

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

**CIVIL APPEAL NO. ABU 0016 of 2014**  
**(ERC No. 4 of 2012)**

**BETWEEN** : **ABINESHWAR VINOD**

*Appellant*

**AND** : **FIJI NATIONAL PROVIDENT FUND**

*Respondent*

**Coram** : **Lecamwasam, JA**  
**Chandra, JA**  
**Kumar, JA**

**Counsel** : **Mr. J. Apted and Ms. W. Chen for the Appellant**  
**Mr. D. Sharma for the Respondent**

**Date of Hearing** : **4 February 2016**

**Date of Judgment** : **26 February 2016**

**JUDGMENT**

**Chandra JA**

I agree.

**Lecamwasam JA**

- [1] This matter came up before this court on an application by the Respondent to have the appeal struck out, without entertaining or hearing of the appeal. The Respondent raised two objections Viz.

*Objection 1- The Court has no express jurisdiction to hear an appeal relating to designated corporation, by virtue of the wording of Section 28(2) of ENIED 2011.*

*Objection 2 – The Chief registrar has already exercised his powers pursuant to section 30 [3] of the ENIED 2011 to issue a Certificate to terminate there was nothing else left to determine. There is no right for any Court to listen to any challenge to the issuance of a Certificate of Termination.*

[2] However, The Appellant has filed the appeal on the following grounds of appeal:

*1. The Learned Judge erred in law in holding that the Respondent is now designated as an “essential national” under the Essential National Industries and Designated Corporations (Amended) Regulations 2013 (“the Regulations”), when she should have held that the Respondent had been designated as a “designated corporation” by the Regulations, the question of law being what was the Respondent’s status under that the Decree and the Regulations.*

*2. The Learned Judge erred in law in holding that although the Respondent was added as an essential national industry on 5 March 2013 –*

*(a) by virtue of section 11 of the Interpretation Act, it must be read retrospectively as an industry which was designated on the commencement date of the Decree on 9 September 2011;*

*(b) that is followed that section 30(2) of the Decree applied to the Respondent from the commencement of the Decree on 9 September 2011 and not from 5 March 2013;*

*(c) that the appeal before her should therefore be terminated.*

*The Learned Judge should have held that –*

*(a) section 11 of the Interpretation Act did not apply;*

*(b) the Respondent was not a “designated corporation” on the commencement date of the Decree;*

*(c) on the true construction of section 30(2) of the Decree, the section did not apply to the Respondent or to the appeal before her; and*

*(d) the appeal before her should not be terminated.*

*The questions of law are –*

- (i) *What is true meaning of section 11 of the Interpretation Act?*
- (ii) *Did section 11 of the Interpretation Act apply to the designation of the Respondent under the Regulations?*
- (iii) *If section 11 applied, did it have the effect of backdating the designation of the Respondent to 9 September 2011, the commencement date of the Decree, instead of 5 March 2013, the effect date of the amendment to the Regulations?*
- (iv) *What is the true meaning of section 30(2) of the Decree?*
- (v) *Does section 30(2) of the Decree apply to the Respondent?*
- (vi) *If section 30(2) of the Decree applies to the Respondent, did it apply to the appeal?*

3. *The Learned Judge erred in law in holding that the Chief Registrar must call for all the matters pertaining to these parties pending in the Employment Relations Tribunal for termination too, when the other matters pertaining to the Respondent which are pending in the Employment Relations Tribunal involve parties who were not before the Court, and arouse in different circumstances to the appeal that was before the Court.*

*The question of law being should any proceedings between the Appellant and Respondent and another party in the Employment Relations Tribunal be sent to the Chief Registrar for termination under section 30(2) of the Decree?*

[3] The facts in brief are as follows.

The Appellant was an employee of Fiji National Provident Fund (FNPF). On 29<sup>th</sup> June 2009 the Appellant had reported an 'employment grievance' over the issue of transfer to the Permanent Secretary in terms of the Employment Relations Promulgation 2007 – the grievance having being referred to the Employment Relations Tribunal (ERT) it commenced hearing the matter in July 2010. An interim order was issued by the ERT preventing any transfer and ordering the FNPF to maintain the status quo by letting the Appellant continuing in his original position. While the grievance hearing was pending FNPF dismissed the Appellant for some other reason in August 2011.

- [4] In the meantime, the Essential National Industries (Employment) Decree 2011 (ENI) came into operation on 9<sup>th</sup> September 2011 which provided for the concept of the ‘designated corporations’. According to which, any matter pending before any court, Tribunal, Commission or any other adjudicating body stood terminated with the coming in-to force of the new Act. It was the duty of the Chief Registrar under Section 30(2) of the ENI to issue a certificate of termination. Initially FNPF was not a ‘designated corporation’ at the time ENI Decree came into force on 9<sup>th</sup> September 2011. However, subsequently by Legal Notice 20 of 2013 i.e. by the amending regulations FNPF was also brought under designated corporations and such fact was published in the Gazette on 5<sup>th</sup> March 2013. At the time of FNPF was designated corporation i.e. on 5<sup>th</sup> March 2013, the inquiries into the grievance application and an application against dismissal of the Appellant had been pending before the ERT. By virtue of Section 30(2) all pending applications are terminated and upon such termination the Chief Registrar was obliged to issue a certificate of termination as per the requirements of the legislation.
- [5] By virtue of the above amendment FNPF made an application for the determination of a preliminary issue as to whether the appeal before ERT should be terminated under section 30(2) of the ENI Decree. Court made order in favour of FNPF declaring that the appeal together with all the matters pending before the ERT to be terminated and made order to transmit the relevant file to the office of the Chief Registrar under section 30(3) for termination of the proceedings. The Court further ordered the Chief Registrar to call for the termination of all the matters pertaining to these parties pending in the ERT.
- [6] This appeal by the Appellant is against the above order of the Learned High Court Judge. The Learned Counsel for the Appellant has taken pains to file extensive submissions running to almost 100 paragraphs. However, he had regrettably omitted to file at least the grounds of appeal and the impugned judgment of the Learned High Court Judge. If not for the written submissions and Affidavit of Laisani Macedru and the attachments thereto, this Court would have had to grope in the dark in search of grounds of appeal and the relevant High Court Judgment.
- [7] However, the foremost grievance of the Appellant is that as the amendment of 5<sup>th</sup> March 2013 has no retrospective effect, the Chief Registrar is not empowered to issue the

certificate of termination and hence such issuance is illegal. In order to better address the submissions made, it is convenient first to deal with the scheme of the Act.

[8] Short title of the Essential National Industries (Employment) Decree 2011 reads ‘as a Decree’ and was promulgated to provide for the governing of the relations between employees and employers in Essential National Industries (Employment). The objectives of the Decree are – interalia ‘(e) to provide for the prompt an orderly settlement of all disputes including but not limited to those that may concern rates of pay, work rules, working conditions or disciplinary actions’.

[9] The most pertinent sections for the determination of this matter are Sections 30(1) – (5): which I, in verbatim reproduce below

*Certain decisions not to be challenged*

30. – (1) No court, tribunal, commission or any other adjudicating body shall have the jurisdiction to accept, hear, determine or in any other way entertain any proceeding, claim, challenge or dispute by any person or body which seeks or purports to challenge or question –

- i. the validity, legality or propriety of this Decree;
- ii. any decision of any Minister, the Registrar or any State official or body, made under this Decree; or
- iii. any decision of any designated corporation made under this Decree.

(2) Any proceeding, claim, challenge or dispute of any nature whatsoever in any court, tribunal, commission or before any other person or body exercising a judicial function, against any designated corporation that had been instituted under or involved the Employment Relations Promulgation 2007 before the commencement date of this Decree but had not been determined at that date or is pending on appeal, shall wholly terminate immediately upon the commencement of this Decree, and all orders whether preliminary or substantive made therein shall be wholly vacated and a certificate to that effect shall be issued by the Chief Registrar or the registrar of the Employment Relations Tribunal.

(3) Where any proceeding, claim, challenge, application or dispute of any form whatsoever, is brought before any court, tribunal, commission or any other adjudicating body, in respect of any of the subject matters in subsection (2), then the presiding judicial officer, without hearing or in any way determining the proceeding or the application, shall immediately transfer the proceeding or the application of the Chief Registrar or the registrar of the Employment Relations Tribunal for termination of the proceeding or the application and the issuance of a Certificate under subsection (2).

*(4) A certificate under subsection (2) is, for the purpose of any proceedings in a court, tribunal, commission or any other person or body exercising a judicial function, conclusive of the matters stated in the certificate.*

*(5) A decision of the Chief Registrar or the registrar of the Employment Relations Tribunal to issue a certificate under subsection (2) is not subject to challenge in any court, tribunal, commission or any other adjudicating body.*

- [10] The amendment of 5<sup>th</sup> March 2013 was introduced to the principal Decree by the Minister in charge of the relevant Ministry to include the FNPF as a new designated corporation. Section 30(1) unequivocally states that *'no Court Tribunal or Commission shall have the jurisdiction to hear determine or entertain any proceeding ... which seeks or purports to challenge or question the validity legality or propriety of this Decree'*. Section 30(1) is manifest of the indelible intention of the legislature to oust the jurisdiction of any judicial body in inquiring into the validity legality or propriety of the Decree, which is resonant of a certain Decree of urgency in enforcing these provisions. It is more so, when we consider the provisions in sub paragraph 2 where it is Decreed *'... but had not been determined at that date or is pending on appeal, shall wholly terminate **immediately** upon the commencement of this Decree...'*
- [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 5<sup>th</sup> 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.
- [14] In view of the above reasoning any further consideration of the facts becomes redundant as the main issue to be resolved centred on the question of the application of the amendment in regard to the retrospective nature of it. As I have already decided that, in fact the application of the amendment is retrospective. Considering the imperative provisions of section 30(1) namely:

*30. – (1) No court, tribunal, commission or any other adjudicating body shall have the jurisdiction to accept, hear, determine or in any other way entertain any proceeding, claim, challenge or dispute by any person or body which seeks or purports to challenge or question –*

- 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.*

I refrain from answering the issues of the Appellant as I hold the view that this appeal should not have been entertained and should have been rejected in 'limine'.

[15] The Learned Counsel for the Respondent moved Court to strike out the appeal based on following objections.

*Objection 1- The Court has no express jurisdiction to hear an appeal relating to designated corporation, by virtue of the wording of Section 28(2) of ENIED 2011.*

*Objection 2 – The Chief registrar has already exercised his powers pursuant to section 30 [3] of the ENIED 2011 to issue a Certificate to terminate there was nothing else left to determine. There is no right for any Court to listen to any challenge to the issuance of a Certificate of Termination.*

According to the reasons I have already given, I uphold the above position taken up by the Respondent and order that the Appeal be struck out.

In view of the answer given to the 1<sup>st</sup> Objection of the Respondent, dealing with the 2<sup>nd</sup> Objection becomes redundant.

[16] Mr. Apted has filed exhaustive submissions and cited a considerable number of authorities. Most of these would have been relevant had the matter before this court was a 'judicial review' application. However as the case before us is only an appeal, it becomes unnecessary for us to consider the preclusive nature of the act, whether the court has jurisdiction to entertain an application for judicial review, principles of ouster or excess of power etc. I must mention that I have perused the case law to which reference has been made by both sides.

[17] In the result and for the reasons I have given I find that the order of the Learned High Court Judge to the Chief Registrar in ordering the issuance of a certificate of termination is correct.

According to the facts before us, as the Appellant is without employment, I would order the parties to bear their own costs. Appeal is struck out.

**Kumar JA**

[18] I agree with the reasoning and order of Justice Lecamwasam.

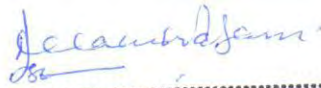


**Orders of Court**

1. *Appeal is struck out.*
2. *Parties to bear their own costs.*



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**Hon. Mr. Justice S. Chandra**  
**JUSTICE OF APPEAL**



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**Hon. Mr. Justice S. Lecamwasam**  
**JUSTICE OF APPEAL**





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**Hon. Mr. Justice K. Kumar**  
**JUSTICE OF APPEAL**