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

CIVIL APPEAL NO. ABU 101 of 2019
High Court No. HBC 94 of 2015

BETWEEN : **JAGDISH SINGH**

Appellant

AND : **SUVA CITY COUNCIL**

Respondent

Coram : **Almeida Guneratne, JA**

Counsel : **Ms L Jackson for Appellant**
Mr D Sharma for Respondent

Date of Hearing : **10 June, 2020**

Date of Ruling : **1 July, 2020**

RULING

[1] By this application the Appellant seeks leave to appeal and a stay pending appeal (in the event leave being granted) against the judgment dated 16 July, 2019 of the High Court of Fiji at Suva. By that Judgment the High Court struck out the Appellant's application for constitutional redress and ordered the Appellant to pay $3,000 as costs of the action.

[2] At the outset learned Counsel for the Respondent said that in the event of leave to appeal being granted he was not objecting to the Stay Order the Appellant has prayed for. He was also not objecting to the filing of the proposed Amended Grounds of Appeal on account of the fact that no affidavit had been annexed to the same. However, he was objecting to the said amended grounds on merits and was opposing the leave to appeal application itself.

The Appellant's opening submissions

[3] The submissions made by Ms Jackson on behalf of the Appellant, in her quest to seek leave to appeal against the judgment of the High Court in striking out her client's claim may be summarized as follows. She submitted that:

(i) The Appellant's claim being one arising out of a contract of employment with the Respondent Council the Prime Minister's Office initially acknowledged that the Appellant be compensated upon his employment being terminated on a blogging allegation of which he was later cleared. However, the Prime Minister's Office subsequently "re-tracked" its earlier decision. (*vide*: paragraphs 7 – 8 of the Appellant's Affidavit dated 14 November, 2019).

(ii) Apparently, that had resulted on account of the Respondent Council's position that, the Appellant's claim stood barred by Section 30 of the Essential National Industries (Employment Decree) No. 35 of 2011 (the Decree) (ENID) in regard to which Ms Jackson submitted, that Section did not bar a Common Law claim for damages arising out of an Employment Contract in support of which she adverted to a judgment of Justice Amaratunga writing for the High Court.

(iii) As against that, in the impugned judgment of Justice Seneviratne against which leave to appeal is being sought, His Lordship has taken a contrary view following one of his own judgments.

(iv) Thus, Ms Jackson submitted, for that very reason, there being two contrary judicial views expressed by the High Court, it was imperative for the (Full) Court of Appeal to have the matter resolved one way or the other for which reason she was seeking leave to appeal.

(v) Without resting her case there, Ms Jackson submitted that, it was based on the said judgment of Judge Amaratunga that, the Appellant filed the present claim for relief.

(vi) Consequently, adverting to the Grounds of Appeal urged, learned Counsel for the Appellant submitted that the Appellant on an alleged "blogging exercise" had been denied access to the Courts resulting in substantial injustice to him.

(vii) Finally Ms Jackson submitted that

(a) the learned Judge had placed wrong reliance on the cases he referred to in his judgment.

(b) (vide: Ground 5 of the Grounds of Appeal), when the learned Judge at paragraph 24 of his Judgment made reference to the 2007 promulgation, which had no relevance and His Lordship had presumably had in mind section 30(1) of the ENID sub-provisions 9 (a), (b) and (c) thereof but it was on 9 September 2011 that the ENID came into force and the Appellant's contract had been terminated on 4 February 2010.

(viii) Taking grounds 6 and 7 of Appeal, Ms Jackson submitted that when the learned Judge held that 'the Court has no jurisdiction', His Lordship overlooked the proviso to Section 30(2) of the ENID. The Appellant did not stake his claim under the 2007 Promulgation and the reference to **Hazelman v. Fiji Hardwood** (among others) was misconceived.

[4] Before giving my mind to the submissions made on behalf of the Respondent I thought it appropriate to look at both the terms of the Promulgation of 2007 and the ENID of 2011.

"**The Employment Relations Promulgation 2007**

30(1). Upon the termination of a contract of service, the employer must pay to the worker all wages and benefits then due to the worker by end of the following working day.

(2) The wages and benefits due to a worker under subsection (1) must, in the case of a worker who is entitled to receive notice from the employer in accordance with this Promulgation or the worker's contract (the terms of which relating to notice are not less beneficial than this Promulgation), include wages and benefits payable in respect of services rendered during the period of notice or payable in lieu of the notice.

(3) If payment is made in lieu of notice the payment must include the wages and benefits that would have been payable to the worker if the worker had worked during the period of notice.

(4) Nothing in this Promulgation precludes either party from summarily terminating a contract of service for lawful cause.

(5) The termination of a contract of service under this Promulgation must be without prejudice to any accrued rights or liabilities of either party under the contract or section 28.

(6) Upon termination of a worker's contract or dismissal of a worker, the employer must provide a certificate to the worker stating the nature of employment and the o"

The ENID of 2011

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 –

(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.

(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.*

(4) A certificate under subsection (2) is for the purposes 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."

<u>Submissions of Counsel for the Respondent</u>

[5] In addition to the matters addressed in his written submissions, Mr Sharma, on behalf of the Respondent tendered what he had described as an 'Oral Argument' (in writing) dated 10 June, 2020 which he supported on his feet at the hearing.

[6] Mr Sharma analysed the provisions of the jurisdiction of the Employment Relations Court and then <u>Section 266</u> of the Employment Relations Amendment Act of 2011. Thereafter, coming down to the ENID of 2011 he analysed first the intent behind <u>Section 28</u> of the Promulgation of 2007 and <u>secondly</u>, the legislative intent in <u>Section 30</u> of the ENID of 2011. Mr Sharma then addressed on the status of the Respondent Council when it had become a Corporation in the year 2013 adverting as he did to the Essential National Justices and Designated Corporation (Amendment)(No. 2) Regulations of 2013.

[7] Mr Sharma went on to refer to the Employment Relations Amendment Act No. 4 of 2015 whereby the Respondent Council had been designated as an "essential service".

[8] Finally, Mr Sharma relied on Section 188(1) of that Act which decreed that *"All trade disputes in essential services and industries shall be dealt with by the Arbitration Court…."* (and the consequential provisions following in that wake) read further with the Employment Relations Amendment Act No. 1 of 2016.

[9] In that whole conspectus of Mr Sharma's submissions (having given my mind to the case of **<u>Setavana Saumatua v. Suva City Council</u>** as well I called upon Ms Jackson to make her submissions in reply.

<u>Ms Jackson's Submissions in Reply</u>

[10] Mr Sharma's forensic skills and his knowledge in interpreting the law have never been in doubt. Nevertheless, Ms Jackson submitted in reply, launching a frontal attack on Mr. Sharma's submissions ending up in submitting (in effect) that, even if full credit was to be

given to Mr Sharma's efforts her submission simply (in the result) was whether her client (the Appellant) was entitled to claim for damages on the basis of a breach of contract (of Employment) in Common Law and that given the divergence of views expressed by the Judgments of the High Court, she was seeking a pronouncement by the (full) Court of Appeal for which reason she was, on behalf of the her client (the Appellant) was seeking leave to appeal.

Determination

[11] Having given my best consideration to the rival contentions made on behalf of the parties I have no hesitation in concluding that there are intricate and arguable issues for the full Court to go into and make a determination thereon, which I regard as the decisive criterion in granting leave to appeal in an application as one that is under consideration.

[12] Accordingly, I make my Ruling in this matter and proceed to make Orders as follows:

Orders of Court

1. *Leave to appeal against the Judgment of the High Court dated 16 July, 2019 is allowed.*
2. *The Order of the High Court in granting Costs in a sum of $3,000 (Three Thousand Dollars) against the Appellant is stayed until the hearing and determination of the Appeal by the Full Court.*
3. *I make no order for Costs in this applications and Costs shall await the full determination of this Appeal by the Full Court.*
4. *The Appellant may advise himself as to what steps he should take according to law.*

Almeida Guneratne
JUSTICE OF APPEAL