

IN THE EMPLOYMENT RELATIONS COURT
AT LAUTOKA
APPELLATE JURISDICTION

ERCA No. 02 of 2018

BETWEEN : LABOUR OFFICER

APPLICANT

AND : DEO CONSTRUCTIONS DEVELOPMENT CO, LTD

RESPONDENT

BEFORE : M. Javed Mansoor, J

COUNSEL : Ms. M. Faktaufon for the Applicant
Mr. J. Narayan for the Respondent

Date of Hearing : 18 March 2020

Written Submissions : 29 April 2020 by the applicant
18 March and 12 October 2020 by the respondent

Date of Decision : 11 September 2023

DECISION

PRACTICE & PROCEDURE Extension of time for leave to appeal – Whether leave required – Defective affidavit – Section 13, Workmen’s Compensation Act 1964 – Section 243, Employment Relations Act 2007 – Order 41, High Court Rules 1988

The following cases are referred to in this decision:

- a) *Denarau Corporation v Deo Construction Development Company Ltd [2016] FJCA 138; ABU 15.2016 (28 October 2016)*
 - b) *Sharma v iTaukei Land Trust Board [2015] FJCA 144; ABU 005.2013 (2 October 2015)*
 - c) *Denarau Corporation Limited v Vimal Deo [2015] FJHC 112; HBC 32.2013 (24 February 2015)*
 - d) *Deo Construction Development Co. Ltd v Port Denarau Marina Ltd [2017] FJHC 163; HBC 160.2009 (3 March 2017)*
 - e) *Stephens v Nunnink and others [2016] FJCA 11; ABU 75.2014 (26 February 2016)*
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1. An application was filed on behalf of a deceased workman in the Employment Relations Tribunal seeking compensation under the Workmen’s Compensation Act (“Act”) 1964, which has been repealed. Following a preliminary objection raised by the respondent in terms of section 13 (1) of the Act, the tribunal by its ruling of 20 February 2018 upheld the objection on the basis that the claim was time barred. Thereafter, the applicant filed a notice of motion under sections 234 and 243 of the Employment Relations Act 2007 seeking an extension of time for leave to appeal the tribunal’s decision.
2. The applicant’s proposed grounds of appeal are reproduced below:
 - i. *“The Employment Relations Tribunal erred in law and in fact when it failed to enquire into the distinction between the claim for compensation and the proceedings for recovery of compensation under section 13 of the Workmen’s Compensation Act 1964.*
 - ii. *The Employment Relations Tribunal further erred in fact in finding that the “application for compensation” was filed outside the 12 months period.*
 - iii. *The Employment Relations Tribunal erred in its findings of fact and in application of law when, having noted that the claim for compensation was served on the Respondent in the same year as the death, failed to therefore find that that claim for compensation was indeed*

filed within the 12 months as required under section 13 of the Workmen's Compensation Act 1964.

- iv. The Employment Relations Tribunal, while holding that it was bound by the decision of the superior courts, erred in law in failing to give consideration to the position in Labour Office v Nirmala Holdings t/a Ocean View Hotel, ERT WC 116 of 2016 which made the distinction between the claim for compensation and proceedings for recovery of compensation and which was aligned with the Fiji High Court and Court of Appeal decisions cited by the Employment Relations Tribunal.*
 - v. The Employment Relations Tribunal erred in law and in the interpretation of the Fiji High Court case of Carpenters Steel Company Limited v Labour Officer (2012) HBA 9 of 2023, and therefore in application of the same, by holding that the "application for compensation" was filed outside the 12 months required under section 13 of the Workmen's Compensation Act 1964.*
 - vi. The Employment Relations Tribunal erred in law and in fact when having adopted the position in the Fiji High Court case of Nisha v Attorney General (2012) Civil Action 177 of 2007, failed to make a finding that the time limitation under section 13(a) of the Workmen's Compensation Act 1964 was complied with and therefore, the Employment Relations Tribunal further erred in law and in fact in having applied the provisions under section 13(b) which were not applicable.*
 - vii. The Employment Relations Tribunal further erred in law by requiring the Appellant to place material before it to justify reliance on the provisos under section 13(b)".*
3. The respondent opposed the applicant's notice of motion and filed an affidavit in opposition through its complex claims team leader, Elizabeth Ratu. When the notice of motion was taken up for hearing, the respondent raised two preliminary issues. The parties made submissions in respect of the respondent's preliminary issues and the application for extension of time to apply for leave to appeal.
 4. The respondent submitted that the applicant's notice of motion seeking an extension of time to apply for leave to appeal is misconceived as the tribunal's ruling was a final order. Therefore, it was submitted, that the applicant should have filed an appeal instead of seeking leave to appeal the Tribunal's decision.

The second issue raised by the respondent was that the applicant's supporting affidavit is invalid and, therefore, the notice of motion should be struck off.

Did the applicant have to apply for leave to appeal?

5. Section 243 (1) of the Employment Relations Act provides that a party aggrieved by a decision of the tribunal in proceedings may appeal as of right or by leave of the court. An appeal must be made within 28 days of the tribunal's decision.
6. The respondent submitted that when its preliminary objection was dealt with by the tribunal, the substantive rights of the parties were determined and, therefore, the decision was final. The respondent referred to the decisions in *Denarau Corporation v Deo Construction Development Company Ltd*¹ and *Sharma v iTaukei Land Trust Board*² in support of its argument.
7. The applicant replied stating that the tribunal's ruling did not finally dispose the case, and that not all interlocutory steps were completed at the time the preliminary issue was raised. The applicant made reference to the decision in *Stephens v Nunnink*³.
8. In order to consider whether the leave of court is necessary to appeal the decision, the preliminary points raised by the respondent before the tribunal and the decision of the tribunal must be considered. The respondent filed its notice of motion on 4 April 2017, supported by an affidavit, and sought the following orders:
 - a) "That there be a hearing on a preliminary point that the action be dismissed as it is time barred under section 13 of the Workmen's Compensation Act [Cap 94].
 - b) That should the matter not be dismissed under (a) above, that the Applicant do within 14 days provide further and better particulars as requested and annexed in the affidavit of Louise Mitchell filed herewith.
 - c) That the applicant do by affidavit within 14 days disclose and provide copies of all witnesses statements, Medical Cause of Death Certificate and Autopsy Report".

¹ [2016] FJCA 138; ABU 15.2016 (28 October 2016)

² [2015] FJCA 144; ABU 005.2013 (2 October 2015)

³ [2016] FJCA 11; ABU75.2014 (26 February 2016)

9. The notice of motion was made in terms of section 13 of the Act, sections 11(1) & (2) and 15 of the Workmen's Compensation (Rules of Court) Regulations and Order 25 rules 5 and 7 of the Magistrates Court Rules.
10. By his ruling the resident magistrate stated that section 13(a) of the Act states a period of 12 months for filing a claim under the Act and that time can be extended to 6 years under section 13(b) if by mistake or other good cause compliance within 12 months is not possible.
11. The tribunal stated:

“The above authorities confirms that the law pertaining to section 13 of the Act is settled in our jurisdiction. The position enunciated above have been endorsed by the High Court and the Court of Appeal that claims must be filed within 12 months. Failing which the claims would still be valid if it fell within one of the two proviso under section 13. And secondly, if it was filed within six years from the date of the accident. This tribunal is bound by the principle of *stare decisis* i.e: it is bound by the decisions of superior courts”.
12. The tribunal stated that there was no material to indicate that the respondent was relying on either proviso of section 13 (b) of the Act. The tribunal's finding was that the application for compensation was filed outside the period of 12 months required by the Act. On that basis, it was ruled that the claim for compensation was statute barred under section 13 of the Act.
13. The resident magistrate's conclusion is misconceived. Section 13 of the Act does not require a claim to be filed in court within 12 months. What is required is for the workman to give notice of the accident to the employer within 12 months. If this is done, the claim for compensation can be filed in the tribunal within six years.
14. The resident magistrate's ruling does not make a finding as to how or when the employer was given notice. Findings by a court or tribunal must be based on evidence. The ruling states there is no material before the tribunal to indicate that the labour officer would be relying on either proviso.

15. In another part of the ruling, it is said that notice was given to the employer in the same year as the accident. This is inconsistent with the tribunal's finding that a claim was not made within 12 months of the accident. The workman died following the accident on 28 May 2011. The record contains a notice of claim on behalf of the workman dated 29 July 2011 from the labour office to the respondent. There is no reference to this notice in the ruling. The ruling states that a further notice was sent to the employer on 10 November 2014. A claim in the same year as the accident will suffice as a valid claim under section 13 of the Act. Consequent to this finding by the tribunal, the claim could not have been statute barred.
16. The resident magistrate was misconceived in his understanding of the operation of section 13 of the Act, and the ruling does not qualify as one that determined the substantive rights of the parties. The respondent cited the example of a split trial in which the court can determine the substantive rights of the parties. In those proceedings, the court must be possessed of evidence in order to make orders that have the character of finality. The tribunal makes no findings on the basis of which the matter could be said to have been finally disposed, entitling a party to appeal the decision as of right. On this reasoning, the tribunal's ruling must be taken as an interlocutory decision, requiring the leave of court to appeal the decision.
17. In reaching this decision, the court is inclined to follow the view expressed by Guneratne, JA in *Stephens v Nunnink*⁴. The Fiji Court of Appeal stated:

“As revealed in the foregoing exposition, on the basis of the ‘Application Approach’ (the established approach in Fiji) as to when an impugned order could be regarded as interlocutory or final would in my view, depend on the nature of the issues raised as preliminary issues and the stage at which they were raised before the Court (the High Court) exercising original jurisdiction. This is the test.”

The defect in the affidavit

⁴ [2016] FJCA 11; ABU75.2014 (26 February 2016)

18. The second preliminary issue raised by the respondent is that the affidavit given by Josefa Mainavolau, the principal legal officer of the Attorney General's office in Lautoka was witnessed by Ms. Vani Doge Raravula, a legal practitioner in the labour office. The affidavit was given in support of the notice of motion.
19. The objection was also raised in the respondent's affidavit in opposition. The affidavit stated that Josefa Mainavolau, was not authorised to swear the affidavit on behalf of the applicant and that the application should be struck out. Ms. Ratu also stated that the deponent of the supplementary affidavit could not have sworn the affidavit in support of the applicant. In their submissions at the hearing, the respondent objected to the supporting affidavit and the supplementary affidavit filed on behalf the applicant on the basis that the affidavits are defective.
20. The respondent submitted that the supporting affidavit did not comply with Order 41 rule 8 of the High Court Rules 1988. In support of its argument, the respondent referred to the decisions in *Denarau Corporation Limited v Vimal Deo*⁵ and *Deo Construction Development Co. Ltd v Port Denarau Marina Ltd*⁶. It was submitted that the affidavit should be expunged, and that in the absence of an affidavit the notice of motion should also be struck off.
21. The applicant's affidavit in support was sworn by Mr. Josefa Mainavolau, the principal legal officer of the Attorney General's office in Lautoka. The supplementary affidavit was given by another legal officer of the same office. The rule in Order 41 of the High Court Rules is meant to ensure that an oath is to be administered by a person who is independent of the deponent and has no interest in the cause before court. This is so that courts can rely upon evidence tendered through affidavits. The proper course in this matter would have been to swear the affidavit before someone whose independence would not be in question. As the respondent rightly pointed out the affidavits were sworn before a person regarding whose independence questions can be raised.

⁵ HBC 23.2013 (24 February 2015)

⁶ [2017] FJHC 163; HBC 160.2009 (3 March 2017)

22. However, in this matter, the supporting affidavit is not in respect of the cause that was before the tribunal. It has been tendered in support of an application seeking an extension of time to apply for leave to appeal. The lawyer who gave the affidavit was personally aware of the circumstances in which the application for leave was not filed on time. He explained what circumstances led to the delay. In this proceeding, the court is not dealing with the substantive rights of the parties. The court only needs to be satisfied that the applicant should be allowed time to file an application for leave to appeal in order to exercise its discretion to allow an extension of time. Therefore, the respondent's second preliminary objections fails.

Extension of time to seek leave to appeal

23. The respondent asked court to deal with the preliminary issues in the first instance. However, the parties dealt with the application for extension of time in the affidavits filed on behalf of the applicant and in the respondent's opposing affidavit. For these reasons and in view of the time that has been taken to dispose this matter, it will be proper to deal with the notice of motion as well.
24. The applicant stated that a written ruling of the tribunal was provided to the office of the Attorney General in Lautoka on 7 March 2018, although the tribunal delivered its ruling on 20 February 2018. The deponent of the applicant's supplementary affidavit, Reshmi Chand, who is the acting secretary of the office of the Attorney General in Lautoka stated that she was informed by counsel for the applicant that the application to appeal out of time was prepared and ready for filing on 19 March 2018. The application was to be filed on 20 March 2018. However, it was delivered by the courier company on 21 March 2018. When the application was taken to the Suva High Court registry the applicant was informed that all employment appeal documents were to be filed in the Lautoka High Court. Thereafter, the application was filed in the registry at Lautoka on 23 March 2018.
25. In regard to the application for extension of time, Ms. Ratu stated in her affidavit in opposition that she was advised that a copy of the ruling of the Nadi

Magistrates Court registry was uplifted on 27 February 2018. She stated that the written ruling was made available well before the expiry of 14 days.

26. The tribunal's decision was delivered on 20 February 2018, and the notice of appeal was filed on 23 March 2018. The application for leave should have been filed on or about 5 March 2018. There is a delay of about 18 days, which the applicant has explained. The court does not consider the delay to be substantial. The applicant has provided a reasonable explanation for the delay in filing the notice of motion. There is no significant prejudice to the respondent in allowing an extension of time. For the foregoing reasons, a lengthy consideration of the merits of the applicant's case will not be necessary. Nevertheless, the court is satisfied that the applicant's case is one that can be pursued in appeal on the merits.
27. In the overall circumstances, the court is of the view that it will serve the interests of justice to grant the applicant an extension of time to apply for leave to appeal the tribunal's ruling. The parties will bear their costs.

ORDER

- A. The respondent's preliminary issues are struck off.
- B. The applicant's application for leave to appeal is allowed.
- C. The registry is to issue notice on the parties to appear in court within three weeks of this decision to take directions concerning the appeal.

Delivered by *skype* at **Suva** on this 11th day of **September, 2023**.



M. Javed Mansoor

M. Javed Mansoor
Judge