

**IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
CIVIL APPELLATE JURISDICTION**

**ERCA 10 OF 2021
ERT Lautoka Grievance No. 128 of 2015**

[An Application for seeking the extension of time & leave to Appeal from the Employment Relations Tribunal, ERT Grievance No. 128 of 2015]

BETWEEN **TRADE FURNITURE & JOINERY PTE LIMITED** a limited liability company incorporated in Fiji and having its registered office at Lot 1 Vunirewa Subdivision, Kerebula, Nadi Back Road, Nadi
APPLICANT

AND **SALESH SINGH**
RESPONDENT

BEFORE A.M. Mohamed Mackie- J.

APPEARANCES Mr. S. Nand -for the Employer- Applicant.
Ms. Vateitei - for the Griever -Respondent.

WRITTEN SUBMISSION: Filed by the Applicant on 24th August 2023.
Filed by the Respondent on 20th September 2023.

HEARING Disposed by way of written submissions

DATE OF RULING 31st October 2023

RULING

1. A Director of the Applicant Company, namely, GOVIND GOUNDAR, by appearing in person, has on 20th October 2021 filed this Application (Notice of Appeal) seeking the following reliefs;
 - a. *THAT leave to appeal out of time the interlocutory decision delivered on 17th August 2018 by the Resident Magistrate Mr. R. Green be granted.*
 - b. *THAT leave to appeal out of time the formal proof ruling delivered on 26th October, 2017 by Resident Magistrate Mr. R. Green be granted.*
 - c. *The employment Grievance No.128 of 2015 be reinstated and referred to another Tribunal for determination.*

The Applicant relies upon the following Grounds of Appeal.

A. IN RELATION TO THE FORMAL PROOF DECISION: (dated 26th October 2017)

1. *THAT the learned Magistrate erred in law and fact when he conducted the hearing of the employment grievance by formal proof in the absence of any evidence that the Applicant was informed of the hearing date after it was vacated by an e-mail dated 29th March, 2017 from the Employment Tribunal.*
2. *THAT the learned Magistrate erred in law and fact when he failed to uphold that the Employment Tribunal was required under section 216 to hear matters in the absence of a party only if there has not been any good cause shown by the employer for its non-appearance whereas in this instance the employer was not informed nor aware of the new hearing date after initial dates was vacated.*
3. *THAT the learned Magistrate erred in law and fact when he failed to uphold section 210(1) of the Employment Act wherein the general function of the Tribunal is to assist employers and their representatives and workers and their representative trade union to achieve and maintain effective employment relations, in particular, by adjudicating and determining any grievance or dispute between parties to employment contracts.*
4. *THAT the learned Magistrate erred in law and fact when he held that the dismissal of the Respondent was unfair and unlawful in the absence of any evidence to support this finding.*
5. *THAT the learned Magistrate erred in law and fact when he failed to uphold that the Applicant had complied with section 33(2) and section 114 of the Employment Act when the Respondent was issued with three warning letters prior to his dismissal and was issued with a written notice of termination with all dues paid.*
6. *THAT the learned Magistrate erred in law and fact when he held that the dismissal of the Respondent was unfair and unlawful when it was established during the formal proof ruling that the Respondent was issued with three warning letters for non-performance.*

B. IN RELATION TO THE INTERLOCUTORY DECISION (dated 17th August 2018)

7. *THAT the learned Magistrate erred in law and fact when he failed to take into consideration the written submissions filed by the Applicant and the legal arguments held on 26th April, 2018.*
8. *THAT the learned Magistrate erred in law and fact when he failed to give reasons for the decision to dismiss the setting aside application for the proof ruling.*
9. *THAT the Applicant reserves the right to add such further grounds of appeal in due course and upon the disclosure of the Tribunal records.*

2. The Applicant has also filed a Notice of Motion on 2nd November 2021 seeking the Stay of the formal proof judgment entered against him, pending the hearing and determination of the leave to Appeal and Appeal.
3. The Application for leave to Appeal Out of time is supported by an Affidavit of the said Director, Govind Goundar, sworn and filed on 20th October 2021, together with annexures marked as "GG-1" to "GG-13".
4. The Application is resisted by the Respondent by his Affidavit in Response sworn on 17th May 2022 and filed on 26th May 2022.
5. The Applicant on 9th June 2022 filed its reply Affidavit sworn by the said Director, Govind Goundar on 8th June 2022, together with annexures marked as "G-1" to "G-6".

WHICH ORDER IS APPEALABLE?

6. Before I proceed further, it must be noted that out of two (2) Orders sought to be Appealed against by the Applicant hereof, it is only the INTERLOCUTORY ORDER made on 17th August 2018 that can be Appealed against for the time being, and not the FORMAL PROOF DECISION pronounced on 26th October 2017, however. Subject to granting of the extension of time and leave to Appeal.
7. The reason being that it is only after the learned Magistrate pronounces his Ruling in the setting aside Application, preferred by the Applicant by considering the merits of it, the Applicant or the Respondent can come before this Court depending on the outcome of it.
8. It transpires from the perusal of the record that the learned Magistrate on 17th August 2018, instead of pronouncing the Ruling on the setting aside Application by considering the merits of it, seems to have proceeded to strike out the setting aside Application on the ground that the Applicant was absent and not represented by his Counsel. Here, questions arise whether the Defendant or his Counsel should necessarily have been present in Court for the Magistrate to pronounce the Ruling?, and can a Magistrate strike out an application for non-appearance of a party while the Magistrate was required to pronounce his Ruling on that particular day?
9. It is only the propriety of the said interlocutory ruling dated 17th August 2018 this Court can delve into at the Appeal, if the leave to Appeal and extension of time is granted. The Court cannot go into the propriety of the Formal Proof judgment as it would be pre-mature at this juncture.
10. If the Applicant succeeds in the Appeal in relation to the Interlocutory decision made on 17th August 2018, the next step would be for the Magistrate to go into the Setting aside Application and make an appropriate Ruling on the merits of it, wherein the Magistrate will decide whether the Formal Proof judgment should allowed to be stand

or not. The party which will be dissatisfied of the Magistrate's Ruling on it can come before this Court, if they wish to do so.

11. Therefore, for the purpose of this Ruling, I will not consider the averments in the Affidavits, submissions by the parties, and ground 1 to 6, which are in relation to the Formal Proof judgment.

FURTHER DISCUSSION:

12. The Courts in Fiji have considered (a) the length of delay (b) the reason for not filing the appeal within time (c) whether there is a ground of appeal that will probably succeed and (d) whether the respondent will be unfairly prejudiced if time is enlarged in deciding whether or not to exercise their discretion in favour of an Applicant seeking for enlargement of time.
13. In ordinary circumstances, the Applicant ought to have filed his Application within the specified days from 17th August 2018 on which date the impugned interlocutory Ruling was pronounced. This Application was filed on 20th October 2021. There appears to have been a delay of around (3) three years and (2) two months. This delay is not insubstantial. The court therefore should delve into the actual reason that caused the delay in filing this Application. The reason adduced by the Applicant is that the Order of dismissal of its setting aside Application was not sealed and served on it. This warrants consideration at the Appeal.
14. The Applicant further states that, the learned Magistrate, instead of making his decision on the setting aside Application, for which written submissions were filed, proceeded to dismiss the Application on the ground that the Applicant was absent and no one represented it.
15. The Respondent in paragraph 14 of his Affidavit in opposition states that the Applicant's Counsel was present in court on 26th April 2018 for hearing, and was aware as to when the matter was adjourned for ruling. He alleges that despite the Applicant and/ or its counsel being aware of the ruling date, they did not appear on the said date.
16. The Respondent in paragraph 15 of his Affidavit states further that the issue should have been dealt with by the Applicant and/ or its counsel immediately after the case was dismissed, but no action was taken for 3 years and 2 months. In paragraph 18 he alleges that the Applicant and/or his Counsel did not make any inquiries at the Registry.
17. I have considered the contents of the written submissions, particularly the proposed grounds of Appeal in relation to the interlocutory decision dated 17th August 2018. The question of the service of the notice of decision on the Applicant appears to be paramount. The propriety of the decision in dismissing the setting aside Application, without going into the merits of it begs serious consideration.

18. The question of delay has to be gone into only when the court finds that the notice of the impugned decision was sealed and duly served on the Applicant. The validity of the argument advanced by the Respondent to the effect that the Applicant and/ or his Solicitor should have made inquiries at the Court's Registry does not sound well. Applicant submitted that they raise important legal issues. He submits that those grounds are arguable and there is a chance of success if the time is extended and leave is granted to appeal.
19. Most of the grounds of Appeal raised by the Applicant are in relation to the Formal Proof Judgment, which do not warrant consideration now. However, the Applicant should be able to identify more grounds in relation to the interlocutory decision dated 17th August 2018. The grounds so far adduced seem to be with merits.
20. Having considered the above and the other arguments advanced in the written submissions, I have decided to allow an extension of time and granted leave to appeal the interlocutory decision dated 17th August 2018, primarily because of the allegation that there was no service of the Order on the Applicant or its Solicitors for them to have acted in response. If the Court finds that the notice of decision has not been duly served, the Court cannot ignore it.
21. The Applicant has taken 3 years and 2 months to come before this Court. The reason adduced for such delay seem to be warrants consideration the intervention of this Court by granting extension of time and leave to Appeal. In order to be fair, I have given some weight to the issue in relation to the notice of the decision.
22. I am mindful that some prejudice may be caused to the Respondent by the grant of an extension of time to Appeal. However, in these circumstances an enlargement of time and granting of leave to file the Appeal seems to be the correct decision. Suitable order for costs, if needed, will compensate the Respondent at the end of the day.

Stay of Execution:

23. This Court need not go into the Application for stay at this stage. The reason being that there is no executable judgment until the learned Magistrate will have gone into the setting aside Application on the merits of it and makes his finding.

ORDER:

- a) The Applicant is granted an enlargement of time to appeal the interlocutory decision dated 17th August 2018 pronounced by the Employment Tribunal.
- b) The leave to Appeal the said decision also granted.
- c) The Applicant shall file and serve the notice and grounds of appeal within 14 days.

- d) The Application for enlargement of time and leave to Appeal in relation to the formal proof judgment dated 26th October 2017 is dismissed.
- e) The parties will bear their own costs.


A.M. Mohamed Mackie
Judge



At the High Court of Lautoka on this 31st day of October, 2023.

SOLICITORS:

For the Applicant: Messrs. K. Law Chambers & Partners- Barristers & Solicitors.

For the Respondent: In Person.