

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

CIVIL APPEAL NO. ABU 73 of 2017
(High Court Civil Action No: 88 of 2012)

BETWEEN : SUVA CITY COUNCIL

Appellant

AND : SETAVANA SAUMATUA

Respondent

Coram : Lecamwasam, JA
Almeida Guneratne, JA
Jameel, JA

Counsel : Mr. D. Sharma with Mr. S. Deo for the Appellant
Mr. I. Fa for the Respondent

Date of Hearing : 11 February 2019

Date of Judgment : 8 March 2019

JUDGMENT

Lecamwasam JA

- [1] This appeal is filed by the Appellant (the original defendant) against the Rulings made by the Learned High Court Judge dated 25th May 2016 and 24th November 2016 respectively. Resulting from two Rulings of the High Court and one decision of the single judge of the Court of Appeal, the facts of the case have been amply recounted in

those judicial proceedings. As such, I will simply reproduce the facts as succinctly narrated by the learned High Court Judge for the convenience of this court;

INTRODUCTION AND BACKGROUND

[1] This is an application made by the Plaintiff, by way of a Writ of Summons. The Writ of Summons together with a Statement of Claim was filed in Court on 27 March 2012.

[2] In her Statement of Claim the Plaintiff claims the following reliefs:

(a) Damages against the Defendant for breach of contract for the unlawful termination (as a City Lawyer) whereby the Plaintiff claims for the following:

(1) Balance of the Contract Salary as at the 8 January 2012 amounting to \$92,316.00 (Ninety Two Thousand Three Hundred and Sixteen Dollars); and

(2) Balance of the Housing Allowance as at 8 January 2012 amounting to \$8,809.00 (Eight Thousand Eight Hundred and Nine Dollars)

(b) Exemplary Damages against the Defendant in the manner of the abrupt, unfair, and wrongful dismissal, and for slander in the sum of \$100,000.00 (One Hundred Thousand Dollars);

(c) General Damages;

(d) Costs of this action;

(e) Any other relief this Honourable Court deems just.

[3] The Defendant filed their Statement of Defence, on 15 May 2012, whereas the Plaintiff filed her reply to the Statement of Defence, on 15 June 2012.

[4] A Pre-Trial Conference had been held between the Solicitors for the Plaintiff and the Defendant and the Minutes of the said Pre-Trial Conference have been filed in Court on 16 July 2015.

[5] On 10 February 2016, the Defendant filed a Summons seeking, inter alia, an Order that the Plaintiff's action be struck out and dismissed on the basis that this Court has no jurisdiction to adjudicate upon this matter. The Summons was supported by an Affidavit sworn by Bijay Chand, Acting Chief Executive Officer of the Defendant, the Suva City Council.

[6] *On 5 April 2016, the Plaintiff filed an Affidavit in Opposition to the Defendant's Affidavit. An Affidavit in Response to Opposition was filed by the said Bijay Chand, on 6 April 2016.*

[7] *This matter was taken up for hearing before me on 5 & 6 of April 2016. Both counsel for Plaintiff and Defendant were heard. The parties also filed detailed written submissions, which I have had the benefit of perusing."*

[2] The learned High Court Judge, in paragraph 8 of his judgment, encapsulates the relief sought by the Defendant in its summons filed to dispute the jurisdiction of the court in the following terms;

SUMMONS TO DISPUTE THE JURISDICTION OF THE COURT

"[8] *In the Summons filed to dispute the jurisdiction of Court the Defendant seeks the following Orders:*

- 1. An Order that the Plaintiff's action be struck out and dismissed,*
- 2. A Declaration that the High Court has no jurisdiction to entertain an employment grievance concerning breach of employment contract, and that the rightful jurisdiction is the Employment Court.*
- 3. A Declaration that the High Court of Fiji has no jurisdiction in adjudicate on an Executive decision of the then Interim Prime Minister made pursuant to the powers given to the Interim Prime Minister under Section 9A of the Local Government (Amendment) Promulgation 2008 to terminate the employment of the Plaintiff.*
- 4. A Declaration that in accordance with Section 173(4)(d) of the Constitution no court or tribunal has the jurisdiction to accept, hear, determine, entertain or challenge any decision of a Special Administrator made pursuant to directive from the Interim Prime Minister under Section 9A of the Local Government (Amendment) Promulgation 2008.*
- 5. Such further or other order(s) as this Court in the circumstances considers appropriate."*

[3] Further, the content of the affidavit in support filed by Bijay Chand, acting Chief Executive Officer of the Defendant entity, find a home in paragraph 9 of the above judgment as follows;

THE AFFIDAVIT IN SUPPORT FILED BY BIJAY CHAND

"[9] The contents of the Affidavit filed by Bijay Chand, Acting Chief Executive Officer of the Suva City Council, in support of the Summons, can be detailed as follows:

- 1. The deponent states that he is the Acting Chief Executive Officer of the Defendant, Suva City Council, in this action and that he is duly authorised to swear the Affidavit.*
- 2. He states that the Plaintiff, Ms. Setavana Saumatua, was terminated from her employment with Council, on the grounds that there were allegations of blogging activities against the then Interim Government using the Council's office computers during office hours.*
- 3. The actions of the Plaintiff were perceived to cause political incitement. That due to the said actions of the Plaintiff, the Permanent Secretary of the Prime Minister's Office, after conducting their investigations gave a directive to the Council on behalf of the Prime Minister to terminate the Plaintiff's employment forthwith. This was an executive decision and directive given by the Interim Prime Minister's Office.*
- 4. On 27 March 2012, the Plaintiff has by way of a Writ of Summons, commenced this action against the Council seeking inter alia, damages for Breach of Contract, alleging two causes of action of Unlawful Termination and Unfair Dismissal.*
- 5. The deponent states that the Plaintiff was employed by the Council pursuant to a Contract of Employment, dated 22 August 2009, for a term of 3 years. A copy of the Contract is annexed and marked as "BC1".*
- 6. The Termination provisions relating to the Plaintiff were governed by Clause 9 of the Contract, in particular Clause 9.5 which gave the Council the power to dismiss the Plaintiff without notice or warning for serious misconduct.*
- 7. It is stated that on or around 6 December 2006, Mr. Bainimarama took over executive control of the Government and was appointed as an Interim Prime Minister. The rule of law was sanctioned and preserved through several decrees enacted by the Interim Government.*
- 8. The Interim Government passed the Local Government (Amendment) Promulgation 2008, the State Services Decree 2009 and the Administration of Justice Decree 2009.*
- 9. The State Services Decree 2009 permitted every Interim Minister appointed pursuant to the Decree under their Ministerial portfolio to appoint a*

Permanent Secretary with who lay the unfettered power to make any decision for its respective Ministerial departments. The Permanent Secretary had the power to terminate employment of any civil servants.

- 10. The validity of these Decrees were preserved by Section 173(4)(d) of the 2013 Constitution.*
- 11. On the 8 January 2010, the Permanent Secretary of the Prime Minister's Office wrote to the Special Administrator of the Suva City Council and directed that the Plaintiff, along with other employees alleged of blogging, were to be immediately terminated of their employment from the Council. A copy of the letter is annexed and marked as "BC2".*
- 12. The said letter stated that the evidence collated by the Prime Minister's Office evidenced that the employees of the Council were using the Council computers for blogging against the Interim Government. The letter demanded that the Council immediately comply with the directives of the Permanent Secretary.*
- 13. That in carrying out the directives of the Permanent Secretary, the Special Administrator of the Suva City Council, by letter dated 4 February 2010, terminated the employment of the Plaintiff. The termination letter is said to be self-explanatory. A copy of the termination letter is annexed and marked as "BC3".*
- 14. The Defendant says that the Court has no jurisdiction to hear this case. It is said that any action taken by Defendant in complying with an executive decision or the directives of the Permanent Secretary of the then Interim Prime Minister's Office cannot be subject to challenge in any Court or Tribunal by virtue of the respective Decrees and Acts then enacted and section 173(4)(d) of the 2013 Constitution.*
- 15. Furthermore, if the Court were to give merit to the Plaintiff's actions, then this action is one of an employment grievance, which is governed by the provisions of the Employment Relations Promulgations 2007 and now by the newly enacted Employment Act No. 4 of 2015.*
- 16. That the Defendant is a local government statutory body and falls within the definition and interpretation of the Essential Services under the Employment Act.*
- 17. It is stated that it is an abuse of process to commence this action through ordinary Court when the Employment Act clearly provides guidelines for such actions"*

- [4] Thereafter, the plaintiff filed an affidavit in opposition, the content of which the learned High Court Judge has concisely elucidated thus:

THE AFFIDAVIT IN OPPOSITION FILED BY THE PLAINTIFF

"[10] The contents of the Affidavit filed by the Plaintiff in Opposition to the Defendant's Affidavit can be summarized as follows:

- 1. She deposes that she is currently unemployed and makes this Affidavit in response to the Defendant's application to strike out and dismiss this action.*
- 2. She admits that her employment was terminated with the Defendant on an allegation of blogging against the Interim Government using the Defendant's office computers during office hours. However, she categorically denies those allegations.*
- 3. She deposes that she has been cleared by the Police and the DPP's Office of the allegations of blogging against the Government. A copy of the correspondence sent to her in this regard, by the Office of the DPP, is annexed and marked as "SSI".*
- 4. She states that the Contract of Employment that was terminated by the Defendant was dated 8 June 2009, and not 22 August 2009, as claimed by Bijay Chand. A copy of the Contract, dated 8 June 2009, is annexed and marked as "SS2".*
- 5. In terms of Clause 20 of the Contract it is stated that "Either party may terminate this Agreement upon giving not less than six (6) weeks written notice to the other party of their intentions or by making payment to the other party of six weeks' salary in lieu of such notice."*
- 6. The Plaintiff deposes that Section 173(4)(d) of the Constitution is not applicable in respect of this matter.*
- 7. She has also annexed, marked "SS3", "SS4", "SS5" and "SS6", several other correspondence in relation to the termination of her employment. All such correspondence is in the year 2013, which would be after these proceedings were filed in Court.*
- 8. She categorically states that the High Court of Fiji has jurisdiction to hear and determine this matter and accordingly for the Summons filed by the Defendant to be dismissed with costs."*

- [5] The content of the affidavit of Bijay Chand filed in response to the above affidavit in opposition, as the last germane piece of evidence in the matter at hand, is condensed in the judgment in the following terms;

THE AFFIDAVIT IN RESPONSE TO OPPOSITION FILED BY BIJAY CHAND

"[11] The contents of this Affidavit can be summarized as follows:

- 1. The deponent reiterates the fact that on 8 January 2010, the Permanent Secretary of the Prime Minister's Office wrote to the Special Administrator of the Suva City Council and directed that the Plaintiff, along with other employees alleged of blogging, were to be immediately terminated of their employment from the Council (reference to document marked "BC2").*
- 2. The Special Administrator did not immediately comply with this directive and instead requested the Plaintiff to remain at home until she received further advice from the Ministry of Local Government.*
- 3. On 14 January 2010, the Special Administrator wrote a letter to the Minister for Local Government, Urban Development, Housing and Environment to accord the Plaintiff due process and natural justice and suggested an alternative to termination of her employment. The said letter is annexed and marked as "BC4".*
- 4. On 2 February 2010, the Special Administrator received a letter from the Acting Permanent Secretary Ministry for Local Government, Urban Development, Housing and Environment stating thus "While we note the matters that you raised on the actions that you took on these officers and the measures that you propose, the Minister has directed me to inform you that it is important at this stage to adhere to the directive given by the Permanent Secretary Prime Minister's Office in his letter dated 8 January 2010, to you." The said letter is annexed and marked as "BC6".*
- 5. Subsequent to this communication and in compliance with the directive given therein, the Special Administrator terminated the employment of the Plaintiff by letter dated 4 February 2010 (reference to document marked "BC3").*
- 6. Also annexed and marked as "BC5" is a further correspondence which transpired term of the agreement that the Plaintiff would be employed for a period of three years from the date of the signing of the Agreement and the Defendant would pay an annual salary and housing allowances too in addition of that it was also a term of the agreement that the Defendant would not dismiss the Plaintiff for cause without first providing the Plaintiff with a written notification on the allegations against her and giving her not less than 14 days within which to provide a written response or explanation."*

- [6] As brought to light in the account of the unfolding of events stated in the judgment of the High Court, the Appellant's services were terminated on a **DECISION** taken by the Permanent Secretary in the Prime Minister's office, and conveyed to the Special Administrator's office.
- [7] The Appellant relies on the ouster clause in Section 173(4) of the Constitution in order to defend the decision which is now challenged. The Constitution in Section 173(4) provides for the ouster of the Courts jurisdiction in respect of any decision made.
- [8] In this case, the decision made was the decision to appoint a '*Special Administrator*', who upon appointment takes the place of the Council and is empowered to exercise the powers, duties and functions of the Council. Since the appointment of the Special Administrator was not challenged, the matter ends there. Thereafter, all acts of the Council (through the Special Administrator) are in law independent of the Order under which the Special Administrator was appointed. Thus the termination of the services of the Appellant was an act independent of the decision to appoint a Special Administrator. Therefore the acts of the Special Administrator or the Council, are not protected by the ouster clause.
- [9] In view of the above, it is pertinent to advert our attention to Section 9A of the Local Government (Amendment) Promulgation 2008. Apart from a few minor amendments to the Local Government Act, the substance of the above promulgation by and large pertains to the establishment of the Special Administrator. This leads to the logical conclusion that the principal purpose of this promulgation was to create the office of the Special Administrator. Section 9A of the said Promulgation reads thus:-

Special administrators

"9A. - (1) The Minister may by order appoint two or more persons to be special administrators of a municipality for such period as the Minister may consider necessary to perform the functions of a council until the election date is determined by the Electoral Commission.

(2) The persons appointed as special administrators under subsection (1) shall be deemed to be the duly constituted council of a municipality and shall, subject to any general or specific directions issued by the Minister, have the power to perform and discharge of all the rights, privileges, powers, duties and functions vested in or conferred or imposed on the council, the mayor and any officer of the council by the Act or any other written law."

[10] Hence, as correctly observed by the Learned High Court Judge, it is clear as per above subsection (1) that the Minister, who is named in the promulgation as the Minister for Local Government, Urban Development and Public Utilities, has the power, by order, to appoint two or more persons to be Special Administrators of a Municipality. Therefore, it is implicit that the Minister for Local Government, Urban Development and Public Utilities is the competent authority to take a '**DECISION**' regarding Local Government matters.

[11] In the light of the above section, it becomes necessary to examine the impact of Article 173 (4)(d) of the Constitution in respect of the background relating to the issues at hand. Section 173(4)(d) reads:

"(4) Notwithstanding anything contained in this Constitution, no court or tribunal (including any court or tribunal established or continued in existence by the Constitution) shall have the jurisdiction to accept, hear, determine, or in any other way entertain, or to grant any order, relief or remedy, in any proceeding of any nature whatsoever which seeks or purports to challenge or question—

(d) any decision made or authorised, or any action taken, or any decision which may be made or authorised, or any action which may be taken, under any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution, except as may be provided in or authorised by any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution".

- [12] As such, the Appellant argues that the termination of the original Plaintiff on the strength of the '*decision*' of the Permanent Secretary in the Prime Minister's office is covered by Section 173 (4)(d).
- [13] A careful examination of the above section reveals that a decision pursuant to any decree, promulgation, or declaration, has to be made in accordance with/ under such promulgation, decree, or declaration. Therefore, it is pertinent to examine whether the '*decision*' made by the Permanent Secretary in the Prime Minister's office is strictly a decision made under the promulgation. A decision regarding Local Government matters has to be taken by the Minister of Local Government, Urban Development, and Public Utilities and none other.
- [14] It is abundantly clear that the initial decision on the termination of the plaintiff was made by the Permanent Secretary to the Prime Minister and not by the Minister for Local Government, Urban Development and Public Utilities himself. Although the decision of the Permanent Secretary was endorsed by the Line Minister, such endorsement does not tantamount to a decision emanating from the line Minister himself. Even after passage from the permanent secretary to the Special Administrator, it continued to be the decision of the Permanent Secretary to the Prime Minister and not of the Minister.
- [15] Although the learned Counsel for the Appellant strenuously argued that, in view of the directive given by the line Minister to his Permanent Secretary, the decision made by the Permanent Secretary became a decision of the line minister when the same was conveyed to him, I cannot agree with such contention. The direction given by the Minister reads thus:-
- "The Minister has directed me to inform you that it is important at this stage to adhere to the directive given by the Permanent Secretary Prime Minister's Office in his letter dated 8 January 2010 to you."*
- [16] Article 173(4)(d) of the Constitution is unequivocal in using the word "*decision*" as opposed to words such as '*directive*' or '*adherence*' or any such other word. Hence, it is crystal clear that the line Minister had merely informed the Special Administrator to

adhere to the decision of the Permanent Secretary in the Prime Minister's office and such directive of the minister does not amount to a '*decision*' by the Line Minister.

- [17] On the strength of the above, I cannot agree with the Appellant and I hold that the above '**DECISION**' is that of the Permanent Secretary to the Prime Minister and not a decision of the Minister of the line Ministry. Therefore such a decision does not amount to a decision made under the promulgation of 2008. As the learned High Court Judge has correctly pointed out, the jurisdiction of the High Court in relation to the matter at hand is therefore not ousted by the provisions of Article 173(4)(d) of the Constitution.
- [18] It is clear that the line Minister has not given his mind to the issue but merely allowed himself to be dictated to by the said Permanent Secretary to the Prime Minister. This, in the context of public law was offensive to the rule against dictation and/or amounted to a surrender of discretion or power.
- [19] I need to give only two illustrations of the said principles. In **Lavender v. Minister of Housing and Local Government** [1970] 1 WLR 1231, the Court held that in a case involving planning permission for gravel working, the Minister having the power to grant such permission had effectively put the decisive power into the hands of the wrong Minister. Then again, a decision of the Home Secretary that a prisoner should serve a term of at least 20 years was quashed because he acted as a rubber stamp on the advice of the judge or of the parole board without making his own decision (**R v. Home Secretary**, e. p, Walsh [1992] COD 240).
- [20] For the reasons stated above, I now answer the Grounds of Appeal relied on by the Appellant as follows:-

1st ground of appeal

The learned High Court Judge erred in fact and in law when he took the view that the directive made by the Permanent Secretary in the Prime Minister's Office was not caught by Section 173(4)(d) of the Constitution;

I hold that the Judge had not erred.

2nd ground of appeal

The Learned High Court Judge erred in fact and in law when he made the findings that the Appellant had acted on the directive of the Permanent Secretary in the Prime Minister's office in terminating the Respondent's employment and in doing so, he did not consider the fact that the Appellant only acted on the advice and directive of his Line Minister, the Minister for Local Government, after receiving the letter from the Minister of Local Government on 2nd February 2010.

I reject the ground of appeal and hold that the Judge had not erred;

3rd ground of appeal

The Learned High Court Judge erred in fact and in law when he made the finding that the decisions of the Special Administrator were not made under the Local Government Amendment Promulgation 2008 but under the Local Government Act Chapter 125, because the duties of the Special Administrator was discharging were duties under the Local Government Act.

I reject this ground too and hold that the Judge had not erred.

- [21] In view of the above conclusion, I dismiss the summons filed by the Appellant and order that the case be sent back to the High Court for further trial.

I order the parties to bear their own costs.

Guneratne JA

- [22] I agree with the judgment of Lecamwasam JA including the proposed orders made by his Lordship.

Jameel JA

[23] I agree with the reasons, conclusions and proposed orders of Lecamwasam JA.

The Orders of the Court are:

1. *Summons filed by the Appellant is dismissed.*
2. *The High Court Judge's Ruling dated 25th May 2016 is hereby affirmed.*
3. *The case to be sent back to the High Court for further trial.*
4. *Parties to bear their own costs.*



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Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

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Hon. Justice J. Guneratne
JUSTICE OF APPEAL

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Hon. Justice F. Jameel
JUSTICE OF APPEAL