

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

CIVIL APPEAL NO. ABU 005 of 2020
[High Court Civil Case No. HBC 128 of 2014L]

BETWEEN : **VISION TRADING LTD**

APPELLANT

AND : **SHEETAL CHAND**

RESPONDENT

Coram : **Basnayake, JA**
Lecamwasam, JA
Jameel, JA

Counsel : **Mr R. R. Gordon for the Appellant**
: **Mr S. F. Koya with Koya (Jnr) for the Respondent**

Date of Hearing : **09 February 2023**

Date of Judgment : **24 February 2023**

JUDGMENT

Basnavake, JA

[1] I agree with the reasoning and conclusions arrived at by Lecamwasam JA.

Lecamwasam, JA

[2] This is an appeal filed by the Appellant against the judgment dated of the learned High Court Judge at Lautoka on the following grounds:

1. *The Learned Trial Judge erred in law and/or in fact in not striking out the Respondent's statement of claim;*
2. *The Learned Trial Judge erred in law and/or in fact when he decided and/or ruled to grant the Respondent and/or allowed the Respondent an adjournment of the hearing of the trial when the Respondent had not secured her witness;*
3. *The Leaned Trial Judge erred in law and/or in fact when he decided and/or ruled that the wordings to the effect "common duty of care" in paragraph 4 of the SOC are well and truly sufficient to denote that the action is brought under the common law for breach of duty of care;*
4. *The Learned Trial Judge erred in law and/or in fact when he failed to decide and/or rule that the action was not brought under the common law for breach of duty of care as the same was not specifically pleaded by the Appellant;*
5. *The Learned Trial Judge erred in law and/or in fact when he decided and/or ruled that the Appellant brought the action both under the common law and the statutory law;*
6. *The Learned Trial Judge erred in law and/or in fact when he decided and/or ruled that even though the Appellant had admitted that the deceased was an employee of it as a Boiler Assistant and he died due to drowning as he was unable to escape from the soak pit, in which he was working, the Appellant had not accepted that they owed a duty of care to the deceased, when the Respondent had not pleaded any such duty of care; and/or a breach of the same;*
7. *The Learned Trial Judge erred in law and/or in fact when he decided and/or ruled that employers owed duty of care to its employees to provide safe system of work and to protect its employees from foreseeable risk and dangers and this common law remedy*

is further guaranteed by the statutory law when the victim is a worker when the Respondent had not pleaded any such duty of care and/or breach of the same;

- 8. The Learned Trial Judge erred in law and/or in fact when he misinterpreted and/or failed to correctly interpret the Health and Safety at Work Act and/or Part II and/or sections 9 and/or 15 of the Health and Safety at Work Act and/or its Regulations;*
- 9. The Learned Trial Judge erred in law and/or in fact when he decided and/or ruled that the common law duty of care has also become a statutory duty pursuant to Section 9 of the Health and Safety at Work Act (1996) and that the Respondent could bring claim under such Act and/or sections.*
- 10. The Learned Trial Judge erred in law and/or in fact in following the ratio decidendi in Krishna v Standard Concrete Industries Ltd [2008] FJHC 42; HBC17.2006 (19 March 2008);*
- 11. The Learned Trial Judge erred in law and/or in fact when he incorrectly interpreted and/or did not correctly interpret the ratio decidendi in Krishna v Standard Concrete Industries Ltd [2008] FJHC 42; HBC17.2006 (19 March 2008);*
- 12. The Learned Trial Judge erred in law and/or in fact in not following the ratio decidendi in Dakuna v Laucala Island Resort Ltd [2017] FJHC 10; HBC150.2015 (20 January 2017) and/or Raj v Flour Mills of Fiji Ltd [1999] FJHC 166 and/or Prasad v Kumar [2008] FJHC 368; HBC 252.2002S (20 June 2008) F Jitoko J;*
- 13. The Learned Trial Judge erred in law and/or in fact in not holding and/or failing to hold that Section 15 and/or Part II of the Health and Safety at Work Act prevented and/or was a bar to the Respondent making and/or basing and/or claiming any cause or causes of action or actions against the Appellant by reason of any alleged and/or purported breach or breaches of Part II of the Health and Safety at Work Act.*
- 14. The Learned Trial Judge erred in law and/or in fact when he decided and/or ruled that therefore, it can be safely concluded that the Respondent hereof can bring and has correctly brought this action to vindicate her right under common law, which stands intact and further guaranteed in the Health and Safety at Work Act 1996, imposing it as a statutory duty on the Appellant, being the employer of her deceased husband, and that the Appellant owed a duty of care not only under common law, but also under the Health and Safety at Work Act 1996, which imposes statutory duty of care on the Appellant;*
- 15. The Learned Trial Judge erred in law and/or in fact when he decided and/or ruled that the Respondent's claim is essentially founded on the breach of duty of care when no such duty of care and/or a breach of duty of care was pleaded by the Respondent;*
- 16. The Learned Trial Judge erred in law and/or in fact when he decided and/or ruled that it became clear that the deceased had been tasked with the work to do it all alone when*

- there was no and/or no credible evidence of the same and that the onus had shifted for the Appellant to lead evidence and/or suggest to the contrary;*
- 17. The Learned Trial Judge erred in law and/or in fact when he decided prejudged and/or decided that matter in favour of the Respondent and/or concluded the matter in favour of the Respondent before properly analysing all of the pleadings and/or evidence and/or written submissions before him;*
 - 18. The Learned Trial Judge erred in law and/or in fact when he decided and/or ruled that the evidence directly points the finger at the Appellant for its failure/s and guides any sensible person to arrive at a safe conclusion as to where and how the Appellant failed in its duty owed to the deceased as the employer;*
 - 19. The Learned Trial Judge erred in law and/or in fact when he unnecessarily and/or excessively interfered in the way, shape, form and manner the trial was conducted and/or assisted the Respondent when he ought not to have done so and/or did so to the prejudice of the Appellant;*
 - 20. The Learned Trial Judge erred in law and/or in fact when he ignored procedural rules governing the conduct of trial;*
 - 21. The Learned Trial Judge erred in law and/or in fact when he decided and/or ruled that the water tank was dangerous, sitting on a steel stand, of which one leg was almost in the pit, posing danger to anyone working or standing under it when the fact was that the tank and stand was there before the Appellant purchased the business and the subject property and the Appellant did nothing further to it;*
 - 22. The Learned Trial Judge erred in law and/or in fact when he decided and/or ruled that this could have been clearly and necessarily foreseeable, had any responsible supervisor/foreman/engineer from the Respondent company given clear instruction and/or supervision before the deceased commenced the work or during the work and/or when the same was not pleaded by the Respondent;*
 - 23. The Learned Trial Judge erred in law and/or in fact when he decided and/or ruled that there was no evidence coming from the Respondent to prove that a supervisor or anyone competent of supervising and instructing the deceased was present near the soak pit or any instruction was given or supervision was in fact made and in doing so reversed the onus of proof onto the Appellant and/or when the same was not pleaded by the Respondent and/or when the same was something the Respondent needed to plead and prove;*
 - 24. The Learned Trial Judge erred in law and/or in fact when he decided and/or ruled that in his view, had there been a supervisor or any responsible person from the Appellant company to supervise or observe the work and instruct the deceased of this impending danger in digging a pit located adjacent to the tank, while one foot of the steel stand was almost at the edge of the pit and when the pit had no wall built around it to avoid*

- any sliding of the earth, this tragedy could very well have been foreseen and avoided when the same was not pleaded and/or relied upon by the Respondent in her claim before the Court;*
25. *The Learned Trial Judge erred in law and/or in fact when he decided and/or ruled that there was no evidence from the Respondent to establish that there was a supervisor or a competent person to supervise and to instruct the deceased at the beginning or during the work and had there been one in place he/she should have reasonable foreseen this impending danger and that one need not be an expert to foresee this type of dangers when this was something the Respondent needed to lead and establish and failed to plead and lead and establish with evidence;*
 26. *The Learned Trial Judge erred in law and/or in fact when he decided and/or ruled that if a prudent supervisor had played his role, he would, undoubtedly, have foreseen the danger and duly instructed the deceased to stop digging or at least would have made appropriate arrangement to provide a strong support to the tank and the stand to stop its leaning and falling, as a temporary measure until the work is over or a permanent solution to stop a possible fall in the future when the same was not pleaded by the Respondent and there was no evidence led of the same by the Respondent;*
 27. *The Learned Trial Judge erred in law and/or in fact when he decided and/or ruled that the deceased had been ordered and allowed by the Appellant to work under such a vulnerable condition when the same was not pleaded and there was no evidence of the same;*
 28. *The Learned Trial Judge erred in law and/or in fact when he decided and/or ruled that the main issue was ordering and allowing the deceased to work unsupervised and uninstructed when the same was not pleaded by the Respondent and there was no evidence led of the same by the Respondent;*
 29. *The Learned Trial Judge erred in law and/or in fact when he relied upon facts that were not before him or properly before him and made conclusions, guesses, and conjectures when he was not entitled to do so;*
 30. *The Learned Trial Judge erred in law and/or in fact when he decided and/or ruled that the witnesses called by the Respondent were not in a position to satisfy the court that the Appellant had taken the necessary measures for the safety of the deceased by providing necessary supervision and/or instructions prior to or during the work attended by the deceased when there was no onus of the Appellant to do so and when the same was not pleaded by the Respondent and no evidence led of the same by the Respondent;*
 31. *The Learned Trial Judge erred in law and/or in fact when he misconstrued and/or misapprehend the circumstances of the accident;*

32. *The Learned Trial Judge erred in law and/or in fact by relying on irrelevant facts and/or evidence and/or by not relying on relevant facts and/or evidence;*
33. *The Learned Trial Judge erred in law and/or in fact by not assessing and/or weighing all the relevant and admissible evidence in totality individually and cumulatively;*
34. *The Learned Trial Judge erred in law and/or in fact when he found that the Appellant was liable in negligence and/or negligent in causing the death of the Respondent when:*
 - 34.1. *The Respondent did not adequately and/or properly plead any and/or any cause or causes of action against the Appellant; and/or*
 - 34.2. *The Respondent failed to plead any and/or any reasonable cause or causes of action; and/or*
 - 34.3. *The Respondent failed to plead vicarious liability; and/or*
 - 34.4. *The Respondent's statement of claim contained no proper pleading of vicarious liability; and/or*
 - 34.5. *The Respondent failed to prove that an employee or employees of the Appellant caused and/or contributed to the death of the deceased; and/or*
 - 34.6. *The Respondent failed to join as a party to the action any employee or employees of the Appellant that the Respondent alleged caused and/or contributed to the death of the deceased; and/or*
 - 34.7. *The Respondent failed to allege and/or identify the and/or any separate duty or duties of care owed by the and/or any employee, servant or agent of the Appellant that the Respondent alleged caused death of the deceased and/or contributed to the death of the deceased; and/or*
 - 34.8. *The Respondent did not adequately and/or properly plead any and/or any breach or breaches of any separate duty or duties of care owed by the and/or any employee, servant or agent of the Appellant that the Respondent alleged caused and/or contributed to the death of the deceased; and/or*
 - 34.9. *The Respondent failed to prove that any of the alleged and/or purported breach or breaches of duty of any separate duty or duties of care owed by the and/or any employee, servant or agent of the Appellant that the Respondent alleged caused and/or contributed to the death of the deceased (which the Appellant denies the Respondent adequately and/or properly pleaded);*
 - 34.10. *The Respondent did not adequately and/or properly plead any and/or any duty or duties of care that may have been owed by the Appellant to the deceased;*
 - 34.11. *The Respondent did not adequately and/or properly plead any and/or any breach or breaches of duty or duties of care that may have been owed by the Appellant to the deceased;*
 - 34.12. *The Respondent failed to prove that any of the alleged and/or purported breach or breaches of duty or duties of care (which the Appellant denies the Respondent adequately and/or properly pleaded) caused the death of the deceased;*
 - 34.13. *No and/or no proper inference could be drawn that any of the alleged and/or purported breach or breaches of duty or duties of any separate duty or duties of care owed by the and/or any employee, servant or agent of the Appellant (which*

the Appellant denies the Respondent adequately and/or properly pleaded) caused the death of the deceased;

35. *The Learned Trial Judge erred in law and/or in fact when he failed to hold and/or find that the deceased was either the sole and/or a and/or the major cause of his own death;*
36. *The Learned Trial Judge erred in law and/or in fact when he failed to hold and/or find that the death of the deceased was attributable to contributory negligence on the part of the deceased;*
37. *The Learned Trial Judge erred in law and/or in fact when he reversed the onus of proof onto the Appellant;*
38. *The Learned Trial Judge erred in law and/or in fact when he misinterpreted and/or incorrectly interpreted the Compensation to Relatives Act and the arguments advanced on behalf of the Appellant as regards the Compensation to Relatives Act;*
39. *The Learned Trial Judge erred in law and/or in fact when he misinterpreted and/or incorrectly interpreted the Workmen's Compensation Act and the arguments advanced on behalf of the Appellant as regards the Workmen's Compensation Act;*
40. *The Learned Trial Judge erred in law and/or in fact when he misinterpreted and/or incorrectly interpreted the Health and Safety at Work Act and the arguments advanced on behalf of the Appellant as regards the Health and Safety at Work Act;*
41. *The Learned Trial Judge erred in law and/or in fact when he misapplied and/or incorrectly applied and/or misinterpreted and/or incorrectly interpreted the principles and/or reasoning and/or method in assessing and/or calculating quantum of damages;*
42. *The Learned Trial Judge erred in law and/or in fact when he awarded \$2,500.00 for loss of life/expectancy, \$3,500.00 for loss of amenities/consortium, \$85,800.00 for lost years, \$34,119.00 for interest and \$4,000.00 for costs;*
43. *The Learned Trial Judge erred in law and/or in fact when he failed to properly consider and analyse all of the submissions and arguments advanced on behalf of the Appellant and dismissed the submissions and arguments advanced on behalf of the Appellant.*

[3] I find most of the extensive grounds of appeal listed above either overlap or are repetitive. Counsel have formulated 43 grounds of appeal, the 34th ground itself containing 13 sub-grounds of appeal. This amounts to a total of 56 grounds of appeal. In contrast, the judgment of the learned High Court Judge contains only 60 paragraphs. It is unfathomable

to me how the counsel managed to formulate such number of grounds of appeal based on the judgment of the High Court. It is incumbent upon counsel to assist court with a well drafted set of grounds of appeal, designed to illuminate the merits of their appeal. The above grounds of appeal obscure the substance of the issues at hand and have made my task far more time-consuming than is necessary. Therefore, I expect counsel to exercise greater self-restraint in the drafting of future petitions of appeal.

[4] I note with some sense of relief that, at the stage of argument, counsel who appeared for the Appellant had undertaken in their written submissions to attempt to deal with the grounds of appeal “*cumulatively, with brevity and concisely*”, having perhaps realised the futility of grounds of appeal. However, the substantive written submissions prove that their undertaking was only paying lip-service to brevity, as the written submissions deal with the staggering 38 grounds of appeal.

[5] As the learned High Court judge has explained the background to the case lucidly and comprehensively in his judgment, for purposes of clarity I will only mention the facts in brief.

[6] The original plaintiff the Respondent in Appeal (hereinafter referred to as the Respondent) is the wife and administratrix of the estate of the deceased, Raj Deo Singh. Her husband, who was employed under the Appellant as a boiler assistant was 40 years of age and had only been employed in the Appellant Company for a little over a month of a time of his death. He had died as a result of drowning in the soak pit which he had been asked to dig at his place of employment. He had been digging the said soak pit in the backyard of the Appellant’s company premises known as DHOBY’S, presumably on the instructions of the office of the Appellant. On the day of his death, when he had stopped digging the soak pit for his morning tea break, the deceased had sought the assistance of Nilesh Chand, a co-worker, in the digging of the soak pit. According to Nilesh Chand, the sole eye-witness to

the incident, while the digging was in progress, a water tanks located above the soak pit then was standing on a stool, had suddenly collapsed into the soak pit, thereby flooding the pit and causing the deceased Nilesh Chand to drown.

[7] As per the evidence, the water tank had trapped the deceased inside the soak pit, which was about 5 feet in depth and had blocked his way out. After the water tank had collapsed, Nilesh Chand had called for help from the other members of the staff, who had flocked there but had failed to rescue the deceased. They had informed the Police as well as the Fire Services Department, who had cleared the water tank from the opening of the soak pit, with the assistance of a crane and had recovered the body of the deceased after 4 hours. The facts of the case leading up to the death of the deceased, are not contested and therefore needs no further elucidation.

[8] The employer had informed the relevant Ministry concerned of the death of their employee. Upon such information and as per the Workmen's Compensation Act, a payment of \$23,400.00FJD had been deposited with the Labour Department made to the wife of the deceased (the Respondent) as compensation which the Respondent had refused to accept.

[9] The position of the Appellant appears to be that as the Respondent was offered \$23,400.00FJD as compensation under the Workmen's Compensation Act, she cannot claim any further compensation under the Common Law. However, it is important to note that although the Respondent was offered \$23,400.00FJD by the Department of Labour, the evidence strongly suggests that she had refused to accept the said amount. Therefore, as far as the Respondent is concerned, she is not estopped from seeking a remedy under Section 25 of the Act, which makes provision for the damages to be recovered in a forum independent to that of the Act.

[10] Throughout the judgment I observe that the learned High Court judge is of the view that this matter is one of breach of duty of care, brought under Common Law and not under any statutory law. The learned Judge holds the position that this Common Law remedy is merely further guaranteed by statutory law when the victim is a worker. Therefore, I will confine my judgment to whether the application of Common Law to the matter at hand was correct in law. I will not delve into the matter of which law takes precedence, as the Act provides recourse to a remedy outside the confines of the Act, as elaborated above.

[11] The employment of the deceased was not disputed. The deceased had been in the employment of the Appellant at the time of his death. It was on the instructions of the Appellant (or one of his staff members) that he had been entrusted with the task of digging the soak pit. However, his request for the assistance of his co-worker Nilesh Chand indicates that the task required more labour than that of one person. Therefore, it could be safely presumed that the deceased had dug a rather deep pit, which required more labour in order to collect and dispose of the earth that was dug out.

[12] No cogent evidence was presented to support the position that the deceased was in the soak pit or the general area on his own accord. There could not have been any need for the deceased to have been in the soak pit area unless except as part of his duties, and on the instructions of a superior officer of the Appellant. As an employee who had joined the Appellant a little over a month before his demise, it would be rather preposterous to presume that the deceased was familiar with the situation of the soil in the pit area. However, even in the absence of statute law, the employer has a duty of care under common law for the health and safety of their employees. This includes maintaining work premises free from hazardous conditions. Therefore, the Appellant should have taken appropriate care to either alert the deceased to the soil conditions and the risk posed by the water tank, which were cheek by jowl with the soak pit, or should have taken measures to fortify the structures on which the water tanks stood, to prevent it from collapsing and causing harm.

- [13] The standard of care required under Common Law is that of reasonableness. That is, as the duty is owed to individual employees, the standard of care varies depending on the person and circumstances. In view of the nature of work entrusted to the deceased, the most prudent course would have been for the Appellant to have the work of the deceased supervised by an experienced person, who would have been mindful of the dangers inherent in the work. The absence of a supervisor displays a lack of duty of care on the part of the Appellant. Had there been appropriate supervision, this unfortunate incident could have been averted.
- [14] The lack of such supervision amply demonstrates the utter neglect and failure of duty of care on the part of the Appellant towards the deceased. Therefore, I am more than satisfied that the Appellant was negligent in this instant and therefore he cannot escape from civil liability.
- [15] Relying on the above reasoning, I answer the grounds of appeal as follows:
- A. *Grounds of appeal 1 and 2*- I reject these grounds of appeal on the basis that striking out the Statement of Claim of the Respondent has no relevance at the stage of trial since it does not affect the substantive matters before court.
 - B. *Grounds of appeal 3-5, 7, 9-11, 14-38, and 40-43*- I answer these grounds cumulatively in the negative.
 - C. *Ground of appeal 6*- I reject this ground of appeal due to the fact that as per paragraph 4 of her Statement of Claim, the Respondent has pleaded these and therefore the learned Judge had not erred.
 - D. *Grounds of appeal 8, 13, and 39*- I answer these grounds too in the negative since the learned Judge had proceeded on Common Law principles, and had not erred.
 - E. *Ground of appeal 12*- The judgment in **Dakuna** (referred) was not applicable as the learned High Court Judge proceeded on Common Law principles.


[16] For the foregoing reasons, I dismiss the appeal and affirm the order of the learned High Court judge. Further, I order Appellant to the Appellant to pay \$5,000.00 as costs in this case to the Respondent.

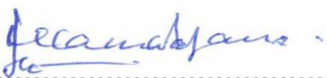
Jameel, JA

[17] I agree with the conclusions and proposed order of Lecomwasam JA.


[18] **Orders of the Court**

1. *The appeal is dismissed.*
2. *The Appellant is ordered to pay the Appellant to pay \$5000.00 within 21 days of this judgment.*


.....
Hon. Justice E. Basnayake
JUSTICE OF APPEAL


.....
Hon. Justice S. Lecomwasam
JUSTICE OF APPEAL




.....
Hon. Justice F. Jameel
JUSTICE OF APPEAL

Solicitors:

Gordon & Co for the Appellant
Siddiq Koya Lawyers for the Respondent