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IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0026 OF 2001S

(High Court Civil Action Nos. HBC 178 of 1997S and HBC 0028 of 1999S)

BETWEEN:

HOUSING AUTHORITY

Appellant

AND:

PENIONI BULU

Respondent

Coram:

The Rt. Hon. Sir Thomas Eichelbaum, Presiding Judge
The Rt. Hon. John Steele Henry, Justice of Appeal
The Hon. Sir Rodney Gallen, Justice of Appeal

Hearing:

Wednesday, 17 October 2001, Suva

Counsel:

Mr. V. Maharaj for the Appellant
Mr. I. Fa for the Respondent

Date of Judgment: Thursday, 18 October 2001

JUDGMENT OF THE COURT

In August 1997 the respondent commenced an action against the appellant alleging wrongful dismissal. That became Civil Action No. 178 of 1997S. The appellant filed a defence to that action in the same month.

In January 1999 the appellant commenced an action against the respondent seeking to recover loan monies advanced to the Talau Housing Scheme of which the respondent is one of the trustees. A statement of defence was filed by the respondent on the 26th February 1999.

The respondent obtained a fixture for his action for the 9th November 2000.

On the 26th of October 2000 the appellant filed a summons to consolidate the two actions.

That summons came before Fatiaki J in chambers on the 8th of November 2000 that is one day before the fixture already obtained by the respondent for his action.

During argument in chambers counsel for the appellant sought leave orally to amend the statement of defence filed in the respondent's action by adding a counterclaim seeking the relief sought in the appellant's action.

The Judge dismissed the application to consolidate and also dismissed the oral application to amend the defence to the respondent's claim by adding a counterclaim. In doing so he was mindful of the fixture obtained for the following day.

The next day however by consent the fixture was adjourned to the 22nd November before the Deputy Registrar for a date of hearing to be fixed for April 2001.

The appellant sought leave to appeal against the dismissal of the application to consolidate and the refusal to allow amendment to accommodate a counterclaim. Shameem J granted leave to appeal substantially on the ground that since the trial had been adjourned

the main concern of Fatiaki J. had been met.

We are satisfied that this was not an appropriate case for consolidation. Although the parties are the same they are in different capacities in the two actions and in such cases the courts have always been averse to consolidation. To the extent that issues are the same in both cases difficulties must arise as to onus of proof where a party is a plaintiff in one case and a defendant in another.

The appeal against the refusal to consolidate must be dismissed.

The appeal as to allowing a counterclaim to be included in the respondent's case is more difficult. The terms of Order 15 rule 2 are very wide. Nevertheless leave was required because the case had been set down for hearing.

The Judge was rightly constrained in his approach to the oral application made to him at a very late stage by the fixture which had been made.

We are not necessarily so constrained since the case did not proceed and there is at present no fixture. Nevertheless we consider that allowing the counterclaim to be added at this late stage must involve extra delay to accommodate the procedures to which it must give rise. Such a delay is unfair to the respondent who had obtained a fixture and who we were informed is ready to proceed. The claim being one relating to employment ought to

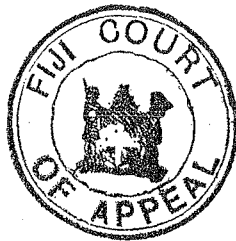
proceed to conclusion as soon as possible. It is also relevant that in 1999 saw fit to pursue its claim by way of separate action rather than by way of counterclaim, when the latter course was clearly open to it.

The appeal will be dismissed and we direct that the respondent's claim be given a fixture as soon as possible.

The respondent is entitled to costs which we fix at \$500.

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Sir Thomas Eichelbaum
Presiding Judge



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Rt. Hon. John S. Henry
Justice of Appeal

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.....
Sir Rooney Gallen
Justice of Appeal

Solicitors:

Messrs. Maharaj Chandra and Associates, Suva for the Appellant
Messrs. Fa and Company, Suva for the Respondent