IN THE EMPLOYMENT RELATIONS COURT AT SUVA

CENTRAL DIVISION

CIVIL JURISDICTION

ERCC: 10 OF 2020

BETWEEN: **CAPITAL INSURANCE LIMITED** a limited liability company having its registered office at 231 Waimanu Road, Suva. Fiji.

APPELLANT/DEFENDANT

AND: **VIKASH DEEPAK KUMAR**

RESPONDENT/PLAINTIFF

Date of Hearing :	**15 August 2023**
For the Appellant:	**Mr. Singh and Mr. Liganivai**
For the Respondent:	**Mr. Sharma P.**
Date of Decision:	**20 September 2023**
Before:	**Levaci SLTTW, A/J**

R U L I N G

(APPLICATION FOR LEAVE TO APPEAL AND STAY PENDING APPEAL)

Cause and Background

1. There are two applications before me – one for a stay order and the other for leave to appeal a consent judgment. I propose to deal with the application for Leave, and in its own turn, the stay application.

2. This application emanates from a Claim made by the Appellant/Defendant for unlawful termination as Claims Manager of the Respondent/Plaintiff. The Appellant/Defendant was employed from 10 December 1990 with Dominion Finance until he was contracted on 1st October 2014 with the Respondent/Plaintiff after restructuring and change of name. He was later terminated on 25th April 2019 having served in the company for 28 years. The Respondent/Plaintiff claimed for unlawful and unfair termination and reimbursement of his salary for the left over terms of his contract as well as for damages.

3. On the 23rd of May 2023 prior to trial, the parties entered into a terms of settlement which the Court entered as **final consent orders** accordingly:

    1. That the Appellant/Defendant shall pay to the plaintiff a sum of F$250,000 in full and final settlement within 30 days from the date of the Order.

    2. That the Appellant/Defendant shall provide to the Plaintiff a Certificate of Service under the Employment Relations Act indicating that the period of employment as 10th December 1990 to 25th April 2019 within 30 days from the date of the Order.

    3. That the hearing dates are vacated.

    4. That upon payment of the said monies and upon issuance of the Certificate of service the Respondent/Plaintiff shall sign a discharge form in favour of the Defendant relieving it from all further liabilities arising out of the dismissal.

    5. That the discharge certificate shall include the term or words to that effect that the settlement is a bar to bringing any further action relating to the employment and dismissal of the Respondent/Plaintiff from his employer.

    6. That the Orders are to be sealed and served by the Respondent/Plaintiff on the Appellant/Defendant.

    7. That this matter now stands disposed for case management purposes. No further action is required in the terms of the case management.'

4. Thereafter, the Appellant/Defendant made an application for Leave to Appeal and to an application to Stay the Orders in Consent entered by the court on the following grounds:

    1. The Learned Judge erred in law in granting the Orders when –

        (i) There is no cause of action for 'unlawful dismissal' whether under the ERA or otherwise; and or

        (ii) The Employment Relations Court has no jurisdiction over unfair and unjustified dismissal claims, and that such claims may only be made by way of an employment grievance that must be first reported to Mediation Services and which, if not settled, may only be referred to the Employment Relations Tribunal; and

        (iii) As such the Learned Judge did not have jurisdiction to grant the Orders (albeit by consent) between the parties.

Law on Leave to Appeal

5. Section 245 of the Employment Relations Act 2007 states as follows –

'*Appeals to Court of Appeal*

245.—(1) An appeal from the Court shall lie to the Court of Appeal.

(2) For the purposes of an appeal to the Court of Appeal, the Court of Appeal Act applies, with necessary modifications.

(3) An appeal from the Employment Relations Court must be filed within 28 days of the delivery of the decision or judgment;

(4) A notice of appeal does not operate as a stay of proceedings in respect of the decision to which the appeal relates unless the Employment Relations Court or the Court of Appeal so orders.

6. In section 12 (2) (e) of the Court of Appeal Act provides that –

'No Appeal shall lie-

(a)…..
(b)……
(e) without the leave of the Court or judge making the order, from an order of the [High Court] or any judge thereof made with the consent of the parties or as to costs only;'

7. The Court is empowered to consider and determine whether to grant leave to appeal or otherwise a consent order entered into between parties. Section 12 (2) (e) of the Court of Appeal Act allows for this.

8. In Lakshman -v- Estate Management Services Ltd [2015] FJCA 26; ABU 14. 2012 (27 February 2015) Callanchini P of CA stated –

'if it is accepted that the appeal to his Court involves a question of law only: it does not necessarily follow that leave should be granted. The first is the long established view expressed in this and other jurisdictions that an appellate court will not readily grant Leave to Appeal from an interlocutory order or judgment arising from the exercise of a judicial discretion. Secondly, it has been said that even if it is shown that the interlocutory decision was wrong, it will not be overturned unless substantial injustice would result should it be allowed to stand….In this case there has been an error by the Learned Judge in the exercise of his discretion. Furthermore, in any event, there is no injustice in allowing Respondent to purse private law claim against the Appellant by way of a trial on the pleadings and evidence in the High Courts.'

9. In the case cited which I am grateful was submitted by Counsels, Abdul Kadeer Kuddus Hussein -v- National Bank of Fiji High Court [1995] 41 FLR in para G and E of pages 133-134 Pathik J elucidated the factors to be considered in an application for Leave to Appeal as follows –

'A useful summary of some of the factors which a judge may in practice consider on an application for grant of leave is to be found in the Judgment of Murphy J in Neimann (Supra) at p.441 which I adopt and they are as follows –

'(1) whether the issue raised is one of general importance or whether it simply depends upon the facts of the particular case;

(2) whether there are involved in the case difficult questions of law, upon which different views have been expressed from time to time or as to which he has been 'sorely troubled';

(3) Whether the order made has the effect of altering substantive rights of the parties or either of them; and

(4) That as a general rule there is a strong presumption against granting leave to appeal from interlocutory orders or judgments which do not either directly or by their practical effect finally determine any substantive rights of either party'.

10. Taking these factors into consideration the Court will analyze the application.

(i) Whether issue raised is of general importance and (ii) whether there are involved in the case difficult questions of law, upon which different views have been expressed from time to time to which the Applicant has been sorely troubled?

11. According to the case of Jubilee Juice Distributors -v- Jai Dhir Singh CBV 0006 of 2014 Judges of Appeal Saleem Marsoof JA, Suresh Chandra JA and Almeida Guneratne JA held that –

'[26] A judgment by consent is just as effective by way of estoppel as a judgment whereby the court exercises its mind in a contested case (vide : *Re South American & Mexican Co 1895 (1) Ch 37 at 50)*

[27] Upon a compromise being effected, the right of action upon the original claim is lost. Any action thereafter must be on the compromise and not upon the original claim. (see C.G Weeramnatry, The Law of Contracts Vol II, 2nd Reprint (2013) Section 735).'

12. In Kelly -v- Fiji Development Bank [2004] FJHC 526; HBC 0489J.2002S (29 January 2004) Gates J cited Privy Council case in considering a consent judgement and stated –

'[16] In Kinch -v- Walcott [1929] AC 482 Lord Blanesburgh in the Privy Council tendered the advice (at p. 493) that:

'an order by consent, not discharged by mutual agreement, and remaining unreduced, is as effective as an order of the Court made otherwise than by Consent and not discharged on appeal.''

13. Quoting Lord Herschel in Kinch -v- Walcott (Supra), Gates J (as he was then) in the case of Kelly -v- Fiji Development Bank (Supra) stated –

'The truth is, a judgment by consent is intended to put to a stop litigation between parties just as much as a judgment which results from decision of the court after the matter has been fought out to the end. And I think it would be very mischievous if one were not to give a far and reasonable interpretation to such judgments, and were to allow questions that were really involved in the action to be fought over again in a subsequent action.'

14. A consent judgment therefore, when endorsed with the seal of the court, has a similar judicial determination of the issues between the parties and would have the same effect as any other judgment and thus the doctrines of *res judicata* and estoppel.

15. In this instance it is contended by the Appellant/Defendant at the time the parties entered into Consent judgment, there were conflicting decisions in the High Court regarding the jurisdiction of the High Court to deal with matters pertaining to employment grievances and unfair or unlawful dismissals and that the Employment Relations Tribunal retained the statutory powers to deal with all matters (Salim Buksh -v- Bred Bank (Fiji) Ltd ERCC No 02 of 2019). The case of Ajendra Sharma -v- ANZ Banking Group No 2 of 2017 on the contrary determined that the High Court retained the original and inherent jurisdiction to determine not only common law breaches of contract but also unfair and unlawful dismissal (reference to the latest case of Setavana Saumatua -v- Suva City Council

16. The Court therefore finds there are issues of law yet to be determined and rightfully as to whether an appeal at Court of Appeal is appropriate avenue.

17. The question however is whether this is a case that falls within that ambit.

18. This Court begs to differ.

19. On a case by case basis, this Case does not fall within the ambit and the reason is clear.

20. Firstly, the parties themselves entered into a terms of settlement and willingly allowed the High Court to enter a consent order. At no time were there any preliminary objections to the jurisdiction of the Employment Court to finalise the terms of settlement by way of a Consent Order.

21. Secondly, the issue in question must arise from that compromise i.e. the terms of settlement and not the initial original claim as the rights arising from the claim is lost when parties had entered the Consent orders.

22. Therefore where the parties challenged the jurisdiction of the court, their challenge raises issues of nullity. With nullity, an application for Leave to Appeal is procedurally incorrect, despite the Plaintiff/Applicant arguing that it is a consent order.

23. I am fortified in my decision with the case of Sushil Prasad Sharma -v- Paula Lagoia Sili and Salome Namata Sili, Registrar of Titles and Attorney General of Fiji CA ABU 0131 of 2018, the Court of Appeal stated –

'[46] A consent judgment is a judgment entered upon the merits, it is not default judgment. When parties to a judgment opt freely and without compulsion to enter terms of settlement, which is made a judgment of court, it is no longer open to Court to adjudicate the subject matter of the dispute. Consent can be presumed if the parties were represented by Counsel. The doctrine of estoppel would operate, to preclude the re-opening of the matters settled. This is in the interest of finality, which is a cornerstone of public policy. A consent judgment then is a contract between the parties whereby rights are created in substitution for an order of the court. It amounts to an abandonment of the original claim and is intended to put an end to the existing litigation between the parties. A consent judgment is as effective as a judgment delivered after contest and a consideration by the Court of the merits of the dispute.

[48] A judgment or order can be set aside if it is a nullity or where a Court was misled into giving the judgment by some mistake, believing that the parties consented to its being given, whereas in fact, they did not; **Craig -vs- Kanseen** (1943) KB 256 or (1943) 1 All ER 108 at 113, or the judgment was obtained by fraud or deceit either in the Court or of one or more of the parties, judgment itself is a nullity, it is obvious that the Court was misled into giving the judgment under a mistaken belief that the parties consented to it; the judgment was given in the absence of jurisdiction, the proceedings adopted was such as to deprive the decision or judgment of character of a legitimate adjudication, where there is fundamental irregularity.'

23. This is a case that procedurally should be dealt with by way of setting aside. Although consent orders require Leave of the Court of Appeal, however given that the Appellant/Defendant is challenging the jurisdiction of the Court to enter Consent Orders when the jurisdiction regarding employment grievances is disputed, the consent orders should be re-examined in the lower court.

24. The Respondent/Plaintiff relies upon Bimal Vimlesh Narayan -v- Reena Kumari Bray (ABU 0063 of 2011) where it was held that where the intentions of the parties are to be ascertained and evidence led, a fresh action was to be filed and hence the Court erred by amending the Consent Judgment.

25. The Court finds that this case is contrary to the decision in Sushil Sharma -v- Paulo Sili (Supra) in which the Court of Appeal has identified challenge to jurisdiction as a nullity empowering parties to seek to set aside the consent orders and start afresh in having the matter proceed to trial.

26. The primary consideration as to whether the Court has jurisdiction or not rests with the court for which the issues are considered and raised. Having entered into Consent Orders, it would be appropriate that the Court of first instance also

determines whether or not there is jurisdiction to do so, if it lacks, it will do so and set aside the orders.

27. In this case, no challenge to the powers of the Court was raised according to the High Court Rules. The parties outright recognized that the Court was capable of entering into the Consent Orders sorted.

28. Concerns are raised that the current dichotomy of law in the area of 'unfair' and 'unlawful' dismissal would be further diluted if the matter remains in the lower courts and offers the ability to change the course of employment law if leave were granted for Court of Appeal to deal with the matters.

29. Given that there are two pending matters before the Court of Appeal on the issues of jurisdiction, they are in no way a determinant that there is success in appeal. Each case turns on its own head and similarly as is in this case.

(iii) Whether the Orders altered the substantive rights of parties and

(iv) That as a general rule there is a strong presumption against granting leave to appeal from interlocutory orders or judgments which do not either directly or by their practical effect finally determine any substantive rights of either party'.

30. A consent judgment brings finality to the cause or matter and thereafter renders the Court to res judicata in furtherance of the original action or proceeding. Leave is rendered necessary for Consent orders to ensure that in very limited areas of law can Consent Judgments be appealed outright.

31. The finality in the Consent Judgment entitles the parties to give effect to the terms of the orders and can only be set aside for very limited circumstances. In essence substantive rights of parties can be exercised thereafter having both settled on the rights they can recover.

Substantial miscarriage of justice

32. The issue before this Court is whether there is a substantial miscarriage of justice if the Court were to let the Consent Orders to stand.

33. Submissions by the Appellant/Defendant recognizes that with pending matters already in the Court of Appeal on similar issues, the Court of Appeal is best suited to determine the matters given the divergence views in the lower courts.

34. The submissions by the Respondent/Plaintiff argues otherwise stating that already the matter has been determined in the Court of Appeal in the case of Setavana

Saumatua -v- Suva City Council [2023] FJCA 131; ABU056.2020 (28 July 2023) where Justice Jitoko V.P, JA Dayaratne and JA Morgan stated –

[23] The ERA does not remove the jurisdiction of High Court to hear claims involving employment contracts. The Appellant contends that the Respondent's employment with the Appellant was governed by her contract of employment and the ERA. The contract does not say this. All it says is that the contract shall be construed and interpreted in accordance with the laws of Fiji which does not mean that it is governed by the ERA. The Appellant further contends but there was nothing in the Contract that provided that the terms and conditions of the contract would be governed by common law. This is a strange argument. The Contract provided that the contract would be construed and interpreted in accordance with the laws of Fiji. It is unquestionable that the laws of Fiji recognise the common law.

[24] The Appellant argues that the Employment Relations Court was created and provided for in the ERA to deal with employment matters. Therefore there is no need to invoke the general jurisdiction of the High Court for employment matters. I do not agree with this contention

[25] The jurisdiction of the High Court in such matters has not been excluded by the ERA. It is a claimant's choice whether to institute an action under the ERP or under the Common Law. As the learned counsel for the Respondent pointed out at the hearing of this appeal there may be causes of action and remedies available under either of the processes that are not available under the other. The decision where to institute an action depends on the facts and circumstance of each case. For the reasons expressed herein, I determine that the Respondent was not precluded from bringing an action in common law in the High Court for breach of her employment contract.

[44] The Learned Judge held that Section 188(4) cannot be applied to the present civil litigation for breach of contract. He then commented in respect of both grounds 4 and 5 above at paragraph 31 on page 6 of his Judgment as follows:

"31. The choice was with the Plaintiff to file an action under Employment Relations Act 2007 either in the Employment Relations Tribunal or Employment Relations Court regarding a breach of contract, or in a court that exercise civil jurisdiction (i.e High Court). Since this action was filed for breach of contract under common law this was not a matter instituted or involved with Employment Relations Act 2007 and provisions contained in repealed Sections 266 of Employment Relations Act 2007 and Section 188(4) of the same Act had no application.'

[45] For the reasons contained in this Judgment I concur with this finding of the learned Judge and hold that the Judge has not erred.'

35. This Court finds that the Court of Appeal has clearly given equal footing at the table of contention for a common law breach of contract as that of an action under the

Employment Relations Act 2007. The choice rests with the Applicant. However the Court of Appeal has stopped short of dictating how procedures can affect the jurisdiction of the Courts where parties seek remedies for breaches of contract and breaches of the Employment Relations Act.

36. This Court is not in a position nor empowered to draw its conclusion from the issues of contention in the Court of Appeal.

37. This Court only needs to consider if there is substantial miscarriage if the Court does not grant the Leave to Appeal. The Appellant/Defendant contends that $250,000 is the monies to be paid if the Leave is not granted and parties must align themselves to the fulfiling to the terms of the Consent order. These are substantial sums of monies.

38. The Respondent/Plaintiff argues otherwise and states that the Consent Judgment is a nullity in law and hence any refusal to grant leave will cause substantial miscarriage as the Court of Appeal may make determinations which are contrary to that for which the Consent Order premises on.

39. However, the Appellant/Defendant has failed to appropriate the correct procedure to address the issues of contention. In initiating these proceedings, they have deprived the parties of the fruits of success and thereafter delayed the outcome of the case even further.

40. The Appellant/Defendant, in appropriating the correct procedure, aligns itself to the proper entitlement and remedies in law. To circumvent the system by directly seeking leave for appeal to the Court of Appeal, really removes the essence of procedure that have been set in time immemorial by common law, tried and tested.

41. I therefore find there is no substantial miscarriage if leave is not granted. There is alternative remedy available and no loss is suffered by the Applicant/Defendant in seeking it. He has however caused commotion by the manner in which he has sort leave and therefore it would be appropriate to impose costs against him.

Stay application

42. The Applicant/Defendant seeks to stay the application pending the Leave to Appeal.

43. Since Leave is not granted, the Court finds no reasonable ground to grant Stay.

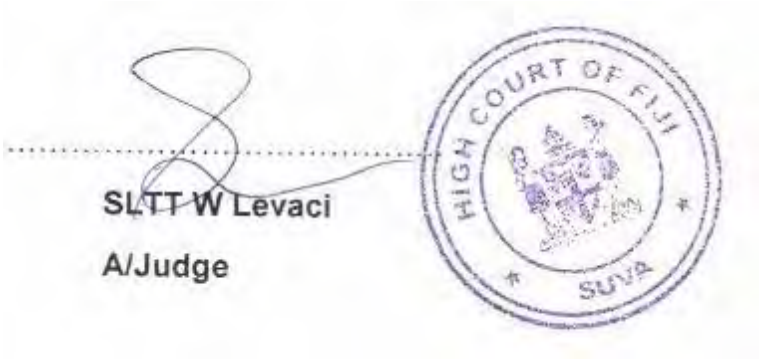
Costs

44. The Court will award costs to the Defendant/Respondent in this matter.

Orders of the Court

45. The Court orders:

(i) Leave to Appeal and stay application is dismissed;
(ii) Costs of $1000 against the Appellant/Defendant.



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A/Judge