SUPREME COURT OF SEYCHELLES

Reportable
[2022] SCSC .1085
CA 6/2022

In the matter between:

SAVOY DEVELOPMENT LIMITED **Appellant**
(rep. by Serge Rouillon)

and

SHARIFA SALUM **Respondent**
(rep. by Ryan Laporte)

Neutral Citation: *Savoy Development Limited v Salum* (CA 6/2022) [2022] SCSC .....1085.....
(....7..... December 2022).
Before: Pillay J
Summary: Appeal – preliminary objections
Heard:
Delivered: 7th December 2022

ORDER

Appeal dismissed

RULING

PILLAY J:

[1] The Appellant by way of a Notice of Appeal with enclosed Grounds of Appeal, filed on 18th March 2022, seeks to appeal against the Order of the Employment Tribunal dated 21st January 2022, in case ET/185/2018.

[2] In answer the Respondent filed preliminary objections. Firstly that the Appeal has been filed out of time and in breach of Section 4 of Schedule 6 of the Employment Act Cap 69 as read with section 6 (2) of the Courts Act Cap 52. Secondly that the Appeal is Res Judicata.

[3] In support of his objections Learned counsel for the Respondent submitted that the Appellant has not filed any notice of motion seeking for leave of the Court to hear their application out of time. It was his submission that the Appellant has not complied with the Court rules requiring that the appeal be filed within fourteen days from the date of the decision being appealed against.

[4] Learned counsel referred to the case of ***Jimmy Camille v Four Seasons Resort Civil Side 9/2012*** as support for his position.

[5] In terms of his second objection, Learned counsel relied on the case of ***Gomme v Maurel & Anor (SCA 06 of 2010 [2012] SCCA 28 (07 December 2012)*** wherein the Court of Appeal stated that "the rule of res judicata … is founded on a public policy requirement that there should be finality in a court decision and an end to litigation in a matter which has been dealt with in an earlier case".

[6] The Appellant's counsel in answer submitted that the Employment Tribunal ruling for recalculation of dues was read out in open Court on 21st January 2022. He added that this was done without any submissions or arguments about the source of the information on which the recalculation is based.

[7] Learned counsel added that when the Appellant asked for a copy of the ruling for appeal purposes they were constantly told that a member for the Tribunal had not signed the ruling and it was not until 11th March 2022 that they got a copy thereupon filing an appeal on 18th March 2022.

[8] It was the submission of counsel for the Appellant that the actual date of the ruling was the day they received the signed ruling.

[9] Learned counsel then proceeded to submit that "it would be fair just and proper for the court to exercise its inherent jurisdiction to allow the appeal to be heard even if in the strict letter of the law as laid down in the rules has not been made within the prescribed time limit."

[10] On the issue of Res Judicata, Learned counsel submitted that in order for the plea of res judicata to succeed there must be "three-fold identity of subject matter, cause and parties." He submitted that there must be "a final binding decision that encompasses the same subject matter, on the same cause of action and the same parties" referencing the cases of ***Attorney General v Joseph Marzocchi and Anor SCA No 8 of 1996***; ***Mathew Chanyumwai v Seychelles Yatch Club CS 22/17***; ***Gomme v Maurel and Anor (SCA 06 of 2010) [2012] SCCA 28 (07 December 2012)***; ***Hoareau v Hemrick [1973] SLR 272 at 273*** and ***Hercule Barbe v Ginette Esparon [2020] SCSC 559*** in support of his position.

[11] Let's start with the first issue: has the appeal been filed out of time?

[12] Indeed section 4 of Schedule 6 of the Employment Act provides that:

> *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.*

[13] Rule 6 (2) of the Appeal rules (Court's Act) which provides for civil appeals from the Magistrates Court provides that:

> *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.*

[14] The question then is when was the Order delivered?

[15] Learned counsel for the Appellant submitted that "the Chairperson simply read out what seemed to be a fait accompli." Learned counsel goes on to comment on the practice of the higher courts reading the last paragraph of the judgment and advising counsels that they will get copies once corrections are done. Indeed that may be so but I fail to see the relevance to the proceedings at hand.

[16] Section 135 of the Seychelles Code of Civil Procedure provides for signing of the decision in open court on the date of delivery in the Supreme Court.

[17] Section 6 (3) of Schedule 6 of the Employment Act, which provides for the rules applicable before the Tribunal provides that

> *Each member of the Tribunal shall have an equal vote and decisions shall be reached by a majority vote.*

Subsection 6 provides that:

> *The Tribunal shall before making any decision—*
>
> *(a) afford the parties the opportunity to be heard;*
>
> *(b) generally observe the rules of natural justice.*

Subsection 7 provides that

> *Notwithstanding the foregoing, the Tribunal shall have power to conduct proceedings in whatever manner it considers most appropriate.*

[18] There is no corresponding provision for the Magistrates Court or the Employment Tribunal for signing of the decision in open court on the date of delivery of the decision nor is there a provision that a signed copy of the judgment is needed in order for an appeal to be filed. That said it is good practice and in keeping with its mandate to "observe the rules of natural justice" that reasoned decisions should be given in open session.

[19] It is noted that at no point did counsel raise an issue that the Tribunal did not have a quorum on the day in question. Nor did counsel claim that the judgment was unsigned on the day it was delivered, so much as, subsequently he was told they were awaiting signature of one member. His point of contention was that the Order was only valid when it was signed and the Appellant received a copy on 11th March 2022.

[20] In my humble opinion it is neither here nor there when the parties received the Order in question. Rule 6 (1) of the Appeal Rules (Court's Act) is clear and unambiguous:

> *Every appeal shall be commenced by a notice of appeal.*

It was the Appellant's choice to await the copy of the Order in question in order to file its Notice and Grounds of Appeal together.

[21] To my mind there is a practical reason for the requirement that a Notice of Appeal be filed first. As clearly foreseen by Rule 7 it then gives time for the record to be prepared, which would include corrections to the typed decision and proceedings before being sent to the parties. It is only following the service of the record that the Memorandum of Appeal is to be filed thereby ensuring that the Appellant has all the necessary documents and information to decide whether or not to proceed with the appeal and also to file a comprehensive appeal.

[22] In as much as I agree that the Courts have plenty of challenges to address, it is my firm belief that if parties are aware of these challenges they should bring them to the attention of the Registrar or the Chief Justice at the earliest in order for the issues to be addressed instead of keeping quiet only to whip them out at opportune times.

[23] With all that said the date of delivery of the Employment Tribunal ruling was when it was read out in open Court on 21st January 2022. The Appeal having been filed on 18th March 2022 is well outside the time limit. The proper procedure would have been for an application condoning the delay instead of a misplaced lecture about the Tribunal not giving litigants a signed copy of rulings speedily.

[24] Flowing from the above then, is there an application to file the appeal out of time and if so should this Court condone the delay?

[25] The submissions of Learned counsel for the Appellant paragraphs 14 and 15 read as follows:

> *14. Therefore the Appellant humbly submits that in the light of the above facts and authorities it would be just and proper to accept this appeal as filed as there is no misrepresentation since the date of the reading of the ruling and the date of the receipt of the ruling are clearly stated and the appeal has been filed within the prescribed time limit.*

15. The Appellant also submits that in the light of the above submissions it would be fair just and proper for the court to exercise its inherent jurisdiction to allow the appeal to be heard even if in the strict letter of the law was laid down in the rules has not been made within the prescribed time limit.

[26] According to Rule 5 of the Appeal Rules in the Court's Act

> *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.*

[27] In the case of **Public Utilities Corporation v Elisa [2011] SLR 100,** the Court of Appeal remarked that "...the trend today is that so long as there is substantial compliance..., adherence precisely to time element should not be fatal to the claim." The Court of Appeal however went on to find that "A court before which such the Limitation period is raised should proceed on a case to case basis and examine the facts and circumstances to decide whether justice would be better served by upholding the procedural objection or overruling it."

[28] In the case of **Jean vs Inter Island Boat Ltd (Civil Appeal No. 44 of 2012) [2013] SCSC 6 (31 January 2013)** the Learned Chief Justice N'tende in "enforcing the time standards established by the rules" relied on the case of **Algae v Attorney General SCA No. 35 of 2010 [unreported]** where the Court of Appeal cited the words of the Privy Council in Ratnam v Curmarasamy [1964] All ER 933, that

> *'The 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 requires 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.'*

The Learned Chief Justice N'tende went on to refer to the case of ***Revici v. Prentice Hall Incorporated, [1969] 1 All E.R. 772*** wherein Lord Denning M.R. made the same point when he said at p.774:

> *'Counsel for the plaintiff referred us to the old cases in the last century of Eaton v. Storer (1) and Atwood v. Chichester (2), and urged that time does not matter as long as the costs are paid. Nowadays we regard time very differently from what they did in the nineteenth century. We insist on the rules as to time being observed.'*

As did Edmund Davies, L.J., who similarly opined at p.774:

> *'On the contrary, the rules are there to be observed; and if there is non compliance (other than of a minimal kind), that is something which has to be explained away.* Prima facie, *if no excuse is offered, no indulgence should be granted.'*

[29] Learned counsel for the Appellant referred the Court to the case of **Christian v Namibia Financial Institutions Supervisory Authority (Appeal -2010/244) [2018] NAHCMD 19 (08 February 2018)**. I have not had the chance to read the judgment referred to but I have to agree with the extract provided. Indeed the Courts do have the discretion to condone non-compliance to the rules, however that discretion is not to be exercised "*in the absence of sufficient cause...*" Indeed "*the rules exist for the court, and not the court for the rules...the court will not become the slave of rules designed and intended to facilitate it in doing justice. It will interpret and apply them, not in a formalistic and inflexible manner, but in furtherance of the objectives they are intended to serve. But, because they cannot conceivably be exhaustive and cater for every procedural contingency that may arise in the conduct of litigation, the court may draw on its inherent powers to relax them or, on sufficient cause shown, excuse non-compliance with them to ensure efficient, uniform and fair administration of justice for all concerned*".

[30] In the case of ***Mondon v Mondon (MA 181 of 2020) [2021] SCSC 296 (09 June 2021)*** his Lordship Dodin J "respectfully differed" from the views of his Lordship Domah JA in the case of ***Gill & Ors v Film Ansalt [2013] SLR 137*** wherein his Lordship Domah JA stated that:

the Court should not be a slave to procedures as procedures, "hand-maids" are meant to be of assistance and not necessarily for strict and unwavering compliance.

His Lordship Dodin J was of the opinion that:

some procedures are designed to assist the parties and the Court).

He went on to add that:

whilst it is not agreeable for "hand-maids" who aspire to be "mistresses" to be always accorded such ambition, it is also not acceptable to reduce "mistresses" to the position of "hand-maids" and thus create uncertainty in what should otherwise be an organised state of affairs.

[31] What I can glean from the above authorities is that the rules are there to be obeyed in order to ensure fairness and justice. Where there is non-compliance, sufficient cause has to be shown as to why the Court should exercise its discretion to condone the non-compliance.

[32] At this juncture it is noted that the Appellant in their Notice of Appeal made the following observation in reference to the Order, "received by the parties on 11th March 2022", clearly showing that the Appellant was well aware that there was an issue with the date of filing of the appeal.

[33] Furthermore, the Appellant has not so much explained the delay and sought the indulgence of the Court as blamed the Tribunal for the Appellant's own failure to file its Appeal on time.

[34] On a consideration of all the above I decline to exercise the discretion to condone the delay for the reason that there has not been, in my view, a proper application to excuse the non-adherence to the procedure by way of a written motion or verbal motion. Even if one was to consider the submissions of counsel at paragraphs 14 and 15 a proper application, I find that the excuse of delay in filing the appeal being a result of the Appellant awaiting a signed copy of the decision is not sufficient cause.

[35] I do not propose to address the second objection with regard to res judicata. Suffice it to say that I agree with Learned counsel for the Appellant to the extent that the current appeal

revolves around the Order of the Court of Appeal with regard to the computation of benefits due to the Respondent.

[36] In view of my findings with regard to the first objection, the Appeal is dismissed.

Signed, dated and delivered at Ile du Port on ..... 7th December 2022

Pillay J