

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

CIVIL ACTION NO. ERCA 3 of 2023

IN THE MATTER of an appeal from the EMPLOYMENT RELATIONS TRIBUNAL Civil Case No. ERT WC26 of 2022

BETWEEN : **THE LABOUR OFFICER** for and on behalf of the dependents of the deceased VALENTIN MAUGARD of Martintar, Nadi
**APPLICANT
(ORIGINAL APPLICANT)**

AND : **CRYSTAL BLUE REEF SAFARI LIMITED** Shop 9, Port Denarau, Nadi
**RESPONDENT
(ORIGINAL RESPONDENT)**

BEFORE : Justice Mr. A.M. Mohamed Mackie.

APPEARANCES : Mr. S. Kant, Mr. Hari Krishnan N & Mr. Khan, for the Appellant.
Mr. A. Narayan (Jnr) with Ms. Lata. P. for the Respondent.

DATE OF HEARING : 27th September, 2023

SUBMISSIONS : On 27th September, 2023 filed by the Appellant.
On 24th October, 2023 filed by the Respondent.
On 06th November 2023 Reply by the Appellant.

DATE OF RULING : On 09th May 2024

RULING

A. INTRODUCTION:

1. Before me is an Application by way of Summons (“Summons”) preferred by the Original Applicant (“the Applicant”) on 05th May 2023, seeking, *inter alia*, the following reliefs;
 - a. *That the time for giving notice of intention to appeal the interlocutory Order of the Resident Magistrate Mr. Indula Ratnayake, delivered at the Employment Relations Tribunal on the 23rd March 2023 in the Employment Relation Tribunal Workmen Compensation Case No- 26 of 2022 be extended.*
 - b. *That the Appellant be granted leave to appeal out of time the interlocutory Order of 23rd March 2023.*
 - c. *That the cost of this application be costs in the cause.*
2. The Summons is filed pursuant to Section 22(4) of the Workmen’s Compensation Act of 1964 (WCA), Regulation 25 of Workmen’s Compensation Regulations 1964, Order 37 (1) (3) of the Magistrate Courts Rules 1945 and the inherent jurisdiction of this Court.

3. The Summons is supported by an Affidavit sworn on 4th May 2023 by Ms. Shabana Khan, Senior Labour Officer, employed by the Ministry of Employment & Industrial Relations, and filed on 5th May 2023, along with annexures marked as “SK-1 and “SK-2”, being a copy of the impugned Ruling delivered on 23rd March 2023 by the learned Tribunal Magistrate (the Magistrate) and a copy of the proposed Notice and Grounds of Appeal, respectively.
4. Respondent vehemently opposes this Summons and filed its Affidavit in response sworn on 26th June 2023 by one DAYA REDDY – Senior Claim Consultant employed by Tower Insurance (Fiji) Pte Ltd, and filed on 28th June 2023, together with annexures marked as “DR-1 “to “DR-3”. The Applicant chose not to file Affidavit in reply.

B. BACKGROUND:

5. **Mr. Valentin Maugard**, now deceased, was employed by the Respondent since December 2017 as a site Manager/ diving instructor, and on 4th February 2018 when he was engaged in training in the pool, drowned and died as a result. The cause of death pronounced on 6th February 2018 was “*Asphyxia*” due to drowning.
6. The Respondent, in terms of WCA, on 13th February 2018, gave notice of the accident to the Ministry of Employment Productivity & Industrial Relations through LD form C-1.
7. The Applicant gave Notice of claim to the Respondent on 28th February 2018, and subsequently on 23rd May 2018, pursuant to section 17(1) (c) of the WCA of 1964, made the claim for compensation from the Respondent in a Sum of \$50,000.00. In response to the said claim for compensation, the Respondent informed the Applicant on 12th June 2018 that they are disputing the claim.
8. Accordingly, on behalf of the **Dependents** of the deceased worker, the Applicant on **24th September 2018** instituted the proceedings bearing **No-WC/ 86/ 2018** before the Tribunal for the recovery of compensation, which was later withdrawn on **21st March 2019** due to issues raised on the monetary jurisdiction of the tribunal.
9. The Applicant thereafter on 3rd June 2022 filed a fresh claim bearing **No-WC/26 / 2022** against which the Respondents on 12th August 2022 filed the strike out Application. After hearing the said Application for strike out on 29th July 2022, the Magistrate by his impugned Ruling dated 23rd March 2023 struck out the claim on the basis that the claim was time barred.
10. Being dissatisfied with the said decision dated 23rd March 2023, the Applicant on 24th April 2023 filed the Notice and Grounds of Appeal, which was, undisputedly, within one month time frame in terms of Order 37 Rule (3) of the Magistrates Court Rules of 1945). However, when the matter had come up before my predecessor Judge on **27th April 2023**, the Respondent’s counsel had raised an issue that the Applicant had failed to comply with the 7 days requirement of giving Notice of Intention to Appeal under Order 37 Rule 1 of the Magistrates Court Rules 1945. Thus, the Notice and Grounds of Appeal filed on 24th April 2023 was instantly withdrawn by the Applicant.

11. By this time, the 7 days' time period to give Notice of Intention to Appeal against the ruling dated 23rd March 2023 in terms of Order 37 Rule 1 of the Magistrates Court's Rule, and one month timeframe to file Notice & Grounds of Appeal under Rule 3 thereof had expired.
12. In order to come out of the above predicament, the Applicant on 5th May 2023 filed the current Summons seeking for the extension of time to give Notice of Intention of Appeal, and the Leave to Appeal out of Time against the Ruling dated 23rd March 2023 delivered by the Magistrate. The hearing on this was held before me on 27th September 2023 and written submissions were filed accordingly.

C. GROUNDINGS OF APPEAL:

13. The Applicant has adduced the following Grounds of Appeal;
 1. *THAT the learned Tribunal erred in law at paragraph 8 of the Ruling by relying upon the decision of Honorable justice Wati in *Nirmala holdings v Labour Officer* [2021] FJHC 341 ERCA 16 of 2016, by holding that a claim for compensation means proceedings for compensation 'when;*
 - a. *Under section 13 of the Act, a claim for compensation bears a different meaning from proceedings for recovery of compensation; and*
 - b. *The learned Tribunal failed to consider that the prescribed manner in which a claim for compensation is made is provided in regulation 4 of the Workmen's Compensation Regulations 1964 and the prescribed form is set out in Schedule 3 of the Regulation.*
 2. *THAT the learned Tribunal erred in law and in fact at paragraph 14 of the Ruling by holding that the time to file the claim well before 3 years' time period lapsed on 4th February 2021. This is incorrect as the learned Tribunal failed to consider that the claim for compensation was made on 28th February 2018, which was well within 3 years' time period prescribed under section 13 of the Act.*
 3. *THAT the learned Tribunal erred in law and in fact in holding in paragraph 16 of the Ruling that the Labour Officer;*
 - a) *Did not establish the failure to file the claim for compensation in Employment Relations Tribunal within 3 years from the time of the death of the workman was occasioned by mistake or other good cause, and*
 - b) *Did not rely on proviso (b) (ii) of section 13.*

The above considerations are irrelevant as there was no need for the Labour officer to establish good cause and mistake stipulated under section 13 (b) (ii) of the Act when the notice of accident was provided on 14th February 2018 , which was a few days post the death of the worker and the claim for compensation was made on 28th February 2018 which was within 3 years of the death of the worker, since both the requirements under section 13 of the Act were met, the Labour Officer was not required to establish good cause or mistake.

4. *THAT the learned Tribunal erred in law and in fact by holding at paragraph 17 that the claim is statute barred when the learned Tribunal failed to consider;*

- a. *That the section 13 of the act does not impose any time limitation for filing of the proceedings for recovery of compensation when the requirements for initiating a proceeding for recovery of compensation under section 13 are satisfied.*
- b. *That the requirements stipulated under section 13 of the Act were met when the notice of accident was provided on 13th February 2018 and the claim for compensation was made on 28th February 2018.*

D. APPLICABLE LAW:

14. For the purpose of easy reference, Section 13 of the Workmen's Compensation Act, as amended by Act No-3 of 2017, is reproduced as follows;

13. Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given by or on behalf of the workman as soon as practicable after the happening thereof, and unless the claim for compensation with respect to such accident has been made within 3 years from the occurrence of the accident causing the injury or, in the case of death, within 3 years from the from the time of death: Provided that-

(a) the want of, or any defect or inaccuracy in, such notice shall not be a bar to the maintenance of such proceedings if it is proved that the employer had personal knowledge of the accident or had been given notice of the accident from any other source at or about the time of the accident, or if it is found in the proceedings for settling the claim that the employer is not, or would not, if a notice or an amended notice were then given and the hearing postponed, be prejudiced in his or her Defence by the want, defect or inaccuracy, or that such want, defect or inaccuracy was occasioned by mistake or other reasonable cause;

(b) the failure to make a claim for compensation within the period above specified shall not be a bar to the maintenance of such proceedings if it is proved that-

(i) the failure was occasioned by mistake or other good cause; or

(ii) the employer failed to comply with the provisions of section 14 (1) or (2) .

so, however, that no proceedings for the recovery of compensation shall be maintainable unless the claim for compensation is made within a period of six years from the date of the accident.

E. DISCUSSION:

15. By his impugned Ruling dated 23rd March 2023, the Magistrate had allowed the Respondent's Strike out Application, as a result of which the Applicant's proceedings **No-WC/26 / 2022** filed on **3rd June 2022** for the recovery of compensation (2nd proceedings) was dismissed.
16. In order to make an Appeal against the said Ruling, the Applicant had on 24th Aril 2023 filed the Notice and the Grounds of Appeal, seemingly, under a different Appeal file number. There was no dispute in relation to the time limit for filing the Notice & Grounds of Appeal.
17. However, when the matter had come up before my predecessor on **27th April 2023**, Counsel for the Respondent had raised an issue on the failure of the Applicant to give Notice of

Intention to Appeal pursuant to Order 37 Rule (1) of the Magistrates Court Rules, on which the Applicant instantly withdrew the said Notice & Grounds of Appeal, and subsequently filed the current Summons **No. ERCA -3 of 2023** on **5th May 2023** seeking for reliefs therein.

18. Order 37 Rule (1) of the Magistrates Court Rules of 1945, does not state that the failure to give Notice of Intention of Appeal would result any consequences. The strict compliance required on the part of the judgment debtor at that juncture, as per the Order 37 Rule (3) of the M. C's Rule, is to file the Notice and Grounds of Appeal within **one month** from the date of the Ruling/ Judgment sought to Appealed against.
19. The reason behind giving the Notice of Intention to Appeal, in my view, is to keep the judgment creditor and the court aware of the next move by the Judgment debtor in relation to the decision pronounced. The failure to give or file Notice of Intention to Appeal need not have, necessarily, defeated the Appeal, provided that the Notice along with the Grounds of Appeal was filed within the stipulated time period.
20. In my view, since the aforesaid Notice & Grounds of Appeal had been filed within the stipulated time period, the intended Appeal could have proceeded without being withdrawn by the Applicant. Unfortunately, this was another setback for the dependents of the deceased on their hope for recovering compensation, while there was no fault on their part. The initial setback for them was the withdrawal of the first claim filed under **No-WC/ 86/ 2018** on the issue of monetary jurisdiction of the tribunal. Though, it was found later that the tribunal had the monetary jurisdiction to have dealt with the said initial claim, no steps were taken to have the initial proceedings reinstated. Had it been reinstated; no necessity would have arisen to commence the 2nd proceedings No-WC 26/22 for same to be confronted with the striking out Application.

Length of Delay

21. Now what is before the Court is the Summons filed on **5th May 2023** seeking for the extension of time to Give Notice of Intention to Appeal, and leave to Appeal out of time. The impugned Ruling in this matter was delivered on **23rd March 2023**. The Notice of Intention to Appeal should have been given in writing on or before **30th March 2023** since no verbal notice was given as required by Order 37 (1). The delay thereof till **5th May 2023** was 5 weeks, excluding the initial 7 days from 23rd to 30th March 2023, during which time it could have been given.
22. The Grounds of Appeal, which should have been filed within one month, was in fact filed within the time frame, but was withdrawn on 27th April 2023 as aforesaid due to the issue raised by the Respondent's counsel on the failure of the Applicant to file **Notice of Intention to Appeal**. Thus, the present Summons was filed on 5th May 2023, after a delay of around 12 days from 24th April 2023. The length of delay, when considered with the history, the circumstances hereof and the reasons given for the delay, is not inordinate or inexcusable.

Reasons for Delay

23. In the Affidavit in support of the summons sworn by Ms. Shabana, she has adduced several reasons for the delay, which cannot be totally disregarded on the mere ground that those are general in nature and not specific for the case in hand.

24. In view of the outcome in ***Nirmala Holdings vs. Labour Officer [2021] FJHC 341; ERCA 16.2016 (22 November 2021)***, which is said to have caused adverse impact in this matter and in several other similar pending matters, the Applicant was justified in having internal meetings and discussions at the Ministry level and with the Solicitor General. Any alleged delay occurred owing to the said processes has to be disregarded mainly because an interpretation of the section 13 of the WCA could, probably, settle the law and benefit both the workmen and the employers in general.
25. As per the Plethora of case law authorities in this jurisdiction, the Court has a discretion to entertain any appeal from Magistrate's Court, on any terms which it thinks just where the Appellant has failed to comply with the rules of Magistrate's Courts in relation to civil Appeals.

Prejudice

26. I don't find any prejudice would be caused to the Respondent on account of the relief of extension of time and leave to Appeal out of time being granted to the Applicant. The right of the dependents of the deceased worker to proceed with the claim should not be curtailed on account of a mere delay of a period less than two weeks in filing this Summons.

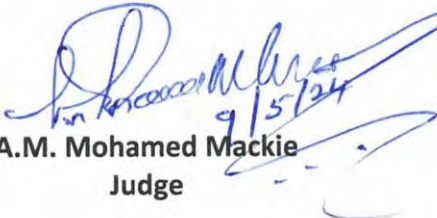
Merits of the Appeal

27. The whole issues hereof revolve around the interpretation of the section 13 of the WCA by the Magistrate. The learned Magistrate has based his decision wholly in the outcome of ***Nirmala Holdings vs. Labour Officer (Supra)*** wherein it has been decided that ***"a claim for compensation means proceedings for compensation"***.
28. In the matter in hand, there was an initial proceeding bearing No -WC/86/2018 filed in court on 24th September 2018, after giving notice of claim by the Applicant to the Respondent on 28th February 2018, following which the Applicant made the claim for compensation from the Respondent on 23rd May 2018 pursuant to section 17(1) (c) of the WCA within the prescriptive period.
29. As the issue of monetary jurisdiction was raised on 21st March 2019, the first proceedings under number WC/86/2018 was withdrawn instantly and subsequently a fresh claim bearing No- WC/26/2022 was filed on 3rd June 2022. However, the claim for compensation made by the Applicant to the Respondent on 23rd May 2018 pursuant to section 17(1) (c) of the WCA had remained intact. There is no provision in the WCA that requires a fresh claim to be made to the Respondent before filing a subsequent proceeding in respect of the same accident.
30. When the section 13 of the WCA is closely scrutinized, it appear that the wordings ***"Claim for Compensation"*** and ***"proceedings for the recovery of compensation"*** refer to two distinct acts, where the first one refers to the act of "making a claim from the Respondent prior to resorting to the Court proceedings for the recovery, and the second one refers to the actual filing and maintenance of proceedings in Court for the recovery after disputation of the claim by the Respondent on receipt of the claim for compensation from the Applicant.

31. The learned tribunal Magistrate, who observed in paragraph 12 and 13 of the impugned ruling to the effect that the tribunal on 30th October 2020 had clarified the law in relation to jurisdiction over the amount of \$40,000.00, and the Labour Officer had ample time to file this claim well before 03 years' time period that lapsed on 4th February 2021, has failed to appreciate the fact that the Applicant had already made the claim for compensation from the Respondent on 23rd May 2018, which was well within the prescriptive period and had filed the proceedings for the recovery on 24th September 2018.
32. The crucial error on the part of the tribunal Magistrate seems to be his failure to distinguish between the "Notice of Claim for Compensation" and the "Proceedings for the recovery of compensation" which, in my considered view, warrants an interpretation in an Appeal, with the extension of time and leave to Appeal out of time being granted.
33. All grounds of Appeal appear to be meritorious. However, addressing the first ground alone, in my view, would, probably, dispose the other grounds as well. Therefore, for the reasons given above, I am inclined to grant the following orders in terms of the summons filed on 5th May 2023.

F. ORDERS:

- a. The Applicant's Summons filed on 5th May 2023 succeeds.
- b. The time for giving Notice of Intention to Appeal against the Ruling dated 23rd March 2023 pronounced by the Tribunal Magistrate is extended.
- c. The Applicant is granted leave to Appeal out of time against the interlocutory order dated 23rd March 2023.
- d. Order on costs reserved.


A.M. Mohamed Mackie
Judge



At High Court Lautoka on this 9th day of May, 2024.

SOLICITORS:

For the Appellant:

Office of the Attorney General

For the Respondent:

A.K. Lawyers – Barristers & Solicitors. Solicitors