bijay Chand, Acting Chief Executive Officer of the Defendant, the Suva City Council.

- [6] On 5 April 2016, the Plaintiff filed an Affidavit in Opposition to the Defendant's Affidavit. An Affidavit in Response to Opposition was filed by the said Bijay Chand, on 6 April 2016.
- [7] This matter was taken up for hearing before me on 5 & 6 of April 2016. Both counsel for Plaintiff and Defendant were heard. The parties also filed detailed written submissions, which I have had the benefit of perusing.

SUMMONS TO DISPUTE THE JURISDICTION OF THE COURT

- [8] In the Summons filed to dispute the jurisdiction of Court the Defendant seeks the following Orders:
1. An Order that the Plaintiff's action be struck out and dismissed.
 2. A Declaration that the High Court has no jurisdiction to entertain an employment grievance concerning breach of employment contract, and that the rightful jurisdiction is the Employment Court.
 3. A Declaration that the High Court of Fiji has no jurisdiction in adjudicate on an Executive decision of the then Interim Prime Minister made pursuant to the powers given to the Interim Prime Minister under Section 9A of the Local Government (Amendment) Promulgation 2008 to terminate the employment of the Plaintiff.
 4. A Declaration that in accordance with Section 173(4)(d) of the Constitution no court or tribunal has the jurisdiction to accept, hear, determine, entertain or challenge any decision of a Special Administrator made pursuant to directive from the Interim Prime Minister under Section 9A of the Local Government (Amendment) Promulgation 2008.
 5. Such further or other order(s) as this Court in the circumstances considers appropriate.

THE AFFIDAVIT IN SUPPORT FILED BY BIJAY CHAND

[9] The contents of the Affidavit filed by Bijay Chand, Acting Chief Executive Officer of the Suva City Council, in support of the Summons, can be detailed as follows:

1. The deponent states that he is the Acting Chief Executive Officer of the Defendant, Suva City Council, in this action and that he is duly authorised to swear the Affidavit.
2. He states that the Plaintiff, Ms. Setavana Saumatua, was terminated from her employment with Council, on the grounds that there were allegations of blogging activities against the then Interim Government using the Council's office computers during office hours.
3. The actions of the Plaintiff were perceived to cause political incitement. That due to the said actions of the Plaintiff, the Permanent Secretary of the Prime Minister's Office, after conducting their investigations gave a directive to the Council on behalf of the Prime Minister to terminate the Plaintiff's employment forthwith. This was an executive decision and directive given by the Interim Prime Minister's Office.
4. On 27 March 2012, the Plaintiff has by way of a Writ of Summons, commenced this action against the Council seeking inter alia, damages for Breach of Contract, alleging two causes of action of Unlawful Termination and Unfair Dismissal.
5. The deponent states that the Plaintiff was employed by the Council pursuant to a Contract of Employment, dated 22 August 2009, for a term of 3 years. A copy of the Contract is annexed and marked as "BC1".
6. The Termination provisions relating to the Plaintiff were governed by Clause 9 of the Contract, in particular Clause 9.5 which gave the Council the power to dismiss the Plaintiff without notice or warning for serious misconduct.
7. It is stated that on or around 6 December 2006, Mr. Bainimarama took over executive control of the Government and was appointed as an Interim Prime Minister. The rule of law was sanctioned and preserved through several decrees enacted by the Interim Government.

9. The Interim Government passed the Local Government (Amendment) Promulgation 2008, the State Services Decree 2009 and the Administration of Justice Decree 2009.
10. The State Services Decree 2009 permitted every Interim Minister appointed pursuant to the Decree under their Ministerial portfolio to appoint a Permanent Secretary with who lay the unfettered power to make any decision for its respective Ministerial departments. The Permanent Secretary had the power to terminate employment of any civil servants.
11. The validity of these Decrees were preserved by Section 173(4)(d) of the 2013 Constitution.
12. On the 8 January 2010, the Permanent Secretary of the Prime Minister's Office wrote to the Special Administrator of the Suva City Council and directed that the Plaintiff, along with other employees alleged of blogging, were to be immediately terminated of their employment from the Council. A copy of the letter is annexed and marked as "BC2".
13. The said letter stated that the evidence collated by the Prime Minister's Office evidenced that the employees of the Council were using the Council computers for blogging against the Interim Government. The letter demanded that the Council immediately comply with the directives of the Permanent Secretary.
14. That in carrying out the directives of the Permanent Secretary, the Special Administrator of the Suva City Council, by letter dated 4 February 2010, terminated the employment of the Plaintiff. The termination letter is said to be self-explanatory. A copy of the termination letter is annexed and marked as "BC3".
15. The Defendant says that the Court has no jurisdiction to hear this case. It is said that any action taken by Defendant in complying with an executive decision or the directives of the Permanent Secretary of the then Interim Prime Minister's Office cannot be subject to challenge in any Court or Tribunal by virtue of the respective Decrees and Acts then enacted and section 173(4)(d) of the 2013 Constitution.

16. Furthermore, if the Court were to give merit to the Plaintiff's actions, then this action is one of an employment grievance, which is governed by the provisions of the Employment Relations Promulgations 2007 and now by the newly enacted Employment Act No. 4 of 2015.
17. That the Defendant is a local government statutory body and falls within the definition and interpretation of the Essential Services under the Employment Act.
18. It is stated that it is an abuse of process to commence this action through ordinary Court when the Employment Act clearly provides guidelines for such actions.

THE AFFIDAVIT IN OPPOSITION FILED BY THE PLAINTIFF

[10] The contents of the Affidavit filed by the Plaintiff in Opposition to the Defendant's Affidavit can be summarized as follows:

1. She deposes that she is currently unemployed and makes this Affidavit in response to the Defendant's application to strike out and dismiss this action.
2. She admits that her employment was terminated with the Defendant on an allegation of blogging against the Interim Government using the Defendant's office computers during office hours. However, she categorically denies those allegations.
3. She deposes that she has been cleared by the Police and the DPP's Office of the allegations of blogging against the Government. A copy of the correspondence sent to her in this regard, by the Office of the DPP, is annexed and marked as "SS1".
4. She states that the Contract of Employment that was terminated by the Defendant was dated 8 June 2009, and not 22 August 2009, as claimed by Bijay Chand. A copy of the Contract, dated 8 June 2009, is annexed and marked as "SS2".

5. In terms of Clause 20 of the Contract it is stated that "Either party may terminate this Agreement upon giving not less than six (6) weeks written notice to the other party of their intentions or by making payment to the other party of six weeks' salary in lieu of such notice."
6. The Plaintiff deposes that Section 173(4)(d) of the Constitution is not applicable in respect of this matter.
7. She has also annexed, marked "SS3", "SS4", "SS5" and "SS6", several other correspondence in relation to the termination of her employment. All such correspondence is in the year 2013, which would be after these proceedings were filed in Court.
8. She categorically states that the High Court of Fiji has jurisdiction to hear and determine this matter and accordingly for the Summons filed by the Defendant to be dismissed with costs.

THE AFFIDAVIT IN RESPONSE TO OPPOSITION FILED BY BIJAY CHAND

[11] The contents of this Affidavit can be summarized as follows:

1. The deponent reiterates the fact that on 8 January 2010, the Permanent Secretary of the Prime Minister's Office wrote to the Special Administrator of the Suva City Council and directed that the Plaintiff, along with other employees alleged of blogging, were to be immediately terminated of their employment from the Council (reference to document marked "BC2").
2. The Special Administrator did not immediately comply with this directive and instead requested the Plaintiff to remain at home until she received further advice from the Ministry of Local Government.
3. On 14 January 2010, the Special Administrator wrote a letter to the Minister for Local Government, Urban Development, Housing and Environment to accord the Plaintiff due process and natural justice and suggested an

alternative to termination of her employment. The said letter is annexed and marked as "BC4".

4. On 2 February 2010, the Special Administrator received a letter from the Acting Permanent Secretary Ministry for Local Government, Urban Development, Housing and Environment stating thus "While we note the matters that you raised on the actions that you took on these officers and the measures that you propose, the Minister has directed me to inform you that it is important at this stage to adhere to the directive given by the Permanent Secretary Prime Minister's Office in his letter dated 8 January 2010, to you." The said letter is annexed and marked as "BC6".
5. Subsequent to this communication and in compliance with the directive given therein, the Special Administrator terminated the employment of the Plaintiff by letter dated 4 February 2010 (reference to document marked "BC3").
6. Also annexed and marked as "BC5" is a further correspondence which transpires in 2013.

LEGAL PROVISIONS AND ANALYSIS

[12] The Defendant has filed the Summons for strike out in terms of the provisions of Order 18, Rule 18(1) of the High Court Rules, 1988. The Rule provides as follows:

18(1)The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –

(a) It discloses no reasonable cause of action or defence, as the case may be;

or

(b) It is scandalous, frivolous or vexatious; or

(c) It may prejudice, embarrass or delay the fair trial of the action; or

(d) It is otherwise an abuse of the process of the court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

- [13] Where a party is disputing the jurisdiction of this Court it is common practice to make the application pursuant to Order 12, Rule 7 of the High Court Rules. The rule provides as follows:

“Dispute as to jurisdiction

7. –(1) A defendant who wishes to dispute the jurisdiction of the Court in the proceedings by reason of any such irregularity as is mentioned in Rule 6 or on any other ground shall give notice of intention to defend the proceedings and shall, within the time limited for service of a defence apply to the Court for-

- a) an order setting aside the writ or service of the writ on him, or*
- b) an order declaring that the writ has not been duly served on him, or*
- c) the discharge of any order giving leave to serve the writ on him out of the jurisdiction, or*
- d) the discharge of any order extending the validity of the writ for the purpose of service, or*
- e) the protection or release of any property of the defendant seized or threatened with seizure in the proceedings, or,*
- f) the discharge of any order made to prevent any dealing with any property of the defendant, or*
- g) a declaration that in the circumstances of the case the Court has no jurisdiction over the defendant in respect of the subject matter of the claim or the relief or remedy sought in the action, or*
- h) such other relief as may be appropriate.*

(2) An application under paragraph (1) must be made by summons or motion, and the notice of motion or summons must state the grounds of the application.

(3) An application under paragraph (1) must be supported by an affidavit verifying the facts on which the application is based and a copy of the affidavit must be served with the notice of motion or summons which the application is made.

(4) Upon hearing an application under paragraph (1), the Court, if it does not dispose of the matter in dispute, may give such directions for its disposal as may be appropriate, including directions for the trial thereof as a preliminary issue.

(5) A defendant who makes an application under paragraph (1) shall not be treated as having submitted to the jurisdiction of the Court by reason of his having given notice of intention to defend the action; and if the Court makes no order on the application or dismisses it, the notice shall cease to have effect, but the defendant may, subject to rule 6(1), lodge a further acknowledgement of service and in that case paragraph (6) shall apply as if the defendant had not made any such application.

(6) Except where the defendant makes an application in accordance with paragraph (1), the acknowledgement by a defendant of service of a writ shall, unless the acknowledgement is withdrawn by leave of the Court under Order 21, Rule 1, be treated as a submission by the defendant to the jurisdiction of the Court in the proceedings”.

[14] In this matter objection to jurisdiction is being taken in terms of the provisions of the new Constitution, which came into force on 7 September 2013 (See Section 162(2) of the Constitution). Therefore, it is understandable, that at the time the pleadings were completed in this case, which was in the year 2012, neither party was privy to the said Constitutional provisions.

[15] During the hearing of this matter the Counsel for the Defendant submitted that he will no longer be pursuing the Declaration sought in the Summons that the High Court has no jurisdiction to entertain an employment grievance concerning breach of employment contract, and that the rightful jurisdiction is the Employment Court.

[16] Therefore, the objection taken up by the Defendant is primarily based upon two grounds.

1. That the High Court of Fiji has no jurisdiction to adjudicate on an executive decision of the then Interim Prime Minister made pursuant to the powers given to the Interim Prime Minister under section 9A of the Local Government (Amendment) Promulgation 2008 to terminate the employment of the Plaintiff; and

2. That in accordance with Section 173(4)(d) of the Constitution no court or tribunal has the jurisdiction to accept, hear, determine, entertain or challenge any decision of a Special Administrator made pursuant to directive from the Interim Prime Minister under section 9A of the Local Government (Amendment) Promulgation 2008.

[17] For a proper understanding of this issue it is important to analyse Subsection 173(4) of the Constitution in its entirety. Subsection 173(4) of the Constitution is reproduced below:

(4) Notwithstanding anything contained in this Constitution, no court or tribunal (including any court or tribunal established or continued in existence by the Constitution) shall have the jurisdiction to accept, hear, determine, or in any other way entertain, or to grant any order, relief or remedy, in any proceeding of any nature whatsoever which seeks or purports to challenge or question—

(a) the validity or legality of any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution;

(b) the constitutionality of any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration

(including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution;

(c) any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution, for being inconsistent with any provision of this Constitution, including any provision of Chapter 2 of this Constitution; or

(d) any decision made or authorised, or any action taken, or any decision which may be made or authorised, or any action which may be taken, under any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution, except as may be provided in or authorised by any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution.

[18] If the provisions of this Subsection are to be dissected it would read as follows:

1. Notwithstanding anything contained in this Constitution;
2. no court or tribunal (including any court or tribunal established or continued in existence by the Constitution);
3. shall have the jurisdiction;
4. to accept, hear, determine, or in any other way entertain, or to grant any order, relief or remedy;
5. in any proceeding of any nature whatsoever;
6. which seeks or purports to challenge or question;

- (a) (i) the validity or legality of any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws),

(ii) made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution (which is the 6 October 2014);
- (b) (i) the constitutionality of any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws),

(ii) made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution (which is the 6 October 2014);
- (c) (i) any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws),

(ii) made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution (which is the 6 October 2014),

(iii) for being inconsistent with any provision of this Constitution, including any provision of Chapter 2 of this Constitution; or
- (d) (i) any decision made or authorised, or any action taken, or any decision which may be made or authorised, or any action which may be taken,

(ii) under any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws),

(iii) made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution (which is the 6 October 2014),

(iv) except as may be provided in or authorised by any such Promulgation, Decree or Declaration (including any provision of any such laws),

(v) made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution (which is the 6 October 2014).

[19] It is therefore clear from a plain reading of this Subsection that notwithstanding anything contained in the Constitution, no court or tribunal shall have the jurisdiction to accept, hear, determine, or in any other way entertain, or to grant any order, relief or remedy, in any proceeding of any nature whatsoever which seeks or purports to challenge or question (a), (b), (c) or (d) above.

[20] In this case the purported challenge is in respect of Section 9A of the Local Government (Amendment) Promulgation 2008. It is stated in the Promulgation that the provisions thereof amends the Local Government Act (Chapter 125).

[21] Section 9A deals with the appointment of Special Administrators to Local Government Authorities and reads as follows:

Special administrators

9A. - (1) The Minister may by order appoint two or more persons to be special administrators of a municipality for such period as the Minister may consider necessary to perform the functions of a council until the election date is determined by the Electoral Commission.

(2) The persons appointed as special administrators under subsection 1 shall be deemed to be the duly constituted council of a municipality and shall, subject to any general or specific directions issued by the Minister, have the

power to perform and discharge of all the rights, privileges, powers, duties and functions vested in or conferred or imposed on the council, the mayor and any officer of the council by the Act or any other written law.

- [22] It is clear from Subsection 1 that the Minister, who is named in the Promulgation as the Minister for Local Government, Urban Development and Public Utilities, has the power by order to appoint two or more persons to be Special Administrators of a municipality for such period as the Minister may consider necessary to perform the functions of a Council until the election date is determined by the Electoral Commission.
- [23] Since this tantamount to a decision made or authorised, or to an action taken by the Minister, when read with Subsection 173(4)(d) of the Constitution, no court or tribunal shall have the jurisdiction to accept, hear, determine, or in any other way entertain, or to grant any order, relief or remedy, in any proceeding of any nature whatsoever which seeks or purports to challenge or question such appointments.
- [24] In terms of Subsection 9A (2) of the Promulgation, the persons appointed as Special Administrators under Subsection 1 shall be deemed to be the duly constituted Council of a municipality and shall have the power to perform and discharge of all the rights, privileges, powers, duties and functions vested in or conferred or imposed on the Council, the Mayor and any officer of the Council by the Act or any other written law, subject to any general or specific directions issued by the Minister. The "Act" referred to here would be the Local Government Act (Chapter 125).
- [25] It is the view of this Court that once the appointment of the Special Administrator is made by the Minister, any decision made or authorised, or any action taken, or any decision which may be made or authorised, or any action which may be taken by the said Special Administrator, would not be statute barred in terms of the Subsection 173(4)(d) of the Constitution.
- [26] However, as stipulated in Subsection 9A (2) of the Promulgation, this provision may be subject to any general or specific directions issued by the Minister in charge of

Local Government. It can be argued that any decision made or authorised, or any action taken, or any decision which may be made or authorised, or any action which may be taken, by the Special Administrator pursuant to any general or specific directions issued by the Minister concerned could be statute barred.

[27] In the present case the Special Administrator of the Suva City Council, by letter dated 4 February 2010, terminated the employment of the Plaintiff. In the letter of termination it is stated as follows: "The Minister has directed me to inform you that it is important at this stage to adhere to the directive given by the Permanent Secretary Prime Minister's Office in his letter dated 8 January 2010 to you." It is evident that the Special Administrator was carrying out a directive given NOT by the Minister concerned, but by the Permanent Secretary of the Prime Minister's Office. The Minister concerned was merely communicating or informing this fact to the Special Administrator.

[28] Therefore, it is the view of this Court that the directive of the Permanent Secretary of the Prime Minister's Office, acting on behalf of the Prime Minister, would not be caught up under the provisions of Subsection 173(4)(d) of the Constitution, as a decision made or authorised or an action taken in terms of Subsection 9A(2) of the Local Government (Amendment) Promulgation 2008.

[29] Both Counsel for the Plaintiff and Defendant have referred to the case of *State v Attorney-General & Minister for Justice, ex parte One Hundred Sands Ltd* [2015] FJHC 286; HBJ 09.2015 (24 April 2015), where His Lordship Justice David Alfred had gone on to interpret the provisions of Subsection 173(4)(d) of the Constitution.

[30] In that case One Hundred Sands Ltd filed an application for judicial review of the decision of the Attorney-General & Minister for Justice, made on 9 February 2015, revoking a casino gaming licence that had been granted to the Applicant, on the 15 March 2012. It was held that the wording of Subsection 173(4)(d) of the Constitution only precludes the Court from hearing and granting relief with regard to decisions made between 5 December 2006 until the first sitting of the first Parliament under this Constitution (which is the 6 October 2014). Since the decision in the said case

was made by the Minister on 9 February 2015, it was held to be clearly outside the ambit of Subsection 173(4)(d) of the Constitution.

- [31] In any event, the facts and circumstances of the present case must be distinguished from the facts and circumstances of *State v Attorney-General & Minister for Justice, ex parte One Hundred Sands Ltd.*

CONCLUSION

- [32] For all the aforesaid reasons, I am of the view that this Court has jurisdiction to adjudicate upon this matter and as such the Summons filed by the Defendant should be dismissed.

- [33] Accordingly, I make the following Orders:

ORDERS

1. The Summons filed by the Defendant is dismissed.
2. Taking into consideration all the facts and circumstances of this case, I feel the ends of justice will be met if I order each party to bear their own costs.

Dated this 25th day of May 2016, at Suva.



Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

