IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 0008 of 2022
[Suva ERCA NO. 02 of 2019]

BETWEEN : **LAND TRANSPORT AUTHORITY**

Appellant

AND : **DANIEL IRVINE**

Respondent

Coram : **Dr. Almeida Guneratne, P**

Counsel : **Ms N. K. Prasad for the Appellant**
Respondent is absent and unrepresented

Date of Hearing : **12th April, 2023**

Written submissions filed on : **12th May, 2023**

Date of Decision : **4th September, 2023**

DECISION

Brief background on the factual content to the present application

[1] This is an application for enlargement of time to appeal the judgment of the High Court dated 18th August, 2021.

[2] By that judgment, the High Court dismissed the applicant's (appellant's) appeal against the decision of the Employment Relations Tribunal.

[3] The Notice of Appeal filed against the High Court judgment is dated 29th October, 2021 and therefore, the High Court Judgment being dated 18th August, 2021, the said appeal was clearly out of time as envisaged in Rule 16(b) of the Court of Appeal Act (the Act).

[4] Upon a perusal of the material on record, I did not see any application having been made by the Appellant in pursuance of Section 20(1)(b) of the Act.

[5] Accordingly, I failed to comprehend how the appellant could have submitted that it made "*a timely appeal.*"

[6] I found it even further difficult to understand how security for costs of appeal had been ordered when there was in fact "*no appeal on foot.*"

[7] Be that as it may, the present application is one seeking extension of time to appeal in "*the appellant*" having failed to pay security for costs of appeal as required by Rule 17(1) of the Act and consequently the appeal being "*deemed abandoned.*"

[8] However, I found having perused the material on record, no notice of abandonment had been sent to the appellant followed by sanction of Court in regarding "*the appeal having been abandoned.*"

[9] Those were the twin criteria I have had regard to in prompting me to disagree with Practice Direction No.1 of 2019 in several of my past decisions, which I re-iterate here.

[10] Having said that, which prima facie would stand in the appellant's favour (subject to what I have reflected at paragraphs [5] and [6] above), taking those factors cumulatively regarding both the Notice of Appeal and the issue on the security for costs payment being out of time, I felt that the best approach to come to a decision in this matter would be to consider the matter in the light of the criteria laid down in the oft quoted decision on **NLTB v KHAN [2013] FJSC 1** (per Gates, J).

Application of the criteria in NLTB v KHAN

[11] In so far as the criterion of delay is concerned, the appellant concedes that, on a calculation, there has been a delay of 2 months and 10 days (from 18th August to 29th October) in filing the Notice of Appeal. (vide: paragraph 17 of the appellant's written submissions dated 12th May, 2023.

[12] In paragraph 19 of the said submissions, the appellant has submitted that, the length of the delay is two months and 23 days calculated immediately after the default from the expiry date for filing of summons for security for costs.

[13] Even if I were to ignore the length of delay, the reason given for the delay being that, the appellant *"needed to thoroughly peruse and process the judgment of the High Court in the legal context as it is a statutory body ___"* is a reason I was not inclined to accept in as much as the law and its process dos not accommodate a distinction to be drawn between a private party and a statutory body in the prosecution process.

The two ends of the spectrum

[14] That being on one end of the spectrum, at the other end is the respondent's lax on his part, not filing an affidavit in opposition and submissions and indeed not appearing in Court though noticed (as the Record reveals). Thus, the consideration of the *"prejudice criterion"* was reduced to a non-issue.

[15] In the result, what remained to be addressed is the criterion of there being "*prospects of success*" if leave is to be allowed, such prospects being dependent on questions justifying serious considerations.

[16] The learned High Court Judge recounted the factual content of the matter in dispute thus:

"1. This is an appeal from the decision of Employment Relation Tribunal handed down on 22.3.2019, where the Grievor-Respondent (Respondent) was reinstated and also awarded compensation. Employer-Appellant (Appellant) being aggrieved by said decision appealed. Respondent was employed as Team Leader – Public Transport with the Appellant in its Regional (Northern) office at Labasa. Appellant had received a complaint from an applicant whose application for Road Route Licence (RRL) was rejected by front line officer, but there was no evidence that Respondent was even informed of this. The rejected applicant was successful in lodgment of an application for RRL in Suva, on 12.5.2016 and without processing that it was forwarded to Regional Office. This was received at Regional office at Labasa on 31.5.2016. Before receipt of this, another application that was lodged at Regional Office at Labasa on 19.5.2016 was processed and advertised. The paper advertisements were done by Regional Office the relevant date of receipt of the application was the receipt of the same at Regional office, hence logically complaint's application which arrived to Labasa on 31.5.2016 should have got advertised later than an application received on 19.5.2016. There was no evidence that Respondent got the application as soon as it received Regional Office, but was responsible to supervise work of the subordinates as Team Leader. Respondent was not responsible for alleged delay as the file was with the superior Regional Manager for 14 days and Respondent had disposed the file as soon as he received it even without verifying the time table. He had admitted that there was an error on the time table prepared by his subordinate but this was corrected later. The complainant's earlier application to Regional Office, was rejected by his subordinate officer after receiving instructions from Regional Manager. The earlier rejection of complainant's RRL by his subordinate officer was not informed to him either by complainant and or his subordinate officer. So, there were no grounds for summary dismissal for delay or rejection of application for RRL by another officer. So the decision of the Employment Tribunal is affirmed. Appeal dismissed."

[17] Having analysed the said factual content, His Lordship concluded as follows:

"<u>CONCLUSION</u>

34. Resident Magistrate had given reasons for the decision and analysed evidence. Appellant had failed to establish any of the reason given in letter of 1.3.2017 for justification of summary dismissal. Hence the Appeal is dismissed and decision of Resident Magistrate is affirmed. The cost of this application summarily assessed at $8,000.00, considering the circumstances of this case. The delay is regretted."

The grounds of appeal urged and submissions made by the appellant thereon

Ground of Appeal No.1

[18] The Appellant has submitted that the learned Judge erred in law in upholding orders for reinstatement when the Respondent did not seek the same.

[19] However, the learned Judge did note that the Respondent *"had also sought re-instatement in his application"* wherein His Lordship had adverted to (page 4 of the High Court Record).

Ground of Appeal No.2

[20] The appellant has submitted that, they will be questioning in law whether there is a mandatory provision requiring all complaints to have been made in writing (and that they submit) that "there is no statutory requirement for the appellant to receive only written complains" (paragraph 32 of the appellant's written submissions dated 12th May, 2023).

[21] However, I could not find any link between the point so urged and the finding of unlawful dismissal made by the learned Magistrate and affirmed by the High Court.

Grounds of Appeal Nos. 3, 5, and 6

[22] The appellant has urged that the learned Judge erred in law *"in its failure to hold that learned Magistrate failed to invoke a purposeful approach to Section 231(1)(2) of the (ERA) Employment Relations Act 2007."*

[23] The appellant submitted further that, the failure to refer to material evidence and call upon imperative evidence were all contrary to the legislative intention behind Sections 210(1)(2), 216(2), 33(2), 114 and Part 20 and 20 of the ERA.

[24] While I found no quarrel with the several precedents cited by the appellant (at paragraphs 34 to 41 of its written submissions), I could not see how the findings of both Courts on unfair dismissal based as it were on the evidence led could be said to have been contrary to the said provisions of the ERA.

Ground of Appeal No.4

[25] In this ground, the appellant seems to contend and draw a distinction between *"unfair dismissal"* and *"procedural irregularity."*

[26] Whichever way one looks at it, the end result was the respondent being dismissed, whether on the basis of *"misconduct or performing his work in an unskilled manner."* On both those counts, both Courts resolved the dispute in favour of the respondent.

Determination and Decision on the grounds of appeal 1, 2, 3, 4, 5 and 6

[27] On the basis of the aforesaid reasons, I could not find any prospects of success on the said grounds of appeal urged.

Ground of appeal No.7

[28] The High Court's order in the sum of $8,000.00 as costs has been put in issue in this ground of appeal as being unreasonable and unjustified.

[29] In the context of ground of appeal No.4, the appellant contended that *"It was to preserve the reputation and integrity of the appellant body that the decision to terminate was taken"* (paragraph 45 of the appellant's written submissions).

[30] It would have been perhaps appropriate to have contended so under this ground (No.7 of appeal).

[31] Although, costs ordered by a Court is generally a matter of discretion for the Court, for the reasons adverted to in paragraphs [29] and [30] above, acting in pursuance of Section 20(1)(k) of the Court of Appeal Act, I make order substituting the sum of $2,000.00 in lieu of the order for costs of $8,000.00 ordered by the High Court.

[32] In proceedings before this Court, the Respondent did not file an affidavit in opposition and/or appeared at the hearing either or file any written submissions for which reason I make no order as to costs.

Orders of Court:

1) *The appellant's application seeking leave to appeal the judgment of the High Court dated 18th August, 2021 is refused and/or dismissed.*

2) *The order for costs in the sum of $8,000.00 ordered by the High Court in its judgment is reduced to $2,000.00.*

3) *I make no order for costs in these proceedings.*

COURT OF APPEAL FIJI

Hon. Justice Almeida Guneratne
PRESIDENT, COURT OF APPEAL