

SUPREME COURT OF SEYCHELLES

Reportable/Not Reportable/Redact
[2021] SCSC 706
MC50/2021

In the matter between:

GEORGES MICHEL
(rep. by Rene Durup)

Applicant

and

NORTH ISLAND (PTY) LTD
(rep. by Guy Ferley)

Respondent

Neutral Citation: Michel v North Island (Pty) Ltd (MC50/2021) [2021] SCSC 706 (29 October 2021).
Before: Carolus J
Summary: Extension of time to appeal to Supreme Court against Judgment of Employment Tribunal – Para 4 of Schedule 6 to Employment Act – Rule 5 of Appeal Rules, 1961 made under the Courts Act.
Delivered: 29 October 2021

ORDER

The application for extension of time to file Notice of Appeal is dismissed. Each Party shall bear their own costs.

E. CAROLUS, J

Background

[1] This ruling arises out of an application for extension of time to file an appeal against a decision of the Employment Tribunal delivered on 11th September 2017 dismissing the applicant’s claim against the respondent for employment benefits.

[2] The application is made by way of notice of motion supported by an affidavit sworn by the applicant. In his affidavit the applicant avers that he was only notified of the Tribunal’s decision by his representative before the Tribunal Ms. Fiona Denis when he came to see her some time later. Thereafter he applied for legal aid to appeal against the

decision, which was granted and Mr. Leslie Boniface appointed to represent him in the appeal proceedings by legal aid certificate dated 4th October 2018. However Mr Boniface failed to lodge the appeal with the Supreme Court. After the applicant had informed the Registrar of the situation, another attorney, Mr. Rene Durup, who is currently representing him in these proceedings, was appointed to represent him, by legal aid certificate dated 18 August 2020.

- [3] The applicant avers that his current attorney was informed that an application for an extension of time to file an appeal should be made, after he made enquiries at the Supreme Court Registry regarding the appeal being out of time by over three years. An application was duly made and mentioned before the Court for the first time on 11th November 2020 at 10 a.m. and the respondent's representative was granted time to file objections thereto. The matter was mentioned for the same purpose on 25th November 2020 at 10 a.m. and again on 3rd September 2020 at 10.a.m. but the objections still not having been filed, the matter was adjourned to 16th December 2020. His attorney informs him that on 16th December 2020, mistakenly believing that the matter was fixed for mention at 10.00 a.m. given that on the three previous occasions the matter had been called at 10.00 a.m. at the Wednesday mentions, he came to court at 10 a.m. He was informed that the matter had been called at 9.00 a.m. before Andre, J who had dismissed the case. The matter had not been cause-listed before Judge Andre at 9 a.m. on that date.
- [4] Finally the applicant avers that he is not at fault for appeal not having been lodged with the Supreme Court within the prescribed time.
- [5] Attached to the application is a Notice of Appeal against the decision of the Employment Tribunal delivered on 11th September 2017 in ET/91/16 setting out the grounds of appeal and remedies sought. The grounds of appeal are as follows:
- (1) *The Tribunal erred in finding the Respondent not liable after terminating the Appellant when he was on sick leave.*
 - (2) *The Tribunal erred in finding the Respondent not liable when the Respondent/Employer had not investigated the alleged absence of the Appellant.*

- [6] The remedies sought in the Notice of Appeal are dismissal of the decision of the Tribunal, any decision that meets the justice of the case, and costs.
- [7] The respondent opposes the application and has filed an affidavit in reply sworn by Vincent Meriton in his capacity as Director of North Island (Pty) Ltd. Mr. Meriton depones that he is informed by his attorney that the matters the Court takes into account in deciding whether or not to grant an extension of time are the length and reasons for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent.
- [8] He avers that the application should not be granted for the following reasons: Firstly that even the applicant's lawyer had doubts about the viability of the application given the inordinate delay of over three years in filing the appeal as shown by his enquiry regarding the same with the Registry of the Supreme Court.
- [9] Secondly an appeal from a decision of the Tribunal is required to be lodged not later than fourteen days from the date of the decision appealed against. A delay of three years is therefore manifestly ordinate and must not be condoned by the Court.
- [10] Thirdly the applicant blames his lawyers for the delay but he is himself responsible for the delay due to neglect and lack of interest in pursuing his appeal. He was granted legal aid three times, each time approximately one year after the previous time he was granted legal aid, but he has to date still not been able to prosecute his appeal.
- [11] Fourthly the applicant has made no averment in his affidavit as to his chances of success on appeal. In that regard Mr. Meriton avers that no grounds of appeal have been mentioned in the applicant's affidavit nor been exhibited thereto. He states that the respondent has only been served with a Notice of Appeal filed on 26th April 2021 without leave of the Court therefore rendering it void ab initio. Further that because the Notice of Appeal was neither mentioned in nor exhibited to the applicant's affidavit it cannot be used in combination with it.
- [12] Finally it is averred that the application is an abuse of process of the Court. Mr. Meriton avers that the applicant has an obligation to obey the rules of Court. Further that the

respondent will be seriously prejudiced if the application is granted because of the amount of time it has spent and the expenses it has incurred and will continue to, if it has to defend the appeal, bearing in mind that it is the third time the matter is before the Court. On that basis he prays the Court to dismiss the application with costs.

[13] Counsels for both parties have filed written submissions in support of their respective cases. I have considered both submissions with care and will refer to them as appropriate.

The law

[14] Appeals to the Supreme Court from decisions of the Employment Tribunal are provided for in paragraph 4 of Schedule 6 to the Employment Act as follows:

4. Any person against whom judgment has been given by the Tribunal may appeal to the Supreme Court subject to the same conditions as appeals from a decision of the Magistrates' Court.

[15] The Appeal Rules, 1961 made under the Courts Act, which governs such appeals provides in Rule 6 (1) and (2) that:

6. (1) Every appeal shall be commenced by a Notice of Appeal.

(2) The Notice of Appeal shall be delivered to the clerk of the court within fourteen days from the date of the decision appealed against unless some other period is expressly provided by the law which authorises the appeal.

[16] Rule 5 of the Rules further provides that:

5. Any party desiring an extension of the time prescribed for taking any step may apply to the Supreme Court by motion and such extension as is reasonable in the circumstances may be granted on any ground which the Supreme Court considers sufficient.

[17] Counsel for the respondent has correctly identified the matters to be considered by the court in deciding whether or not to grant an extension of time to appeal under Rule 5 as follows: 1. The length of the delay; 2. The reasons for the delay; 3. The chances of the appeal succeeding if the appeal is granted; and 4. The degree of prejudice to the Respondent. These same matters were considered by the Court of Appeal in the case of

Boniface v Marie (SCA MA01/2019) [2019] SCCA (28 May 2019) for the purpose of deciding whether or not to grant an extension of time to appeal. In that case the Court relied on the case of *Commissioner of Police v Antonio Sullivan* (unreported) Civil Appeal SCA26/2015 in which the Court of Appeal been guided by English authorities, one of which was *Norwich and Peterborough Building Society v Steed* [1991] 2 AER 880.

[18] Although the Seychelles Court of Appeal Rules 2005 in Rule 26 allows extension of time “on good cause shown” and the Appeal Rules 1961 applicable to the present case, allows such extension “as is reasonable in the circumstances”, I am of the view that these two phrases are analogous and I see no valid reason why the same matters should not be considered in deciding whether to grant an extension of time for filing an appeal in the Supreme Court, as in the Court of Appeal.

Analysis

[19] The decision which the applicant intends to appeal against is averred to have been delivered on 11th September 2017. It is noteworthy that a copy of the judgment was not exhibited to the affidavit in support of the present application. In terms of Rule 6(2) of the Appeal Rules 1961, the Notice of Appeal should have been filed by 25th September 2017.

[20] The applicant holds his previous lawyers/legal representatives responsible for the initial delay in lodging the appeal. He avers that Mrs. Denis who represented him before the Employment Tribunal did not notify him of the judgment of the Tribunal until he went to see her sometime after, but he does not state when he became aware of the judgment. He further avers that his lawyer Leslie Boniface who was appointed did not lodge the appeal. According to him Mr. Boniface was appointed to represent him “[b]y virtue of legal aid certificate dated 4th October 2018, of which he produced no supporting evidence. There is no information as to when he made the legal aid application, but legal aid was granted more than a year after the judgment sought to be appealed against. In the circumstances the earliest that Mr. Boniface could have filed the application is when he was appointed to represent the applicant i.e. 4th October 2018, which is over a year after the judgment

was delivered. Even at that point in time, the delay in filing the appeal was inordinate to say the least, and even more so in regards to the present application which was filed on 28th April 2021 – three and a half years after the judgment was delivered.

[21] One observation that I make is that the applicant, having retained the services of a legal representative/counsel in both instances, appears to have felt no need whatsoever to follow up on what was happening to his cases. Having filed a case before the Tribunal it was incumbent upon him to keep himself informed of the outcome of the case. Further, having been let down by Ms. Denis, it would have been reasonable to expect him to be more diligent in following up on what Mr. Boniface was doing in his case. He therefore cannot lay all the blame solely at his legal representative/counsel's feet for the delay in lodging the appeal but must also take some responsibility for the same. I agree with the respondent that he showed a distinct lack of interest in pursuing his appeal.

[22] In any event, it would appear that acts or omissions of counsels do not constitute grounds for extending time for filing appeals. In *Wilfred Richmond v Gilbert Lesperance* (unreported) SCA MA9/2013 (4 September 2013), the Court of appeal stated at paragraph 9 of its ruling –

9. *There must be finality to judicial decisions and for this purpose there must be strict compliance with the procedural requirements setting out the time period for filing of appeals unless the non-compliance is shown not to be caused by the acts or omissions of the applicant or his counsel. In Lagesse v CIE Ltd V Commissioner of Income Tax 1991 MR 46, citing Dependants Pursun v Vacoas Transport Co Ltd 1969 MR 148 and Espitalier-Noel Ltd v Serret 1980, the Court applied the well settled principle that non-compliance with the required formalities within the prescribed time limits is fatal to the hearing of an appeal unless such non-compliance was not due to the appellant's fault or that of his legal advisers [...]* Emphasis added.

[23] It appears from the affidavit of the applicant that he managed to file an application for extension of time through his current lawyer whom he states was appointed on legal aid to represent him after he informed the Registry of the Supreme Court that Mr. Boniface had not filed the appeal. Records on the Court file show that his new counsel was

appointed on 18th August 2020 – almost two years after the judgment was delivered. It is averred that his application was dismissed for the reasons stated at paragraph 3 hereof, namely that the matter was called in Court at 9.00 a.m. on 16th December 2020, and that his counsel, mistakenly thinking that it was going to be called at 10.00 a.m. on the basis that it had been called at that time on the three previous mention dates, had put in appearance at 10.00 a.m. He also avers that the matter was not cause-listed at 9.00 before Andre J on that date. None of this is supported by any evidence. In particular, none of the following documents were produced to this Court: Copies of the application for extension of time; Court proceedings of the 9th December 2020 fixing the date and time for the next mention date for the case; the ruling dismissing the application on 16th December 2020 or the relevant Court proceedings; and the cause-list for 16th December 2020.

[24] I note that the only supporting document filed together with the application is a Notice of Appeal which I take is intended to be filed by the applicant if leave is granted to appeal out of time. As rightly pointed out in the affidavit in reply filed on behalf of the respondent, neither the Notice of Appeal nor the grounds of appeal contained therein, which are pertinent to the issue of the applicant’s chances of success on appeal (one of the matters to be considered by the Court in determining whether or not to grant leave to appeal out of time), have been mentioned in the applicant’s affidavit. In fact the averments in the affidavit are confined only to the reasons for the delay in lodging the appeal. I further note, in that regard, that applicant’s counsel other than citing the applicable law, also addresses only the reasons for the delay in his submissions and concludes at paragraph 11 that “*the applicant has been prejudiced by the non-performance of his previous attorneys and it is the main underlying reason for the failure to appeal as per the 14 days requirement ...*”.

[25] The Notice of Appeal merely having been attached to the application, and not having been exhibited to the affidavit, and furthermore no reference whatsoever having been made to it in the affidavit, this Court declines to consider on it. As stated by Robinson JA in *Boniface v Marie* (supra), at paragraph 14 of her ruling -

14. ... The applicant filed a Notice of Appeal containing three grounds of appeal, on the 4 January 201, challenging the decision of the learned

Judge of the Supreme Court. It is noteworthy that the applicant's affidavit does not refer to the said Notice of Appeal. It is not clear to me as to whether or not the said Notice of Appeal is to be used in combination with the applicant's affidavit. Be that as it may, I state that I did not consider the Notice of Appeal because it had not been exhibited to the affidavit: see, for example, In Re Hinchcliffe, A Person of Unsound Mind, Deceased, Court of Appeal, 5 November 1894 [1895] 1 Ch. 117, in which it was held that any document to be used in combination with an affidavit must be exhibited to the affidavit ...

[26] Furthermore, as stated, the judgment which is intended to be appealed against has not been exhibited. Hence not only is the Court unable to verify the very existence of the judgment but it cannot ascertain the reasons for the Employment Tribunal's decision. Therefore, even if it were to take note of the grounds of appeal as stated in the Notice of Appeal, this Court would be unable to determine the applicant's chances of success on appeal.

[27] In *Laurette & Ors v Savy & Ors* SCA MA13/2019 [22 October 2019], an application seeking extension of time to file a Notice of Appeal against a judgment of the Supreme Court, Robinson JA stated the following at paragraph 6 of her ruling:

In Aglae v Attorney General (2011) SLR 44 the Appellate Court guided by Ratnam v Cumarasamy and Another [1964] 3 All ER 933, stated: "[t]he 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 requires 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 of extension of time which would defeat the purpose of the rules which provide a timetable for the conduct of litigation".
Emphasis added

[28] The applicant has failed to exhibit the relevant documents to his affidavit with the result that the averments in the said affidavit were not sufficiently substantiated. In consequence I find that there is no material before the Court on which to exercise its discretion to grant an extension of time to appeal. Furthermore, given the circumstances discussed above which gave rise to the inordinate delay of three and a half years to file the appeal, I do not find that it would be reasonable to allow such extension. Counsel for

the applicant has submitted that it would be in the interest of justice to do so. I certainly do not find that to be the case particularly after the applicant has sat on his rights after so long. The interest of justice applies not only to the applicant but also to the respondent. To condone the extreme tardiness in filing the appeal would not, in my view, do justice to the respondent.

[29] Accordingly I dismiss the application.

[30] Each party shall bear their own costs.

Signed, dated and delivered at Ile du Port on 29 October 2021.

E. Carolus J