IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. 88 of 2012

BETWEEN : **SETAVANA SAUMATUA** of Lot 7 Niranjan Place, Namadi Heights, Barrister & Solicitor

PLAINTIFF

AND : **SUVA CITY COUNCIL** a statutory body established pursuant to the Local Government Act, Cap 125 of the Laws of Fiji, whose Head office is located at 196 Victoria Parade, Suva

DEFENDANT

Counsel : **Plaintiff: Ms. Fa. F**
: **Defendant: Ms. Choo. N**

Date of Hearing : **17.06.2020**

Date of Judgment : **30.6.2020**

JUDGMENT

INTRODUCTION

1. Defendant filed this application seeking leave to appeal against the decision delivered on 28.2.2020. This was regarding interpretation of Section 30 of Essential National Industries (Employment) Act[1] 2011 (ENIA). Defendant's position is that this action should have been terminated by Chief Registrar in terms of Section 30 of ENIA. Plaintiff filed this action under common law *inter alia* for breach of employment contract and slander. There was no restriction under ENIA or any other law, for a person to seek relief under common law for breach of contract and for any tort including defamation, irrespective of such employer was an essential service. This action was instituted in 2012 and Defendant had even accepted jurisdiction of this court for more than eight years. They even appealed to the Court of Appeal and no time objected on the basis of patent lack of jurisdiction under ENIA. They are estopped from denying jurisdiction now at interlocutory stage, after eight years. Part six of the ENIA specify Employment Act[2] 2007 and if this is not clear enough Section

[1] See Section 3(i) of Interpretation Act 1967
[2] See section3(j) of Interpretation Act 1967

30(2) of ENIA is expressly stated. that it was limited to Employment Act[3] 2007, and this action was not instituted under Section 30(1) for a matter stated therein. Again, if action was, under Employment Relations Act 2007 termination can be granted by virtue of Section 30(2) of ENIA. Section 30(3) of ENIA reiterated requirements under Section 30(2) for termination. So there was no ambiguity as to actions that were terminated in terms of Section 30(1),(2), (3) and this action for tort under common law, was not covered under any of the said provisions. This was clear from the beginning. Defendant's solicitors who were appointed in 2012 never disputed jurisdiction, and in their acknowledgment was not a qualified and or limited and or subject to any qualification. At the hearing for leave to appeal contended that an employee cannot seek redress for torn in common law in civil jurisdiction. Defendant was denying jurisdiction of civil court under common law for breach of contract and or for defamation. This is farfetched and has not merits as it is trite law that any person can exercise such options for litigation in Employment Relation Court or in civil court depending on claims. This was not an argument that was made in the hearing of the summons for strike out and should be rejected *in toto.* This was not included in the written submissions. Defendant is also relying on a decision of Court of Appeal but said decision was an appeal from decision of Employment Relations Court hence there was no issue as to applicability of Section 30 of ENIA as it applied under Employment Relations Court in terms of Section 30(2) of ENIA. If said Court of Appeal decision is relied in this case it is misapplication of said decision. There was no qualm that all proceedings under Employment Relations Act 2007 were terminated in terms of Section 30 of said Act, but not all civil actions for tort. This prohibition of litigation under ENIA, cannot expand to all the actions instituted as a civil action. So the leave against the interlocutory order had not merits.

FACTS

2. Defendant filed summons seeking following orders;

"a) A **Declaration** that the Plaintiff's Claim was filed illegally in March 2012 and contrary to s. 266 of the Employment Relations Amendment Decree 2011;

b) Alternatively a **Declaration** that the Plaintiff's Claim was deemed to have been terminated as against the Defendant as a designated corporation and thus statue barred under s. 30 of the **Essential National Industries (Employment) Decree No. 35 of 2011**;

c) An **Order** that the Plaintiff's Statement of Claim against the Defendant be dismissed and struck out;

[3] ibid

d) **Alternatively**, the Plaintiff's claim be struck out for non-compliance with section 188 (4) of the Employment Relations Amendment Act No. 4 of 2015.

e) Costs of this action on an indemnity basis; and

f) Such other relief as this Honourable Court deems just."

3. The above orders were sought on following grounds as stated in the said summons for strike out

"1. At the time the Plaintiff filed his Writ of Summons and Statement of Claim on 27th March 2012, such a claim was statute barred pursuant to s. 266 of the Employment Relations Amendment Decree 2011.

2. The Claim was again deemed to be terminated under the **Essential National Industries Employment Decree No. 35 of 2011 when the Defendant became a designated corporation in December 2013.**

3. The Defendant was deemed to a Designated Corporation under the **Essential National Industries & Designated Corporations Amendment Regulations 2013.**

4. The Defendant was a designated corporation from 18th December 2013 under the **Essential National Industries Employment Decree No. 35 of 2011** and became an essential service pursuant to the Employment Relations Amendment Act No. 4 of 2015.

5. The Plaintiff's employment grievance arose on 4th February 2010 when the Plaintiff's employment contract was terminated, which effectively meant that the grievance was caught under s. 266 of the Employment Relations Amendment Decree 2011 and deemed to have been statute barred."

4. The substantive application filed by the Plaintiff was by way of a Writ of Summons, together with a Statement of Claim, which was filed in Court on 27 March 2012. It sought damages for breach of contract and unlawful termination and also balance of her salary in term of the contract of employment. She also claimed for housing allowance and damages for slander in the manner of dismissal.

ANALYSIS

5. Court of Appeal In *Kelton Investments Ltd & Another –v- Civil Aviation Authority of Fiji & Another* Civil Appeal No. ABU0034 of 1995, Decision 18 July 1995, (C.A.). There the President on behalf of the Court of Appeal considered authorities available at that time and stated:

"that Courts have repeatedly emphasized that appeals against interlocutory orders and decisions will only rarely succeed. Again [at p.10] he said:

"The Courts have thrown their weight against appeals from interlocutory orders or decisions for very good reasons and hence leave to appeal [is] not readily given.....I am not persuaded that this application should be treated as an exemption. In my view the intended appeal would have minimum or no prospect of success if leave were granted".

6. So the grant of leave to appeal is an exception in regard to interlocutory application. The obvious consequence of such grant of leave to Court of Appeal is delay and one need not go further than to examine the delay in this case as previously an interlocutory decision by my brother judge Hamza was appealed to Court of Appeal and time taken for determination of that. Already eight years lapsed and there will be issue as to witnesses and availability of them at trial due to delay. This is the logic behind seeking leave of the court as opposed to right to appeal regarding final decision.

7. As the said decision was interlocutory decision Defendant sought leave from this court to appeal to the Court of Appeal. This was a prerequisite as there was parallel jurisdiction to Court of Appeal to grant leave from interlocutory decision.

8. The pivotal point to be determined in terms of the summons was the application of Section 30 of ENIA and whether this action can be terminated in terms of the said provision. The other issues raised on the summons need not be considered if the answer to above was in favour of Plaintiff.

9. Defendant is required to show merits of the appeal in order to grant leave to appeal to Court of Appeal. In *Nasese Bus Company Ltd v Chand* [2013] FJCA 9; ABU40.2011 (8 February 2013) Court of Appeal held,

"*ii) Drafting grounds of appeal*

[7]. In their Notice of Appeal, the Appellants have listed ten grounds of appeal. **The first three grounds are vague and lacking in sufficient particulars for this Court to determine whether there is any merit. The requirement to particularise grounds of appeal is clearly set out in Rule 15 of the Court of Appeal Rules (the Rules)**. Every notice is required to **specify the precise form of the order which the appellant proposes to ask the Court of Appeal to make.** The purpose of the Rule is, in respect of all appeals, to narrow the issues in the appeal, **to shorten the hearing and to reduce costs**. This can only be achieved if the Appellant states in his notice of appeal the findings of fact and points of law which will be in issue on appeal.

Although the notice should state the precise order which the Court of Appeal will be asked to make, this should not result in lengthy or elaborate notices of appeal. **Detailed reasoning should not be included.**

[8]. The first three grounds do not comply with either the literal mandate nor the spirit of the Rule. The Court is not able to consider those grounds because they are simply too wide and too vague. Ground nine does not specify which award or why the award of damages is erroneous and excessive. Ground 10 should have stated why the calculation of interest was erroneous. However, grounds 9 and 10 have been considered." (emphasis added).

10. I have considered Grounds of Appeal as stated in the prospective application separately. But these grounds are vague and hard to deduce grounds of appeal easily. They were not framed with the intention of resolving the issue before the court, but to make it more complex and uncomprehensive.

11. The proposed grounds of appeal and my comments on the merits of each are as follows:

"GROUND 1

"The Learned Judge erred in law in not holding that the Plaintiffs claim for breach of employment contract was not caught by **section 30** of the **Essential National Industries (Employment) Decree 2011** and in doing so he misapplied the principles set out by the Court of Appeal in **Vinod v Fiji National Provident Fund [2016] FJCA 23. ABU 0016 of 2014** which Court had held that:

[11] Hence it is manifestly clear that the legislature intended to end all matters pending before a Court against designated corporations. Such objective was propelled by the need to replace all the dispute related matters pending before courts or any other judicial body with a new mechanism to provide for the prompt and orderly settlement of all disputes. The necessity for urgency or the need to terminate proceedings with immediate effect, arose as a corollary of introducing the new mechanism in order to prevent overlap of proceeding and to resolve matters urgently. The intention of the legislature was to replace the old system with a new mode of mechanism with immediate effect and therefore it is apparent that there was some urgency, as such the new law sought all the matters pending before the court also to be terminated with immediate effect.

[12] The FNPF which was not hitherto subject to the law relating to 'designated corporations' was also brought under the designated corporations provisions by the amendment on 5th March 2013. Court safely presumes that the same urgency was prevalent at the time when the new amendment was brought in. Regard must be paid to the dominant intention of the principal Act and the amendment ought to be

interpreted in accordance with the intention of the principal Act. As stated in Maxwell on The Interpretation of Statutes Eleventh edition page 19—

The true meaning of any passage, it is said, is to be found not merely in the words of that passage, but in comparing it with other parts of the law, ascertaining also that what were the circumstances with reference to which the words were used, and what was the object appearing from those circumstances which the legislature had in view. The same, it would seem, applies to a by-law. Every clause of a statute should be construed with reference to the context and the other clauses of the Act, so as, so far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter.

[13] Accordingly the text of the amendment cannot be read in isolation. It has to be read in conjunction with the principal Decree. Such reading makes it abundantly clear that the intention of the legislature was for the amendment to have retrospective effect and therefore the Learned High Court Judge has correctly applied section 11 of the interpretation act and given effect to the intention of the legislature and any contrary interpretation would have caused harm to the intention of the legislature. Therefore, I do not agree with the Learned Counsel of the Appellant on his averment that the Learned High Court Judge has erred in law."

Comment

12. Section 28 as well as Section 30 of ENIA had no application to this action based on common law, breach of contract and also for slander. Section 30(1) of ENI only restricts three specific action and they are

> "(a) the validity, legality or propriety of this Decree;
>
> (b) any decision of any Minister, the Registrar or any State official or body, **made under this Decree**; or
>
> (c) any decision of any designated corporation made **under this Decree**."(emphasis added)
>
> Plaintiff's action is not any of the above types."

This action is not based on any of the above grounds.

13. Section 30(2) and 30(3) are only dealing with actions instituted in terms of Employment Relations Act 2007 and this was expressive so a court cannot give an interpretation that was not stated.

"**GROUND 2**

That the Learned Judge erred in law when he failed to consider the effect of section 28 of **Essential National Industries (Employment) Decree 2011** and it precluded not only cases under the Employment Relations Act 2007 but under any other law.

Section 28 of the ***Essential National Industries (Employment) Decree 2011*** *provides:*

This Decree has effect notwithstanding any provision of the Employment Relations Promulgation 2007 or any other law and, accordingly, to the extent that there is any inconsistency between the Decree and the Employment Relations Promulgation 2007 or any other law, this Decree shall prevail.

Except as otherwise provided in this Decree, the provisions of the Employment Relations Promulgation 2007 shall not apply to any essential national industry, designated corporation or any person employed in any designated corporation or any essential national industry."

Comment

14. Section 28 of ENIA applies if there is inconsistency and there is no inconsistency between this action and ENIA. This is not the only action that proceeded in civil courts by an employee and this happens even now and High Court had even refused such application being transferred to Employment Relation Court (See Justice Seneviratna in *Kasabias Ltd v Wanninayake* [2019] FJHC 653; Civil Action 331 of 2018 (2 July 2019).

15. Section 28 had no application unless there is some inconsistency between ENIA and any other law. Even if I am wrong on that, application of Section 28 of ENIA does not per se terminate actions and termination is granted only under Section 30 of the ENIA

"**GROUND 3**

That the Learned Judge erred in law when he held at paragraphs 24 and 25 of the Judgment that:

i. Nothing precluded an employee working in a designated corporation from seeking civil remedy for termination of an employment contract.

ii. That common law remedy for breach of contract **was not expressly excluded by the Employment Relations Act 2007;**

iii. That an employee who elected to institute a civil action in the High Court, couldn't be terminated through s. 30(2) of the **Essential National Industries (Employment) Decree 2011** which applied only to proceedings commenced in terms of the Employment Relations Act 2007. The issue was not whether the action was instituted in the Employment Relations Court or the High Court Civil Division but whether the action brought by an employee in a designated corporation which was founded on alleged breach of employment contract was caught under section 30 of **Essential National Industries (Employment) Decree 2011.** Therefore, the Judgment in **Vinod v Fiji National Provident Fund [2016] FJCA 23. ABU 0016 of 2014** had unequivocally ousted the jurisdiction of the Court to hear the Plaintiffs Claim against a designated corporation if the action was founded on an employment contract. It was irrelevant whether the said action was filed in the Employment Relations Court or the High Court Civil Jurisdiction."

Comment

16. There is no ground of appeal stated but stated that erred in said paragraphs. Are the Defendants denying self-evident facts. I do not comment on that. I can only reaffirm my position stated.

"GROUND 4

That the Learned Judge erred in law in holding that section 266 (1) of the Employment Relations Act 2007 (as amended by the Employment Relations Amendment Act 2011) did not apply in this case because the Employer was not a Minister or the Government of Fiji but in paragraphs 4, 5 and 6 of the Judgment his Lordship set out the undisputed facts of this case relating to the decision to terminate and these were that:

i. The Appellant had on 8.01.2010 received a directive from the Permanent Secretary of the Prime Minister to immediately dismiss the employment of a number of persons.
The reason was alleged to be anti-Government blogging activities during office hours;

ii. The Appellant had received a directive from its Line Minister on 2.2.2010 to terminate the employment of employees including the Respondent;

iii. The Appellant terminated the employment of the employees on 4.2.2010 acting on the directive given on 8.1.2010 and in accordance with the directive and decision given by the Line Minister on 2.2.2010.

Comment

17. Again there was no ground stated and error of law is not stated. Said provision of law stated in the above ground, cannot be applied as I have decided that Section 28 and Section 30 of ENIA had not application to this action.

"GROUND 5

That the Learned Judge erred in law in holding that section 188(4) of the **Employment Relations Act 2007** (as amended by the **Employment Relations Amendment Act No. 4 of 2015**) could not apply to the present civil litigation for breach of employment contract when in fact the said section was relevant and gave the Respondent the opportunity to commence an action by a person who was previously employed in a designated corporation (and which eventually became known as an essential services) and who was statute barred from bringing an action within 21 days from 11 September 2015."

Comment

18. This ground again has no merits when Section 30 of ENIA has no application to the present action.

"GROUND 6

That the Learned Judge erred in law when he failed to address and consider a further ground that was relevant in this case.

The Plaintiff did not commence an action against the Council within 21 days from the date the ER Amendment No. 4 of 2015 came into effect i.e. 11 September2015.

On 15" February 2016 the Employment Relations Amendment Act No. 1 of 2016 was enacted and contained the following provisions:

***10.** Part 19 of the Promulgation is amended by inserting the following new division after Division 8—*

"Division 8A — Transitional Reinstatement of individual grievances 191 BTA.-

(1) Any individual grievance which was terminated or discontinued under section 30(2) of the Decree or under section 266 is here by reinstated, and shall be determined by the Arbitration Court.

(2) In the determination of any individual grievance which is reinstated under subsection (1), the Arbitration Court shall have such powers and be subject to such procedures as prescribed under sections 191AY and 191AZ.

Application for compensation for termination of employment under the Decree

191BTB.-(1) Subject to subsection (2), any worker who-was employed in an essential national industry under the Decree or with a designated corporation or a designated company under the Decree, and

whose employment was terminated by the employer during the operation of the Decree,
may make an application to the Arbitration Court for compensation, provided however that any such application must be made to the Arbitration ***Court within 28 days from the date of the commencement of this section.***

(2) No application for compensation shall be made by any worker for the termination of employment-
on the basis of established, proven or admitted corruption, abuse of office, fraud or theft; or
whereby the facts and situation which led to the termination has resulted in the worker being convicted of an offence.

(3) ***In the determination for compensation made under this section the jurisdiction of the Arbitration Court shall be limited to only an award of compensation not exceeding $25,000.00.***

(4) Subject to subsection (3), in the determination of any application made under this section, the Arbitration Court shall have such powers and be subject to such procedures as prescribed under sections 191AY and 191AZ.

I am advised and believe that the Plaintiff's initial claim was filed illegally on 11th February 2015 but as at that date the Council was already a designated corporation. My legal advice is that no employee could bring any claim against the Council in any court by former employee for unlawful terms of an Employment Contract whilst the Council remained a designated corporation.

The Plaintiff seeks to still maintain this Writ against the Council. However, I am advised and believe that ENID also ousted the jurisdiction to bring an employment claim under common law. I verily believe that s. 28 of the ENID did not only apply to cases that came under ERP applies but to any claim under any other law.

I am advised and believe that after the 2016 ER Amendment Act the only avenue to bring a case against the Council for any employment matter that arose prior the Council becoming an essential service is through the Arbitration Court within 21 days from the date the 2016 Amendment was passed.

I am advised that the intention of the law is that all past cases have a compensation ceiling of $25,000.00.

I am advised and believe that in light of the above the Plaintiff cannot maintain the current Writ against the Council in the High Court. If anything the case would have to be filed in the Arbitration Court. I am advised that at best the only Court that has jurisdiction to hear such a matter is the Arbitration Court."

Comment

19. This again is irrelevant when this action was not terminated and also could not be terminated in terms of Section 30 of ENIA. Plaintiff had instituted this action for alleged torts committed.

20. So the proposed grounds of appeal are unmeritorious and leave is refused. Such application for leave needs to be struck off as it will only delay the hearing of this action. High Court had even refused transfer of action to Employment Relations Court (see *Kasabias v Wanninayake* (decided 2/7/2019)Per Seneviratna J.

21. Considering circumstance of the case I do not award costs.

FINAL ORDERS

a. Leave to appeal against interlocutory order delivered on 28.2.2020 refused.
b. No costs.

Dated at Suva this 30th day of June, 2020.

HIGH COURT OF FIJI
SUVA

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Justice Deepthi Amaratunga
High Court, Suva