IN THE EMPLOYMENT RELATIONS COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

ERCA. **01** of **2020**

[An appeal from the decision made by the Tribunal on 18 October 2019 and supplementary decision dated 7 February 2020]

In the matter of ERC Grievance No 10 of 2019

BETWEEN : **POASA TURAGANISOLEVU RAQIO**

APPELLANT

AND : **FIJI SUGAR CORPORATION**

RESPONDENT

BEFORE : M. Javed Mansoor, J

COUNSEL : K. Maisamoa for the appellant
: N. Tofinga for the respondent

Date of Hearing : 1 June 2020
Date of Decision : 9 September 2022

DECISION

PRACTICE & PROCEDURE Enlargement of time – Applicant did not receive notice of judgment – Stay of tribunal's order directing worker to vacate quarters – Absence of penal notice in tribunal's order – Representation of company in court proceedings – Employment Relations Act 2007, Sections 211 (1), 229 (1) (b) & 238 (2) – High Court Rules 1988, Orders 5 rule 6 (2) and 45 rule 6 (4) (a)

The following cases are referred to in this decision:

a. *NLTB v Ahmed Khan and another [2013] FJSC 1; CBV 2. 2013 (15 March 2013)*
b. *Shalini v Basanti [2003] FJHC 63; HPP 36J.1999S (27 August 2003)*
c. *Penilope Postulka v George Postulka [1988] FJHC 7; [1988] 34 FLR 82 (3 May 1988)*
d. *Iberian Trust Limited v Founders Trust and Investment Company Limited [1932] 2 KB 87*
e. *Prasad and Chand Investment Ltd v Ali [2011] FJHC 56; HBC 216.2010 (9 February 2011)*

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1. The applicant (described as "appellant" in the caption) seeks the leave of court for enlargement of time to appeal the decision of the Employment Relations Tribunal. The orders sought by the applicant's summons of 24 February 2020 are framed in the following way:

i) "That the appellant is seeking the leave of the court to appeal the decision of the employment tribunal dated 18 October 2019 and its supplementary decision dated 7 February 2020 respectively out of time.

ii) That the appellant is seeking leave for the enlargement of time to appeal the decision of the tribunal dated 18 October 2019 and its supplementary decision dated 7 February 2020 respectively.

iii) That appellant be granted leave to file notice of appeal and grounds of appeal.

iv) That there be a stay of execution of the orders dated 7 February 2020 and the enforcement order dated 7 February 2020 respectively".

2. In his affidavit in support, the applicant stated that he was employed by the respondent as a field officer. He averred that he had no knowledge that the Employment Relations Tribunal gave its decision on 18 October 2019. Neither he

nor his solicitor at the time, Mr. Nair, was given notice of the ruling. The tribunal's registry, he said, had sent the notice to his former solicitor, instead of sending it to him or his solicitor at the time. The registry sent it to the wrong email, although Mr. Nair had notified the tribunal of the change in solicitors. The applicant received the decision from Mr. Nair, after the tribunal's registry sent it to him much later, on 11 December, 2019. Mr. Nair had taken over from his former solicitor and acted in that capacity until solicitors were changed again. Mr. Raqio also said that his trade union declined to appeal the decision soon after he received it on 11 December 2019, and refused his request to pay solicitor's fees.

3. Davendra Prasad, Employment Relations Manager for the respondent filed an affidavit opposing the application for enlargement of time. He said the applicant worked as a field coordinator until his summary dismissal on 20 September 2018. Mr. Prasad stated that the applicant should have followed up after reporting a grievance, and that insufficiency of funds was not an excuse for the delay in making the application to court as assistance was available through legal aid and from the Ministry of Employment.

4. In reply, the applicant reiterated that the decision was wrongly sent to his former lawyer, and that the appointment of a new solicitor was intimated to the registry by letter dated 13 June 2019, well before the hearing. He said that the delay in filing the appeal was not due to a lack of funds. When he called the registry on several occasions to check on the ruling, he was told that he would be sent a notice of the ruling. This, he said, was not done. Later, when his solicitor inquired, he was told that the ruling was delivered.

5. In submissions at the hearing in this court, the applicant stated that he was employed by the respondent for more than 20 years. He said his services were terminated on 20 September 2018, following certain allegations which had not been properly investigated. After the applicant reported a grievance on 1 November 2018, the matter was referred to the tribunal and hearing was fixed for 17 July 2019. Ruling was to be issued after notice to the parties. As mentioned, the applicant did not receive notice of the ruling, and came to know of the

delivery of the decision much later after his solicitor inquired inquiry from the registry.

6. An appeal from a decision of the tribunal must be made to the High Court in the prescribed manner within 28 days of the decision, in terms of section 242 (1) of the Employment Relations Act. The applicant submitted that such an appeal lies as of right to the Employment Relations Court, under section 242 (4) of the Act. The Act makes no specific provision for the extension of time. Notwithstanding the absence of such a provision, the applicant submitted, the court could grant an extension of time and that this was made evident by section 242 (5) (a) of the Act. He submitted that the court could grant an extension of time under Order 3 rule 4 of the High Court Rules 1988, as permitted by section 238 (2) (b) of the Act. The court accepts that it is competent for the court to grant an extension of time where appropriate. The applicant submitted that the delay in appealing was not the fault of the applicant, as the tribunal did not give him notice of the ruling.

7. 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 asking for enlargement of time[1].

8. In ordinary circumstances, the applicant ought to have filed his appeal by 15 November 2019. This application was filed on 24 February 2020. According to the applicant he was late by five months and 11 days, or 141 days. Seen this way, the delay is not insubstantial. The court must, therefore, consider the matters mentioned in *NLTB v Ahmed Khan*. The court is satisfied that the tribunal registry did not serve the applicant notice of the ruling that was due on 18 October 2019. The court takes cognizance of the registry's error.

9. A fair way in which to approach the matter is to compute the time for appealing from 11 December 2019, the date of receiving the tribunal's decision. This reduces the period of delay. Soon after receipt of the decision, the legal vacation

[1] NLTB v Ahmed Khan and another [2013] FJSC 1; CBV 2.2013; (15 March 2013)

would have intervened in December 2019. The applicant has not provided the court with details of the legal vacation, which is not reckoned in the computation of time. The legal vacation is usually over a month. Looked at in this way, the delay in filing this application is approximately a month.

10. The applicant has invited the court's attention to his proposed grounds of appeal. These mainly concern the evidence before the tribunal, and the magistrate's supposed flaw in evaluating the evidence, resulting in the eventual findings. He submitted that they raise important legal issues. He submits that they are arguable and there is a chance of success if the opportunity to appeal is allowed.

11. The applicant's proposed grounds of appeal are reproduced below:

a. "That learned tribunal magistrate erred in law and in fact for wrongly recorded the Griever's evidence during examination in chief by saying at paragraph 7 of the ruling that "*the Griever also acknowledged that he refused the request to have any of the complainants attend the meeting in order that he could confront them in relation to their allegation*" when in fact that there were no evidences produced by the employer's witness to support that the Griever's refusal in conjunction with the statement alluded by the tribunal at paragraph 7.

b. That the learned tribunal magistrate erred in law and in fact by saying at paragraph 8 of the ruling that "*the general depiction of the Griever is that he had been operating in an environment where he was abusing his position*" when in fact there is no evidence to support these statements by the employers witness.

c. That the learned tribunal magistrate erred in law and in fact by saying at paragraph 8 that *"the Griever elected not to confront those persons who had made the allegations"* when in fact there was no evidence provided by the employers witness during the hearing.

d. That the learned tribunal magistrate erred in law and in fact by saying at paragraph 9 of the ruling that "*this was not the situation where the employer had the onus to prove beyond reasonable doubt that the Griever was guilty of the conduct as alleged"* when in fact that there is a saying that whoever alleged must prove the case beyond reasonable doubt and further to that the employer's witness has insufficient evidence to prove the guilt of the appellant.

e. That the learned tribunal magistrate erred in law and in fact by saying at paragraph 9 of the ruling that *"the Griever's own witness acknowledged that state of affairs*" when in fact the Grievers' witness clearly stated at paragraph 6 of the ruling that *"...he understood the employer would have brought the complainants to the meeting*"

f. That the learned tribunal magistrate erred in law and in fact by saying at paragraph 10 of his ruling that *"the tribunal finds the dismissal decision is justifiable for the purpose of Section 230(2) of the Employment Relation Act 2007*" when in fact there were no evidence to pin point that the Griever had actually received commission; loan of monies; wrong measurement and reversal cane payment and even there were no complainants present during the meeting and the hearing to corroborate their statements

g. That the learned tribunal magistrate erred in law and in fact by dictating to the Griever that he must vacate the FSC premises on the grounds:

- That the griever is given 7 days to advise the registry whether or not seeks remedy of reinstatement;

- That in the event the griever elects to pursue remedy he must vacate the premises no later than 21 days at the close of business on 8 July 2019;

- When the above were not part of the grievances proceeding and in addition when there is a proceeding in the High Court for vacant possession of the same".

12. The grounds mainly urged by the applicant concern the evidence placed before the tribunal. However, the applicant has not provided the court with the tribunal's record in order to assess whether he has a good case on the merits. This was a failing on the applicant's part as it is for him to satisfy court that the appeal, if allowed, has prospects of success on the merits. When inquired by court, counsel for the applicant submitted that his client finds it difficult to obtain a copy of the proceedings. Most grounds of appeal raised by the applicant cannot be assessed without reference to the evidence given by the parties. I am also not able to see an issue of law relied upon by the applicant that will likely aid him.

13. I have decided to allow an extension of time to file the appeal and grounds of appeal primarily because of the tribunal registry's failure to issue timely notice of judgment. There was prejudice to the applicant as a result. The delay was not excessive considering the circumstances. In order to be fair, I have given weight to the tribunal's failure to provide the applicant with notice of the judgment. The supplementary decision of 7 February 2020 is closely connected with the decision of 18 October 2019. This is another factor that I have considered in allowing the applicant time to file the appeal. The applicant states that he intends to appeal the tribunal's decision of 18 October 2019 and the supplementary decision of 7 February 2020. He seems to be within time in respect of the second decision.

14. I accept that there may be some prejudice to the respondent by the grant of an extension of time to appeal. However, in these circumstances an enlargement of time to file the appeal seems to be the correct decision.

Stay of execution

15. The applicant's summons sought a stay of execution of the tribunal's decisions dated 7 February 2020 and the enforcement order of the same date. Mr. Maisamoa submitted that the stay application was in respect of the tribunal's order to hand over possession of the premises. He submitted that the tribunal had no authority to make an order evicting the applicant from his residence. He said that proceedings under section 169 of the Land Transfer Act were already on foot at the time the resident magistrate made order directing the applicant to vacate the employer's quarters, and that the matter was fixed for hearing on 15 September 2020. Mr. Maisamoa undertook to furnish details concerning the status of the section 169 application. However, the court has not been informed of the status of this application or whether the court hearing the eviction case was apprised of the proceedings before the tribunal and this court. The grounds of appeal make no reference to the employer's application under the Land Transfer Act.

16. The respondent submitted that a direction was made by the tribunal to vacate the property that was given for the applicant's accommodation. The tribunal made the direction on 10 June 2019. On that day, the tribunal directed the applicant to

inform the registry whether he was seeking reinstatement, and if he chose to pursue the remedy of compensation only he must vacate the premises within 21 days i.e: 8 July 2019. Mr. Tofinga submitted that an enforcement order was made by the tribunal on 7 February 2020 directing the applicant to vacate the premises within 14 days. He submitted that quarters were required for occupation by another worker. The respondent submitted that the applicant's excuse for the delay was not meritorious, and that no undertaking was given in respect of the application for stay of the tribunal's decisions.

17. In ERCC 2 of 2020 – in which the respondent sought orders of compliance – I have given reasons that the resident magistrate was within his jurisdiction to direct the applicant to vacate from the employer's quarters. The court expressed the view that section 169 of the Land Transfer Act did not fetter the resident magistrate's power under section 211 to order the applicant to hand over the employer's quarters. This is what was stated on the matter in ERCC 2 of 2020:

> "When an employer provides accommodation to a worker, it is a benefit incidental to the worker's employment. The rights and limits of such a benefit will ordinarily be governed by the contract of employment. When the employment contract is terminated, the benefit is likely to cease unless there are terms agreed upon to different effect between the worker and the employer. In this case, the worker's employment was terminated on 20 September 2018. While the respondent was in employment, accommodation in his quarters was possibly a matter of entitlement under his contract of employment. The tribunal has jurisdiction to inquire into and adjudicate an action involving an entitlement. The respondent submitted that the tribunal went beyond its limits as no action was filed in respect of the worker's entitlement to accommodation in the employer's quarters.
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> In my view, the respondent's position is not correct. The tribunal has jurisdiction to adjudicate on matters referred to it by mediation services or any party to the mediation. The resident magistrate has considered the matter of handing over vacant possession of the employer's quarters as a matter connected with the termination of the respondent's employment. This is understandable as the applicant has to provide accommodation to a new worker taken in place of the dismissed respondent. The resident magistrate was entitled to adjudicate the

matter concerning the respondent's occupation of quarters after the termination of his employment. This was not adjudicated in the order of 18 October 2019. The order to vacate was given on 7 February 2020. The High Court, that was hearing the action to evict the respondent, did not restrain the resident magistrate from hearing or making orders in respect of the quarters occupied by the respondent; it is not even clear that court was apprised of proceedings before the tribunal. The pending application under section 169 of the Land Transfer Act did not fetter the tribunal's jurisdiction, although it must be said that the order concerning the employer's quarters should have been made in the decision given on 18 October 2019, and not by way of a supplementary decision".

18. In urging a stay of the tribunal's orders, the applicant submitted that orders of the resident magistrate that were served on him did not contain a penal notice. The applicant said that the placement of the penal notice was not specified under the Employment Relations Act. However, it was submitted, section 238 (2) of the Act made the rules of the High Court applicable to proceedings before the tribunal. As a result, the applicant submitted, Order 45 rule 6 (4) (a) of the High Court Rules requires a notice to be placed on an order served on a person informing him that he is liable to process of execution to compel him to obey the order if he neglects, abstains or disobeys the order.

19. Order 45 rule 6 (4) of the High Court Rules states:

(4) There must be indorsed on the copy of an order served under this rule a notice informing the person on whom the copy is served-

(a) in the case of service under paragraph (2), that if he neglects to obey the order within the time specified therein, or, if the order is to abstain from doing an act, that if he disobeys the order, he is liable to process of execution to compel him to obey it, and

(b) in the case of service under paragraph (3), that if the body corporate neglects to obey the order within the time so specified or, if the order is to abstain from doing an act, that if the body corporate disobeys the order, he is liable to process of execution to compel the body to obey it.

20. In saying that the respondent failed to comply with Order 45 rule 6(4) of the High Court Rules, the applicant relied on the decisions in *Shalini aka Salini*

Sangeeta Devi v Basanti and another[2] and *Penilope Postulka v George Postulka*[3]. The proceedings in these cases concerned non-compliance with orders of the High Court. They were committal proceedings under Order 52 of the rules. In *Shalini v Basanti*, the court quoted a passage from the judgment in *Iberian Trust Limited v Founders Trust and Investment Company Limited* which is reproduced below[4].

> "The object of the indorsement is plain – namely, to call to the attention of the person ordered to do the act that the result of disobedience will be to subject him to penal consequences".

21. In *Shalini v Basanti* the court gave an example of how a penal notice could be framed: "If you neglect to obey the order within the time specified herein, or, if the order is to abstain from doing an act, that if you disobey the order, you are liable to process of execution to compel you to obey it"[5]. In the same case Pathik, J said that the applicant had not fully and strictly complied with the rules in regard to contempt proceedings. As the proceedings were penal in nature, the court ruled that service of the order was clearly irregular as it did not contain the penal notice.

22. In *Postulka*, an application was made for committal as the respondent failed to pay interim maintenance as ordered by the High Court. Both parties were absent when the order was made, but the order was served on the respondent. The penal notice was not endorsed on the order. Fatiaki, J said that the proceedings were penal in nature. As the liberty of the respondent in that case was at stake, this led the court to conclude that the applicable rules ought to be strictly complied with. The court also noted that there were alternate enforcement provisions available in the Matrimonial Causes Act. The application for committal was refused.

23. *Shalini v Basanti* and *Postulka v Postulka* suggest that the effect of Order 45 rule 6 (4) is particularly important when an application is proposed to be made for

[2] [2003] FJHC 63; HPP 0036J.1999S (27 August 2003)
[3] [1988] FJHC 7; [1988] 34 FLR 82 (3 May 1988)
[4] [1932] 2 KB 87 at 97
[5] Shalini v Basanti

committal or for sequestration of property. The question is whether Order 45 rule 6 (4) applies to the decision of the tribunal, in view of Order 3 rule 8 of the Magistrates' Courts Rules; and whether an order by the tribunal that directs the doing of an act or the abstaining of an act must necessarily comply with the rule. This issue merits deeper consideration. In response to the application for compliance orders (ERCC 2 of 2020), I have not imposed penal sanctions or made an order for sequestration of property. Instead, the applicant will be required to comply with orders issued on the same day as this decision. For these reasons, the court will not order a stay of execution of the tribunal's orders made on 7 February 2020.

Representation of a body corporate in court

24. Another matter raised by the applicant concerns the representation of the respondent in court. The applicant submitted that the respondent was in breach of Order 5 rule 6 (2) of the rules. My observations on this are the same as stated in the decision of ERCC 2 of 2020.

25. Order 5 rule 6 of the High Court Rules states:

> (1) Subject to paragraph (2) and to Order 80, rule 2, any person (whether or not he sues as a trustee or personal representative or in any other representative capacity) may begin and carry on proceedings in the High Court by a barrister and solicitor or in person.
>
> (2) Except as expressly provided by or under any enactment, a body corporate may not begin or carry on any such proceedings otherwise than by a barrister and solicitor.

26. The respondent's objection is based on rule 6 (2) of Order 5. In raising this objection, the decision in *Prasad and Chand Investment Ltd v Ali* was cited[6]. In response, Mr. Tofinga submitted that he was entitled to represent the applicant in terms of section 229 of the Act.

27. Section 229 of the Employment Relations Act states:

[6] [2011] FJHC 56; HBC 216.2010 (9 February 2011)

A party to a proceeding before the tribunal or court may-

a) appear personally;

b) be represented by a representative whom the tribunal or the court is satisfied has authority to act in proceedings; or

c) be represented by a legal practitioner,

and may produce before the tribunal or the court witnesses, documents, books and other evidence as the party thinks fit.

28. Section 229 (1) (b) of the Act permits a party before a tribunal or court to be represented by a representative whom the tribunal or the court is satisfied has authority to act in proceedings. The respondent submitted that the applicant's representative has not satisfied court that he has authority to act in these proceedings. Mr. Maisamoa did not say whether the objection concerning representation was raised before the resident magistrate. This is a matter the court is not able to check without the record of proceedings. No opposition was taken to the company's representation when the notice of motion was filed on 18 March 2020. The objection seems to have been raised for the first time by counsel for the worker at the hearing of this application and the appeal hearing (the objection was in respect of both cases). If this is the case, Mr. Tofinga's authority to represent the applicant was not an issue in proceedings before the tribunal. Unfortunately, the applicant has not filed an authorisation to represent it in these proceedings. Had this been done, the controversy could have been avoided. In the absence of any objection to the applicant's representation in proceedings before the resident magistrate, there is no reason to doubt that Mr. Tofinga has the authority to represent the company. The court is satisfied that the applicant's representative has the authority to act in these proceedings under section 229 (1) (b) of the Employment Relations Act.

ORDER

A. The applicant is granted an enlargement of time to appeal the decision of the tribunal dated 18 October 2019 and to file the notice and grounds of appeal.

B. The parties will bear their own costs.

Delivered at **Suva** this **9th** day of **September, 2022**

M. Javed Mansoor
Judge