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

CIVIL APPEAL NO. ABU 058 of 2024
[In the High Court Case No. ERCA 26 & 28 of 2017]
[In the Employment Relations Tribunal Action No. 201 of 2013]

BETWEEN : **PURAN PRASAD**

Appellant

AND : **FIJI NATIONAL UNIVERSITY**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Ms. L. Lazel for the Appellant**
Mr. R. Prasad for the Respondent

Date of Hearing : **28 October 2024**

Date of Ruling : **13 December 2024**

RULING

[1] The appellant through its solicitors had filed summons for enlargement of time to appeal on 21 June 2024 against the Ruling of the Employment Relations Tribunal (ERT) dated 03 May 2024 (ERT Grievance No. 201 of 2013) and the Judgment of the Employment Relations Court (ERC) 15 November 2022 (ERCA 26 and 28 of 2017).

[2] The appellant was summarily terminated on 25 July 2013 and on 06 November 2017 the ERT ruled in favour of the appellant declaring the termination to be unlawful and unfair and directing the respondent pay 06 months' salary for unlawful dismissal and further $3000.00 for unfair termination.

[3] The appellant appealed to the ERC on 24 November 2017. The respondent also appealed to the ERC. The ERC delivered a single judgment in both appeals on 15 November 2022 allowing the respondent's appeal and ordered a re-hearing in the ERT.

[4] Coming back to the ERT, the appellant on 24 April 2024 sought to transfer the matter back to the ERC (opposed by the respondent) and the learned magistrate not only refused his application but also struck out and dismissed the appellant's ERT Grievance No. 201 of 2013 on 03 May 2024.

[5] In terms of section 242 of the Employment Relations Act (ERA) an appeal against a decision of the ERT to the ERC should be filed within 28 days while as per section 245 of ERA an appeal against a decision/judgment of the ERC should be made to the Court of Appeal within 28 days.

[6] Accordingly, the appellant should have filed an appeal against the ERC judgment by 13 December 2022 and he should have filed an appeal against the Ruling of the ERT by 01 June 2024.

[7] Section 245 (2) of the ERA is very clear that for an appeal to the Court of Appeal, the Court of Appeal Act 1949 would apply. It is equally clear from section 12 of the Court of Appeal Act that the Court of Appeal has jurisdiction to entertain an appeal only from the High Court which includes the ERC. There is no provision in the ERA which allows an aggrieved party to appeal a decision by the ERT directly to the Court of Appeal. Therefore, in my view, the appellant has no right of appeal against the impugned decision of the ERT dated 03 May 2024 to the Court of Appeal. When there is no right of appeal, there is no right to seek leave to appeal or extension of time to appeal under section 20(1)(a) or (b) respectively of the Court of Appeal Act. However, I reserve this as a question of law for the Full Court to determine.

[8] The appellant did have a right of appeal to this court against the judgment of the ERC dated 15 November 2022. He did not avail himself of that right. Instead, the appellant chose to

accept the judgment for re-hearing and made an application in the ERT to have his matter transferred to the ERC. Eventually the ERT struck out and dismissed the appellant's ERT Grievance No. 201 of 2013 altogether on 03 May 2024.

[9] The appellant now seeks to canvass the ERT decision on 03 May 2024 and ERC judgment of 15 November 2022 by his current summons for extension of time to appeal filed in this court. His appeal from ERC is late by almost 01 year and 06 months while his purported appeal from the ERT is late by 20 days.

Law on enlargement of time

[10] It is well settled now that this Court has an unfettered discretion in deciding whether or not to grant the leave out of time[1]. However, the appellate courts always consider five non-exhaustive factors to ensure a principled approach to the exercise of the judicial discretion in an application for enlargement of time namely (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? and (v) if time is enlarged, will the respondent be unfairly prejudiced?[2] Nevertheless, these matters should be considered in the context of whether it would be just in all the circumstances to grant or refuse the application and the onus is on the appellant to show that in all the circumstances it would be just to grant the application[3]. In order to determine the justice of any particular case the court should have regard to the whole history of the matter, including the conduct of the parties[4]. In deciding whether justice demands that leave should be given, care must also be taken to ensure that the rights and interests of the respondent are considered equally with those of the applicant[5].

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[1] **State v Minister forTourism and Transport** [2001] FJCA 39; ABU0032D.2001 (12 November 2001); **Latchmi v Moti** [1964] FijiLawRp. 8; [1964] 10 FLR 138 (7 August 1964)

[2] **Native Land Trust Board v Khan** [2013] FJSC 1; CBV0002.2013 (15 March 2013); **Fiji Revenue and Customs Services v New India Assurance Co. Ltd.** [2019] FJSC 34; CBV0020.2018 (15 November 2019); **Norwich and Peterborough Building Society v Steed** (1991) 2 ALL ER 880 C.A; **CM Van Stilleveldto B V v. E L Carriene Inc.** [1983] 1 ALL ER 699 of 704.

[3] **Habib Bank Ltd v Ali's Civil Engineering Ltd** [2015] FJCA 47; ABU7.2014 (20 March 2015)

[4] **Avery v Public Service Appeal Board** (No 2) (1973) 2 NZLR 86

[5] Per Marsack, J.A. in **Latchmi v Moti** (supra)

[11] Since the reason for the delay is an important factor to be taken into account, it is essential that the reason is properly explained - preferably on affidavit - so that the court is not having to speculate about why the time limit was not complied with. And when the court is considering the reason for the delay, the court should take into account whether the failure to observe the time limit was deliberate or not. It will be more difficult to justify the former, and the court may be readier to extend time if it was always intended to comply with the time limit but the non-compliance arose as a result of a mistake of some kind.[6]

[12] The length of the delay is determined by calculating the length of time between the last day on which the appellant was required to have filed and served its application for leave to appeal and the date on which it filed and served the application for the enlargement of time.[7] In this case the renewed application for leave to appeal should have been filed by 26 February 2024 but eventually filed on 26 March 2024. Thus, the length of the delay is 04 weeks which is substantial. 40 days have been considered 'a significant period of delay'[8]. Delay of 11 days[9] and 47 days[10] also have defeated applications for enlargement of time. Even 04 days delay requires a satisfactory explanation[11]. However, in some other instances, delay of 05 months and 02 years respectively had not prevented the enlargement of time although delay was long and reasons were unsatisfactory but there were merits in the appeal.[12]

[13] Rules of court must, prima facie, be obeyed and in order to justify a court in extending the time during which some step in procedure is required to be taken there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.[13]

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[6] **Fiji Industries Ltd v National Union of Factory and Commercial Workers** [2017] FJSC 30; CBV0008.2016 (27 October 2017)

[7] **Habib Bank Ltd v Ali's Civil Engineering Ltd** (supra)

[8] **Sharma v Singh** [2004] FJCA 52; ABU0027.2003S (11 November 2004)

[9] **Avery v Public Service Appeal Board** (supra)

[10] **Latchmi v Moti** (supra)

[11] **Tavita Fa v Tradewinds Marine Ltd and another** ABU 0040 of 1994 (18 November 1994) unreported

[12] **Formscaff (Fiji) Ltd v Naidu** [2019] FJCA 137; ABU0017.2017 (27 June 2019) & **Reddy v. Devi** [2016] FJCA 17; ABU0026.2013 (26 February 2016)

[13] **Ratnam v Cumarasamy** [1964] 3 All E.R. 933

[14] As for the reason for the delay the appellant claims in his affidavit dated 21 June 2024 that the reason for the delay was the delay caused by the ERT in delivering its original decision (02 years and 08 months) and then ERC delaying its judgment (03 years and 04 months). However he has not explained the delay of almost 01 year and 06 months in trying to invoke the jurisdiction of this court since 15 November 2022 or 20 days since 03 May 2024. Therefore, I am not persuaded by the explanation or the reasons for the delay. I am also of the view that the explanation does not meet the necessary threshold to satisfy the requirement for reasons for the delay.

[15] Even where the length and the reasons for the delay are adequately explained to the satisfaction of Court, if an appellant is unable to satisfy Court as to his or her chances of success in appeal if extension is to be granted, then the application must be rejected; even if an appellant fails to satisfy court as to the length and reasons for the delay, nevertheless a Court shall allow an extension of time if it is satisfied that, an appellant has a reasonable chance of success should an application were to be granted unless the reason for the delay in either case is owing to a mistake or misconception as to the correct applicable legal position on the part of lawyers[14]. The Supreme Court commenting on these three position of Dr. Almeida Guneratne, J.A. said[15] that the effect of propositions (i) and (ii) subject to proposition (iii) is to make the merits of the appeal the paramount, indeed the decisive, consideration and that goes too far because there may be cases where the merits of the appeal may not be that good, but where the overall interests of justice mean that the litigant should not be denied the opportunity of having his appeal heard. By the same token, there may be cases where the merits of the appeal are strong, but the prejudice caused to the other party if the appeal was allowed to proceed would be so substantial that it would be an affront to justice for the delay to be excused. The Supreme Court added that the bottom line is that each case should be considered on its facts, with none of the factors which the court is required to take into

[14] Per Dr. Almeida Guneratne, J.A. in **Ghim Li Fashion (Fiji) Ltd v Ba Town Council** [2014] FJCA 192; Misc. Action 03.2012 (5 December 2014) & **Gregory Clark v Zip Fiji** [2014] FJCA 189; ABU0003.2014 (5 December 2014)

[15] **Fiji Industries Ltd v National Union of Factory and Commercial Workers** [2017] FJSC 30; CBV0008.2016 (27 October 2017)

account trumping any of the others. Each factor is to be given such weight as the court thinks appropriate in the particular case. In the final analysis, the court is engaged on a balancing exercise, reconciling as best it can a number of competing interests. Those interests include the need to ensure that time limits are observed, the desirability of litigants having their appeals heard even if procedural requirements may not have been complied with, the undesirability of appeals being allowed to proceed which have little or no chance of success, and the prospect of litigants who were successful in the lower court having to face a challenge to the decision much later than they could reasonably have expected. As for the proposition (iii), the Supreme Court said mistakes made by lawyers is not an exceptional category for this purpose and the fact that the mistake was made by lawyers is just one matter to be taken into account in the whole scheme of things, but it can in no way be decisive.

[16] However, Dr. Almeida Guneratne, P took a different view later and said[16] that if the length and reasons for the delay, (criteria (a) and (b) laid down in ***Khan's case***) are explained to the satisfaction of Court, then the matter should be left to the full Court to determine the appeal on the merits because, while a party who files an appeal within time is vested with an unqualified statutory right, party who seeks enlargement of time to appeal requires the exercise of the court's discretion to earn that right. That right is earned when the aforesaid criteria (a) and (b) are satisfied. If the threshold criteria as envisaged in (a) and (b) above are not met by an applicant for enlargement of time to appeal, then such an application should be rejected and/or dismissed without the need to consider criteria (c) and (d) laid down in **Khan's case** in as much as the above reasons would not be applicable. A distinction must be drawn between a party who explains the delay to the satisfaction of Court to be treated on a par with a timely appeal and a party who fails to explain the reasons for the failure to file a timely appeal.

[17] However, because Dr. Almeida Guneratne, P has not taken into account the views of the full court judgment of the Supreme Court in ***Fiji Industries Ltd v National Union of Factory and Commercial Workers*** in his second ruling in ***Pacific Energy (South-West***

[16] **Pacific Energy (South-West Pacific) Pte Ltd v Chaudhary** [2022] FJCA 190; ABU0020.2022 (30 December 2022)

Pacific) Pte Ltd v Chaudhary and also because I am bound by the Supreme Court decision, I am inclined to follow the Supreme Court decision in accordance with section 98(6) of the Constitution of Fiji incorporating the doctrine of *stare decisis*.

[18] However, I am still required to consider the prospect of his appeal before the Full Court, for interest of justice demands that I take a holistic approach[17] by considering all the factors set out in ***Native Land Trust Board v Khan*** (supra) in addition to any other relevant factors before exercising my discretion either to grant enlargement of time or not.

[19] As I have already stated the appellant instead of appealing the ERC judgment in time to this court decided to abide by the judgment and went back to the ERT for a re-hearing. However, before the re-hearing began he sought to have the matter transferred to ERC for a hearing on the basis that his claim would exceed $40,000.00 and the ERT would lack jurisdiction to hear his matter in terms of section 211(2)(a) of the ERA. The basis on which the matter was sent back for a re-hearing according to the ERC judgment is set out at paragraphs 22-24 which in summary is that the ERT had not made a finding of unlawful and unfair termination on the correct applicable principles and the matter has to be heard and determined again for fairness to both the parties. The sentiments expressed by the ERC in those paragraphs suggest its reluctance to determine questions of fact but its preference for the ERT to do so upon hearing witnesses and evidence afresh.

[20] The appellant's application for the transfer of the matter to ERC is based on his assertion that his claim would exceed $40,000.00. Section 218(2) of the ERA permits the ERT to transfer a matter to the ERC if it is of opinion that (a) an important question of law is likely to arise or (b) the case is of such a nature and of such urgency that it is in public interest to do so. Thus, it appears that upon a transfer of a matter by the ERT under section 218(2)(b), the ERC has jurisdiction to deal with questions of fact or mixed fact and law because of the nature and urgency of the matter and it is in public interest that the ERC hears and determines such a matter. In this situation ERC functions similar to an ERT.

[17] **Hussein v Prasad** [2022] FJSC 7; CBV 15 of 2020 (3 March 2022)

[21] I think, the ERT was right in its conclusion that it could not form an opinion that an important question of law is likely to arise or the case is of such a nature and urgency that it is in public interest to transfer the matter to the ERC only on the basis based on the appellant's assertion that his claim would exceed $40,000.00 as it would not constitute any of the two grounds set out in section 218(2)(a) & (b) of the ERA. The question then is whether the striking out and dismissal of the appellant's grievance is the only option available to the EDT. If so, an employee whose claim may exceed $40,000.00 at least partly due to the delay on the part of the administration of justice system (in this case from January 2014 to December 2022) would be left with no remedy in the end. Is it not logical that any claim beyond $40,000.00 should then be heard and determined by the ERC?

[22] Therefore, I am of the view, that although in any given matter the ERT cannot form an opinion that that an important question of law is likely to arise or the case is of such a nature and urgency that it is in public interest to transfer the matter to the ERC for it to exercise its discretion [note the word 'may' in section 218(2)] to do so, if a party to the proceedings applies to the ERT that the claim would exceed the monetary limit assigned to the ERT, it has the discretion (again note the word 'may' in section 218(1)] to transfer the matter to the ERC for hearing and determination. **Tabua v Fiji Rugby Union** [2012] FJHC 1441; ERCM 01.2011 (10 August 2012) would not apply in this situation as in that case the matter had already been heard and therefore it was held that it could not be transferred for determination of only the quantum. However, ***Tabua*** does admit that a party can apply for transfer of the matter to ERC for hearing and determination. The ERT exercises its discretion under section 218(1) on an application of a party and does so on its own motion under section 218(2). This is an important question of law for the Full Court to decide.

[23] The *ratio decidendi* in **Khelawan v Ram** [1967] FJLawRp 5; [1967] 13 FLR 196 (8 December 1967) also has no application here as it was decided in a different statutory contest. In that case, in the original claim, the plaintiff sought to enforce a contract for the sale of land for the sum of £1200; in addition he claimed substantial damages. It was not

disputed that the total of the value of the property and the damages originally sued for was far in excess of £400 in excess of the jurisdiction of a magistrate's court under section 17(1) (a) of the Magistrates' Courts Ordinance. The magistrate made an order giving leave to the plaintiff to amend his claim by reducing it to a claim merely for damages for breach of contract in the sum of £400. The Supreme Court held that where the claim was for property and damages far in excess of £400 in value the court below had no powers to exercise jurisdiction in the case by ordering an amendment of the statement of claim and magistrates' court was not empowered to exercise any jurisdiction in the case at all.

[24] On the other hand, in terms of section 218(3) the appellant could have sought special leave of the ERC for an order that the proceedings be transferred to the ERC when the ERT declined its application for such a transfer. The appellant does not appear to have done so. The appellant could have then sought leave to appeal from the ERC itself within 14 days and if ERC refuses such special leave then sought leave to appeal from the Court of Appeal as stipulated in section 244 of the ERA.

[25] Just as Keith J in the Supreme Court said in ***Fiji Industries Ltd v National Union of Factory and Commercial Workers*** there may be cases where the merits of the appeal may not be that good, but where the overall interests of justice mean that the litigant should not be denied the opportunity of having his appeal heard and I think this is one such case. In my view, this appeal raises an important questions of law as stated earlier, and therefore I think the overall interests of justice demands that the appellant be given extension of time to seek leave to appeal.

[26] When it comes the prejudice to the respondent, I think that the prejudice caused by the systematic delay to the appellant far outweighs the prejudice, if at all, that would be caused to the respondent.

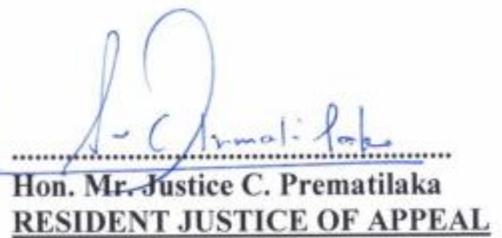
[27] In all the circumstances above discussed, taking an all-inclusive view of the relevant law and the material before me, I am inclined to grant the appellant enlargement of time to file an application for leave to appeal.

Orders of court:

(1) Enlargement of time to appeal against the impugned ERC judgment on 15 November 2022 is refused.

(2) Enlargement of time to appeal is allowed only on the questions of law arising from ERT Ruling on 03 March 2024 as stipulated in this Ruling.

(3) Cost lie where they fall.



Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL