

IN THE EMPLOYMENT RELATIONS COURT
AT LAUTOKA
APPELLATE JURISDICTION

APPEAL No: 03 of 2019

BETWEEN : UNITED COACH BUILDERS LIMITED.

APPELLANT

AND : SATYA LINGHAM.

RESPONDENT

BEFORE : M. Javed Mansoor, J

COUNSEL : Ms M. Tavakuru for the Appellant
Ms V. Doge for the Respondent

Written submissions: Filed by Appellant on 5 November 2019
Filed by Respondent on 19 February 2020

Date of Judgment : 27 April 2020

RULING

APPEAL: ENLARGEMENT OF TIME Delay due to mistaken filing of appeal – Solicitor’s error – Substantial delay – Factors to be considered by court – Absence of court proceedings – Contract of service – Independent contractor – Duty of employer to maintain records – Sections 45 & 214 (2) of the Employment Relations Act 2007

The following cases were referred to in the ruling:

- a. NLTB v Ahmed Khan and another, CBV 2 of 2013; 15 March 2013
 - b. Ratu Kaliova Dawai v Native Lands and Fisheries Commission and Others Civil Appeal No. ABU 43 of 2018; 24 May 2019
 - c. Ahilya Sharma & Another v Mahendra Pratap Singh (unreported) Civil Appeal ABU0027.03S; 11 November 2004
 - d. Tabua v Fiji Rugby Union [2012] FJHC 144
 - e. Gatti v Shoosmith [1939] 3 All E.R 916
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1. This is an application by the applicant (described as the appellant in the caption to the notice of motion) for enlargement of time to file an appeal and stay pending appeal. The applicant has sought leave to file the notice of appeal out of time against the judgment dated 27 April 2018 of the Employment Relations Tribunal in Lautoka. The application for enlargement of time was filed on 26 March 2019. The applicant conceded that it was out of time by about 330 days.
2. Tribunal proceedings followed a writ of summons instituted by the labour officer under section 214 (2) of the Employment Relations Act of 2007 (the Act) seeking to recover unpaid wages from the applicant. The learned Magistrate by his order dated 27 April 2018, after hearing the evidence on behalf of both parties, ordered the applicant to pay Mr. Satya Lingam, the respondent, the sum of \$24,000.00: the amount claimed as arrears of wages. The sealed order was served on the applicant on 14 May 2018.
3. The applicant’s case is that notice of intention to appeal together with the grounds of appeal was filed in the registry at the tribunal in Suva on 29 May 2018

and, thereafter, this was served on the respondent, and that the tribunal registry in Suva had not informed the applicant that it was not the proper place for filing the appeal. The applicant submitted that when it wrote to the tribunal seeking a clarification on the summons for direction which it had filed, it had transpired that a case number was not allocated to its appeal. As a result, when the applicant tried to file the notice of appeal in the correct registry, the appeal was out of time. The grounds of appeal in this application are the same as the one which was filed by the applicant in the tribunal at Suva.

4. It was submitted on behalf of the applicant that the registry had advised them differently in other proceedings, and that the registry was not able to identify the proper place for filing of the appeal until 31 January 2019, when the registry of the Lautoka High Court advised the applicant's solicitors to file the appeal in Suva.
5. The applicant relied on the decisions in *NLTB v Ahmed Khan and another*¹ and *Ratu Kaliova Dawai v Native Lands and Fisheries Commission and others*². These decisions considered the reason for the failure to file within time, the length of the delay in so filing, the merits of an applicant's case justifying consideration by the appellate courts, the probability of the applicant's success where there is substantial delay and the likelihood of unfair prejudice to the respondent, in exercising the court's discretion to allow an extension of time.
6. In *NLTB v Ahmed Khan*, the Supreme Court of Fiji stated that an intending appellant who is faced with an adverse judgment of this court must act with promptitude. The President of the Supreme Court, His Lordship A. H. C. T Gates stated, "In *Ahilya Sharma*³, the court considered 40 days 'a significant period of delay', and refused to extend time. The lateness was only 11 days in *Avery v No. 2 Public Service Appeal Board and Others* [1975] 2 NZLR 86, yet when considering the whole history of the matter, leave was refused. The appeal was 47 days late in *Latchmi v Moti* [1964] 10 Fiji LR 138". The Court then referred to cases in which time was allowed: "But then in *Norwich and Peterborough Building Society and Steed*

¹ CBV 2 of 2013 15 March 2013

² Civil Appeal ABU 43 of 2018; 24 May 2019

³ *Ahilya Sharma & Anor. v Mahendra Pratap Singh* (unreported) civil Appeal ABU0027.03S; 11 November 2004

[1991] 1 WLR 449 the delay was 6 ½ months. Though it was felt prejudice would occur to the respondent, leave was granted. There had been considerable difficulty and delay in obtaining legal aid assistance for the appeal. In *Gatti's* case leave was given since there had been a very short delay, a few days only, and notice had already been given to the Respondent's solicitors." His Lordship declared that every case turned on its own special facts, though the principles for approaching such applications remained the same and all must be weighed.

7. It was submitted on behalf of the applicant that it would succeed on the merits of the case for the following reasons:
 - (a) The Magistrate erred in invoking section 45 of the Employment Relations Act.
 - (b) The Magistrate has overlooked the fact that though the respondent claimed to have been in employment from 2005 to 2012, he was claiming arrears of wages only from 2009 to 2012.
 - (c) The Magistrate had relied on unauthenticated records given by the labor officer. The applicant contended that there were no wages and times records for the respondent as he was only an independent contractor in providing security services on weekends from 8am to 5pm for \$60 per week, which was later increased to \$80 after the respondent became the night watchman as well.
 - (d) The Magistrate had not considered the principles enunciated in Tabua v Fiji⁴ Rugby Union.
 - (e) The Magistrate had disregarded the principles relating to the control test. The absence of the applicant's control over the respondent in this case should have shifted the onus of proving that the applicant had such control, to the respondent.
8. The matters urged by the applicant on the merits of his claim cannot be properly assessed in the absence of the record of proceedings before the learned

⁴ [2012] FJHC 144

Magistrate. The duty of providing a record of proceedings to this court was upon the applicant, which it has chosen to avoid, notwithstanding the time available to obtain the necessary material. That is a peril of the applicant's choosing. A perusal of the Magistrate's order seems to indicate that he has considered the evidence before him. Whether there was sufficient consideration of the evidence or whether the tribunal's assessment was correct are not matters that could be gone into without the benefit of having before me the proceedings before the tribunal.

9. The tribunal has preferred to accept the evidence of the respondent. The learned Magistrate has said that both witnesses of the applicant were unaware of the contract between the parties, and that the contract was negotiated by the father of a director whose evidence was not before the tribunal. He rejected the proposition that the respondent was an independent contractor. He has also noted that both witnesses for the applicant had confirmed that the company had failed to comply with section 45 of the Employment Relations Act. In the absence of the proceedings, I am unable to assess the correctness of the sum awarded as arrears of wages for the period 2009 to 2012.
10. Counsel for the applicant submitted that the respondent will not be prejudiced if time is enlarged, as he would be awarded the sum decreed by the judgment if the appeal is not allowed. This court cannot agree with that assertion. Considerable delay has been caused as a result of the applicant's erroneous filing of the appeal. The claim relates to the period 2009 to 2012. The respondent wrote a letter dated 7 January 2019 to the tribunal registry stating that he was 74 years of age at that time, and that he was unwell and found it difficult to attend court. Since then more than a year has passed.
11. It was for the applicant's solicitor to have checked with the registry and file the appeal in the correct place. It must be said, with regret, that the applicant has been lax in prosecuting the appeal. Even when this matter came up for hearing on 15 October 2019, counsel for the applicant submitted that her client had closed business. She sought time to obtain documentation with regard to the closure of the company. The case was then adjourned to 17 October 2019, with the

applicant ordered to pay the respondent cost in a sum of \$500 and the applicant's counsel was asked to show proof of closure of the company. On 17 October 2019, the applicant's counsel, Ms. Tavakuru, submitted that the company was in the process of deregistering and sought time to file written submissions. She did not have any documentation in proof of such a process. Both counsel relied on their written submissions and made no oral submissions: counsel for the applicant filed written submissions on 5 November 2019, while submissions on behalf of the respondent was filed on 19 February 2020.

12. The delay in filing the appeal is substantial. Even inordinate. Without a review of the evidence, I am unable to make a determination as to whether the applicant has a ground that could probably succeed in the absence of the tribunal proceedings. For the same reason, I am unable to make a decision on the merits of the applicant's application. There is also no doubt that the respondent could suffer prejudice as a result of further delay by granting an extension of time. The submission by the applicant's counsel that the applicant business has closed (though no proof of this was provided) must be a matter of great concern to the respondent. Such conclusions should not in usual circumstances sit favourably with an applicant seeking time to file an appeal.

13. However, I am mindful of the fact that there may have been some administrative confusion which could have caused the delay in filing the appeal. The decision that this court has to make is whether to exercise its discretion and grant the applicant the indulgence to file the appeal notwithstanding the substantial delay. The question for this court is whether the twin factors of possible administrative confusion and the error on the part of the solicitor are sufficient to tilt the balance in favour of the applicant. I am of the view that delay – even if significant – must not in every instance preclude a party from having access to a superior court. There are decisions in which it has been held that the rights of a party should not be prejudiced solely because of the fault of a solicitor⁵. In this instance, there is evidence that the applicant was desirous of appealing the order of the Magistrate. Laxity – on the part of both client and solicitor – and possible administrative muddle appear to have contributed to the delay.

⁵ Gatti v Shoosmith [1939] 3 All E.R 916

14. For these reasons, I am of the view that an extension of time should be allowed to file the appeal subject to the conditions that are laid down in order to mitigate the prejudice to the respondent. The indulgence granted is premised only on the special facts of this case and must not be seen as a softened approach by this court. The parties will be required to observe strict timelines in order to conclude this matter without delay. It may be fitting to mention that the pronouncement of this ruling was delayed by the respective lockdowns in Lautoka and Suva.

15. In these circumstances, the applicant's application for enlargement of time is allowed subject to depositing a sum of \$24,000 in the registry of the High Court. In view of the applicant's laxity and the resulting prejudice to the respondent, the applicant is directed to pay the respondent a sum of \$3,000 as costs.

ORDERS

- (a) The applicant is granted leave to file notice of motion to appeal out of time the judgment of the Employment Relations Tribunal dated 27 April 2018 upon depositing with the registrar of the High Court a sum of \$24,000.00. The deposit has to be made and the appeal filed within 14 days of this ruling.
- (b) The applicant is directed to pay the respondent within 14 days of this ruling a sum of \$3,000 being costs summarily assessed.

Delivered at Suva this 27th day of **April**, 2020



Justice M. Javed Mansoor
Judge of the High Court

