SUPREME COURT OF SEYCHELLES

Reportable
[2023] SCSC 227
MC 44/2022

In the matter between:

RALPH AMELIE AND ORS **Appellants**
(Represented by Mr Basil Hoareau)

and

CABLE AND WIRELESS (SEYCHELLES) LIMITED
Represented by its Chief Executive Officer
(Represented by Mr Divino Sabino)

Neutral Citation:	*Amelie & Ors vs Cable & Wireless (Sey) Ltd* (MC 44/2022) [2023] SCSC 227 (21st March 2023)
Before:	Adeline J
Summary:	Application for leave to appeal out of time.
Heard:	27th January 2023
Delivered:	21st March 2023

FINAL ORDER

Application for leave to appeal out of time is dismissed with cost.

ORDER ON MOTION

Adeline, J

[1] The Appellants, Ralph Amelie & Ors, who were the Applicants in the court at first instance, has commenced proceedings by way of notice of motion supported by an affidavit under Rule 1 of the Appeal Rules (SI 11 of 1961) ("the Rules"), made under the Courts Act, Cap

52 of the laws of Seychelles, ("the Act"), by which they apply to this court under Section 5 of the Rules, for an extension of time to file their Appeal.

[2] The grounds for the making of the application are set out in the affidavit in support of the same sworn by one Ralph Amelie, of which the most relevant averments for the determination of this application are quoted to be the following;

"*4. On the 13th May 2022, the Employment Tribunal delivered judgment in respect of the claims of prospective Appellants, instituted before the Employment Tribunal against Cable & Wireless Seychelles Limited (hereinafter the Respondent). It is now shown to me, produced and exhibited herewith as A1 a copy of the judgment.*

5. Despite, the judgment being read openly before the Employment Tribunal, only a summary of the judgment was read out, and not the entire judgment. Therefore, the prospective Appellants could not fully and properly comprehend the findings and reasoning of the Employment Tribunal at the time the judgment was ready openly in the Employment Tribunal.

6. Despite, the fact that the judgment was read openly before the Employment Tribunal, it was only on the 14th June 2022, that a copy of the judgment was received by the prospective Appellants.

7. Moreover, by the time we received the judgment, the Attorney-at-law of the prospective Appellants who was representing the prospective Appellants before the Employment, Miss Kelly Louise, had been appointed as a Magistrate on the 8th June 2022.

8. As a result, the prospective Appellants had to obtain a new Attorney-at- law and it was only the 1st July 2022 that the prospective Appellants appointed Attorney-at-law Basil Hoareau as the new legal representative.

9. The Respondent has already filed its Notice of Appeal.

10. The Notice of Appeal and Memorandum of Appeal in respect of the proposed appeal of the prospective Appellants, have already been drafted and are ready to be filed. It is now shown to me, produced and exhibited hereto, respectively as RA2, and RA3, a copy of the said Notice of Appeal and Memorandum of Appeal".

[3] The Respondent in seeking to oppose this application, did file an affidavit in reply sworn by one Martin Laurence, the Director Regulatory and Corporate Compliance in the employment of the Respondent, in which affidavit, he interlia makes the following averments;

"3. That I was in attendance at the Employment Tribunal when the relevant judgment was delivered on the 13th May 2022. That Mr Ralph Amelie and several of the Applicants were present on the day including their lawyer, Ms Kelly Louise.

4. That although only a summary of the judgment was read in open court, the heads of the awards were clearly stated by the court. This includes a clear statement from the Employment Tribunal that it awarded the Applicants only with their salaries and not any of the other purported employment benefits that they sought to claim.

5. That I have seen the proposed Memorandum of Appeal of the Applicants and that the summary of the judgment as read out openly in the Employment Tribunal on the 13th May 2022 clearly outlined the matters that are the subject matter of the proposed appeal of the Applicants. They would have therefore known about the matters that they wish to base their appeal on, on the day that they judgment was delivered by the Employment Tribunal.

6. In any event, I am advised by the Respondent's counsel, Mr Divino Sabino, that for an Appeal from the Employment Tribunal to the Supreme Court, it is not a requirement to particularise the grounds of appeal on the filing of the Notice of Appeal, that the memorandum of Appeal can be filed later. Accordingly, the Applicants could have filed their Notice of Appeal even before receiving a written copy of the judgment. Their counsel at the time, Ms Kelly Louise, could have filed their Notice of Appeal any time from the date of delivery of the judgment till the date she was appointed as a Magistrate.

7. Accordingly, cognizant of the heads of the awards given in the judgment, of which the Respondent wished to appeal against, and given that the Memorandum of Appeal could be filed at a later date, we filed our Notice of Appeal on the 27th May 2022 (Civil Appeal 11 of 2022). I am advised by the Respondent's counsel, Mr Divino Sabino, that the Notice of Appeal could have been filed up until the 2nd June 2022, being 14 court days from the 13th May 2022, the day that the judgment was delivered. By the Applicant's own affidavit in

Support of this motion, they had legal counsel until at least the 8th of June 2022, when Ms Kelly Louise was appointed as Magistrate.

8. That we receive a written copy of the ruling on the 13th June 2022, and the annex on the 14th June 2022. Although this is less than ideal, it did not prevent us from filing our Notice of Appeal in time, which the Applicants could have done.

9. That this application should therefore be dismissed with costs".

SUBMISSION

(Appellant's Submission)

[4] Learned counsel for the Appellant opted to submit orally, whereas, learned counsel for the Respondent opted to submit partly orally and partly in writing. In his submission, learned counsel for the Appellant began by reminding the court that an appeal as the instant one, must have been lodged by way of notice of appeal within the prescribed period of 14 days of the date of the judgment or order, which he said, admittedly, has not been done, and that's the reason why the Appellant is calling on the court to exercise its discretion and extend the time within which the Appellants can file their Notice of Appeal. Learned counsel explained, that under Rule 5 of the Appeals Rules, in granting this application extending the time to file Notice of Appeal, the court can even impose such conditions that are reasonable in the circumstances of the case.

[5] Learned counsel stated, that in exercising such a discretion, the court has to act judiciously in the sense that it has to conduct a balancing exercising between the pros and cons taking into account all the relevant facts and circumstances of the case, and to decide the application purely and solely on its merit. The facts as laid before this court as per learned counsel's submission, are those averred in the supporting affidavit to the motion sworn by Mr Ralph Amelie, the 1st Appellant, as well as those averred by Mr Laurence in the Respondent's affidavit in reply. They are that, the Employment Tribunal on the 13th May 2022, did deliver judgment on this matter, although only a summary of the judgment was read in open court, which learned counsel said is confirmed by Mr Laurence's affidavit in reply, at paragraph 7. Further, learned counsel added, that although the judgment was

delivered on the 13th May 2022, the parties only received copy of the entire judgment more than a month later, the 14th June 2022.

[6] Learned counsel added, that the judgment is a bulky one containing 119 paragraphs, and that ample time was needed to read and assimilate the content. He also added, that the Appellant filed this application by way of notice of motion supported by affidavit on the 7th July 2022, and exhibited with Mr Amelie's affidavit is the notice of appeal to be filed once the Respondent receives the extension of time which is being sought for. Learned counsel also stated, that the Appellant has even had their memorandum prepared, and is ready to file it in court once the extension of time is granted.

[7] Learned counsel made the point, in concurrence with the law as it presently stands, that generally, the time prescribed by law to lodge an appeal must be respected. He then proceeded to add, that given that the court is vested with such a discretionary power to extent the time limit, that shows, that the rule is not cast in stone, and that is evident based on case law authorities. Learned counsel added, that the court's exercise of its discretion extending the time limit to lodge an appeal, means, that there are certain conditions which the Appellant has to satisfy the court that they are met. Learned counsel cited the case of Eden Holistic Spa (Pty) Ltd vs Woodland Holding, in which case he said, the Appellant was 4 days out of time. Learned counsel refers the court to page 2, the last sentence of the paragraph. I have read the judgment of Eden Holistic Spa (supra) and for ease of reference the following passage is quoted from the judgment;

"... Furthermore the period of 4 days outside the prescribed time is not unduly lengthy that it would cause undue prejudice to the Respondent. I have also perused the memorandum of appeal and I find that there are reasonably serious questions of law and fact to be tried on appeal. This meets the requirements set out in the case of Yvon Dusel & Anor vs Yvette Juliette & Anor case No 1 of 2005, where the Court of Appeal determined, that the Applicant must "show that on the appeal they have an arguable case and the prospects of success are good on the balance of probabilities".

[8] Learned counsel submitted, that the court made two findings in this case (i) there was no undue delay, and (ii) there was an arguable case. Learned counsel also cited the case of Kannus Supermarket vs Vaithiyanathan Uthrapathy (MA 200/2020) [2021] SCSC 320 (14 June 2021) in which case the Appellant was 8 days outside the prescribed limitation period of 14 days, and in which case the court referred to the case of Parcou vs Parcou SCA 32/1994, LC 93 which held that it is trite law that the court has a discretion to allow appeals out of time, and that when exercising its discretion, the court has to consider "the length of the delay, reasons for the delay, degrees of prejudice to the Defendant, and whether there is an arguable case on appeal". (underlined emphasis for counsel)

[9] Learned counsel also cited the case of FARM AG vs Barclays Bank SSC 2002in which case it was confirmed, that the court has an unfettered discretion in matters of delay and extending time for appeal, (underlined emphasis for counsel) and that the court will exercise its discretion for the purpose of doing justice. Learned counsel emphasised, that in the same case, the court did say that, the "legitimate expectation of a Respondent that no appeal will be filed after the expiry of the notice period, cannot in the interest of justice, defeats the Applicant's right to apply for leave out of time".

[10] Learned counsel cited the case of Germain vs Republic Crim 1 (a) 2005, 5 March 2007, in which case, he said, the court had said that "non-compliance with procedural requirements is not fatal to an appeal provided that the Appellant shows good cause to justify non-compliance".

[11] As per learned counsel's submission, in that case, the court went on as to say that, "In deciding whether to grant leave to appeal, the court should take into account all the circumstances of the case, including, the intention of the Applicant, diligence of counsel, proper explanation for delay, extent of a delay, unprejudiced and the merits of the application for leave to appeal".

[12] Learned counsel cited the English case of Denton & Ors vs TH White Limited [2014] 1 WLR 3926, in which case he said, the court identified a three-staged approach for

determining whether or not, to grant leave to appeal out of time. The three-staged approach are;

"(i) to identify and assess the seriousness or significant of the failure to comply with the Rule. As regards to the first stage, if the breach is not serious or significant, leave will usually be granted.
(ii) If the court is of the view, that the breach is serious or significant, then the second and third stages become more important, in that, the court has to ascertain why the failure or default occurred".

[13] In his attempt to apply this approach developed by case law to the facts of the instant case, learned counsel first considered the issue of time that has lapsed between the time when the appeal ought to have been filed to the 7th July 2022 when this application to extend time was actually filed, and submitted, that there has been no inordinate or unreasonable delay. He explained, that the judgment was delivered on the 13th May 2022, and 14 days later means that the appeal ought to have been filed by the 27th May 2022. As per learned counsel's submission, 6 weeks delay cannot be said to be a lengthy, unreasonable or inordinate delay by any stretch of the imagination.

[14] Learned counsel then urged the court to consider the reasons for the delay in order to make the right decision. He emphasised, that the court must consider the fact that only a summary of the judgment was read when the judgment was delivered on the 13th May 2022, and also, the fact that the said judgment was lengthy and complex containing a total of 119 paragraphs. Points which learned counsel said, are also made in the affidavit in support of the Application sworn by Mr Amelie. Learned counsel also stated, that on the day the summary of the judgment was read and delivered, not all the Applicants were present, and that fact is also borne out of Mr Laurence's affidavit in reply to the Applicant's application.

[15] Learned counsel did bring to the attention of this court Mr Amelie's averments in his affidavit in support of the application, that he could not comprehend the findings and reasoning of the Employment Tribunal, and when a copy of the whole judgment was

received on the 4th June 2022, their lawyer then, Ms Kelly Louise, had or was about to be appointed a Magistrate. Learned counsel submitted, that as such, the Applicants needed to appoint a new lawyer to represent them which they did on the 1st July 2022, when they effectively appointed him as their lawyer. According to learned counsel, he needed to take sometime to go through the judgment to see if there is any merit for an appeal by determining the grounds for the appeal, and also, to be able to prepare the Memorandum of Appeal, which he said, explains why the application for an extension of time to file Notice of Appeal was on the 7th July 2022.

[16] Learned counsel then proceeded to discuss, whether, the granting of an extension of time to file notice of appeal will cause prejudice to the Respondent. His conclusion, was that it would not. Learned counsel commented on the case of Wilfred Richemond v Gilbert Lesperance cited in the Respondent's written submission as an authority to the principle that "there must be finality to judicial decision, and for this purpose, there must be strict compliance with procedural setting of time period for filling of appeals".

[17] Learned counsel stated, that finality to this judgment is not relevant in this particular instance, more so, because the Respondent itself has challenged the judgment by instituting an appeal, and this is averred in Mr Laurence's affidavit which affidavit makes no mention of the prejudice that it would suffer or is likely to suffer if leave is granted to the Applicant. Learned counsel submitted, that the Applicants/Appellants do have an arguable case, and that this is borne out of the Memorandum of Appeal. Learned counsel cited the case of Kankan Ltd v Senpa v Seychelles Civil Aviation, in which case, he said, the Court of Appeal had determined, that the duty to mitigate no longer forms part of the Seychelles law, and that is one of the points that will be taken on appeal.

[18] In essence, the crux of the submission of learned counsel for the Applicants/Appellants stems, amongst other things, from the following propositions;

(i) Only a summary of the judgment was read when the judgment was delivered on the 13th May 2022.

(ii) The said judgment is lengthy, bulky and complex containing 119 paragraphs.

(iii) The Applicants/Appellants could not comprehend the findings and reasoning of the employment tribunal then.

(iv) Counsel who was representing them at the Employment Tribunal was appointed Magistrate on the 8th June 2022.

(v) Applicants/Appellants needed time to appoint a new lawyer and only did so on the 1st July 2022.

(vi) Lawyer studied judgment to establish if on merit to lodge appeal.

(vii) Lawyer needed time to prepare Memorandum of Appeal which was filed on the 7th July 2022.

(viii) Whether extension of time will cause prejudice to the Respondent.

(ix) In his affidavit, Mr Laurence fails to make any averments of any prejudice the Respondent will suffer.

(x) The Applicants/Appellants have an arguable case.

(xi) The duty to mitigate loss is not part of our employment law, and

(xii) Non-compliance with procedural requirements is not fatal to an appeal provided that the Applicant shows good cause to justify non-compliance.

[19] In his written submission opposing the Applicant's application, learned counsel for the Respondent sought to argue, that the application should not be allowed for several reasons some of which he also canvassed in his oral submission. To put the application made by the Applicants in perspective as regards to the law, learned counsel began by correctly stated, that an appeal from a decision of the Employment Tribunal to this court is governed by the statutory provision in paragraph 4 of Schedule 6 of the Employment Act 1995, as amended.

[20] Such statutory provision provides, that any person against whom the Employment Tribunal delivers a judgment, may appeal to the Supreme Court on the same conditions as appeals from a decision of the Magistrates' Court. Under the Appeals Rules discussed in the preceding paragraphs, every appeals have to commence by way of Notice of Appeal, such "to be delivered to the clerk of the court within 14 days from the date of the decision

appealed against unless some other period is expressly provided by the law which authorises the appeal".

[21] Learned counsel for the Respondent found it convenient to make special mention of Rule 5 of the Rules which provides that;

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

[22] Thus, learned counsel for the Respondent has no issue over whether, as a matter of procedural law, the Applicants' application is in conformity with the law as clearly it is.

[23] Learned counsel reminded the court, that although only a summary of the judgment was read in open court on the 13th May 2022, the heads of the awards were clearly stated by the Tribunal that those who were present, including their lawyer, would have known the grounds that they now wish to pursue their appeal on.

[24] Learned counsel then sought to discuss the principles enunciated by case law which the court ought to consider and put in application, in deciding whether or not to grant the application for an extension of time to file notice of appeal. Learned counsel cited the case of Michel v North Island (Pty) Ltd (MC 50 of 2021) [2021] SCSC 706) 29 October 2021, in which case the court had to consider an application for extension of time to file notice of appeal for appeal against the decision of the Employment Tribunal to the Supreme Court. The factors which the court had to consider in making its decision whether or not to grant the application are;

(i) The length of the delay
(ii) The reasons for the delay
(iii) The chances of the appeal succeeding if the appeal is granted, and
(iv) The degree of prejudice to the Respondent

[25] Learned counsel stated, that in the North Island case (Supra) the court mentioned the case of Wilfred Richmond v Gilbert Lesperance (unreported) SCA MA 9/2013) in which case "delay" was discussed, and quoted the Court of Appeal having said the following;

"*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*".

[26] Learned counsel also cited the case of Lagesse v CIE Ltd v Commissioner of Income Tax 1991 MR 46, in which case the case of Dependants Pursun v Vacoas Transport Co Ltd 1969 MR 148 and Espitalier-Noel Ltd vs Svriet 198 were cited, applying 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".

[27] Learned counsel also cited the constitutional court case of Lesperance v Bastienne & Anor (MA 324 of 2021) [2022] SCSC 4 (18 October 2022) to further illustrate the court's approach in determining an application for leave to file appeal out of time. In that case, the court did mention the case of Darrel Green v Seychelles Licensing Authority and Government of Seychelles CA 43/1997, in which case, the court had said that to file an application out of time is not the norm but the exception, and that such application shall be granted not as of course but only if the Applicant shows sufficient reason to justify an extension of time. It was also stated in Darrel Green (supra) that an extension of time will be granted if the court is satisfied, that there is good and sufficient cause for the delay, and the court will consider whether the circumstances that cause the delay are attributable to the Applicant or not.

[28] Therefore, based on the principles coming out of the above cited cases, as per learned counsel's submission, it is only when the delay is not because of the Appellant fault or that of his legal adviser's fault, that the delay would be excused. Commenting on the

Applicants' argument, that they did not comprehend the ruling until they received a written copy of the judgment on the 14th June 2022 because only a summary of the judgment was read on the 13th May 2022, and that they did not have an Attorney to represent them from the 8th June to the 1st July 2022, learned counsel submitted, that the Applicants fails to particularise in their affidavit in support of their application, what it was that they did not comprehend.

[29] To counter the Appellants' suggestion, that they did not comprehend the ruling of the Employment Tribunal when the summary of the judgment was read on the 13th May 2022, at paragraph 9 of his written submission, learned counsel has this to say;

"*9. But they would have had an attorney when the summary was read out. And the summary clearly stated the heads of the awards. They and their counsel would have known that their salaries was not awarded to them and that for particular Applicants who had alternative work or alternative income, their salary award was discounted accordingly. This was clear from the summary as can be seen from Martin Laurence's affidavit in reply to this application. The Applicants cannot genuinely claim and in fact, do not specifically claim in their affidavit in support of this application that they did not know about this on the day that the summary was delivered*".

[30] To further counter the Appellants' argument, learned counsel proceeded to add, that the Appeal Rules do not require the Appellants to file their Memorandum of Appeal within 14 days of the delivery of the judgment. All that the rules require, is that, they should have filed their notice of appeal within 14 days. Having not done so, means, that this was because of their fault or the fault of their lawyer, and therefore, based on the case law authorities discussed above, their application cannot succeed. Learned counsel also stated, that the fact that the Respondent was able to file its notice of appeal against the same judgment within time, means, that the Applicants could have done so as well, and therefore, the reasons given for not having filed their notice of appeal on time have no merit because it is entirely their fault having not done it.

[31] Learned counsel submitted, that based on the case of North Island (Supra), the chances of success on appeal is another consideration in determining whether an application for extension of time should be allowed or not, and that decision should be based on a prima facie view of the case. Learned counsel refers the court to the Applicants' Memorandum of Appeal, and points to the fact that ground 1 is based on the 5th to 26th Applicants not being awarded their employment benefits for the entire 12 months' period that they had claimed for other than their salaries which were awarded to them. Learned counsel brings to the attention of the court, that at paragraph 49 and 50 of the tribunal's judgment, the tribunal makes the point, that a party may not claim for what is not pleaded, or prayed for, and that they only prayed for their salaries.

[32] As to Ground 2 in the Memorandum of Appeal, learned counsel submitted, that in respect of the issue of re-instatement as regards to the 1st – 4th Applicants, in the judgment, at paragraph 95-98, the employment tribunal found that the 2nd Applicant is a pensioner and that he could not be re-instated, and in respect of the 1st, 3rd and 4th Respondents the tribunal found that reinstatement was not practicable, and as such, this ground is unlikely to have a chance of success.

[33] Learned counsel submitted, that the proposed Grounds 3 and 4 are similar to Ground 1, in that, they seek for other employment benefits besides their salaries, which the 1st-4th Applicants believe are due to them. Yet during the mediation process, their only claim raised was for payment of unpaid salaries. Learned counsel also commented on the proposed ground 5 in the Appellants' Memorandum of Appeal seeking to challenge the deductions made by the Employment Tribunal to the awards of the 7th, 8th, 16th and 17th Applicants. Learned counsel explained, that the 7th Applicant, Juan Gopal, was paid redundancy terminal benefits, and the tribunal having not considered the redundancy payments approved by the Employment Department, awarded him 12 months' salary from June 2016 plus a 13th month salary. According to learned counsel, it is only fair that the redundancy terminal payment is discounted from the award.

[34] In respect of the 8th Applicant, Gina Vidot, learned counsel explained, that a payment was made by the Respondent to her in pursuit of a settlement agreement, and since the Employment Tribunal had ruled that the settlement agreement is void, and awarded her 12 months salaries plus a 13th month salary, the tribunal had ordered that such payment made to her under the settlement agreement, which learned counsel stated is only fair in the circumstances.

[35] As regards to the 16th Applicant, Nicholas Verlaque, learned counsel submitted, that he commenced alternate work from July 2016 at a much higher paid job. He was awarded his salary for the month of June 2016 only. Relying on the case of Savoy Development and Sharifa Salum MA 16/2021 (arising in SCA 10/2021 [2021] SCCA 79 (17 December 2021), learned counsel submitted, that this case is established precedent that a party may not profit from unfair dismissal and claim salaries, that a party may not benefit from two simultaneous salaries.

[36] As regards to the 17th Applicant, Francis Bristol, learned counsel submitted, that the Employment Tribunal allowed him to keep erroneous payments made to him, and awarded him 12 months salaries from June 2016, plus a 13th month salary, and that it is not clear what deduction the 17th Applicant takes issue with.

[37] In sum, learned counsel's submission for the Respondent opposing the application rests, amongst other things, on the following propositions;

(i) The heads of the awards were clearly stated in the summary of the judgment read.

(ii) In Michel v North Island (supra) the court spelt out the criteria to be followed to decide the application, namely;

(a) Length of delay

(b) Reason for delay

(c) Chances of success of an appeal, and

(d) Degree of prejudice to Respondent

(iii) Non-compliance with procedural formalities with the prescribed time limit is fatal unless non-compliance not caused by any act or omission of the Applicants or counsel.

(iv) It was incumbent of the Applicants to show sufficient cause to justify extension.

(v) The Applicants failed to particularise what it was that they did not comprehend in the summary judgment in their affidavit.

(vi) Their counsel was present on the day the summary judgment was read and should have acted diligently.

(vii) There is no requirement under the Appeal Rules to file Memorandum of Appeal within 14 days from date of judgment

(viii) The Applicants have no chance of success on appeal.

DISCUSSION OF THE FACTS AND THE LAW

[38] This application for an extension of time to appeal against the decision of the Employment Tribunal due to the lapse of time, is made under Rule 5 of the Rules which is couched in the following terms;

"Any parts desiring an extension of 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".

[39] That being a rule of the court, the general tendency, based on case law, as far as the court's approach is concerned, is for the court to say that Rules of Court has to be followed. This was the approach in the Court of Appeal case of Aglae v Attorney General SCA No 35 of 2010 [unreported] and cited with approval the words of the Privy Council in the case of Ratnam v Curmarasamy [1964] ALLER 933, having said 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 court 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".

[40] Similar point was echoed in the English case of Revici v Prentice Hall Incorporated [1969] 1 ALLER, when at page 774, Denning MR had this to say;

"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".

[41] In the same case, Edmund Davies LJ was of the opinion (at p.774) that, rules are there to be followed. He commented as follows;

"*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 excused is offered, no indulgence should be granted.*"

[42] Although the above case law authorities support the proposition that Rules of Court has to be obeyed, as a matter of construction, the wordings of Rule 5 of the Appeal Rules do suggest, that when there has been disobedience of the rule, it is possible for a party to a case to be granted "such extension as in reasonable in the circumstances", of course, within the precinct of the principles developed through case law over the years. This is an application that calls for the exercise of this court's discretion to grant an extension of time for the Applicants/Appellants to file their notice of appeal out of time, having not done so within the prescribed statutory limitation period. It's a discretion that has to be exercised judicially and expeditiously after careful consideration of the facts as averred in the affidavit in support of the application dated 7th July 2022 sworn by Mr Ralph Amelie as well as the affidavit dated 15th November 2022, sworn by Martin Laurence opposing the application.

[43] The Applicants' case for an extension of time, rests on their proposition, that this case is one fit for an extension of time, not so much because arguably the six weeks delay is not inordinate, but most significantly, because the evidence tendered before this court by way of affidavits, shows special peculiarities which the court ought to consider in determining this application.

[44] Those facts, which appears to give the Applicants'/Appellants' case special peculiarities, which in the submission of learned counsel for the Applicants are the reason why the notice of appeal could not be filed on time, are partly answered by the Respondent in its affidavit in reply sworn by Mr Martin Laurence.

[45] Mr Laurence, interalia, confirms that only a summary of the judgment was read, and added that "the heads of the awards were clearly stated by the court (underlined emphasis is mine). He went on as to say that "a clear statement from the Employment Tribunal that it awarded the Applicants only their salaries and not any of the other purported employment benefits that they sought to claim". (underlined emphasis is mine)

[46] Mr Laurence also avers, that having seen the proposed Memorandum of Appeal of the Applicants, the matters raised therein are matters that were in the contemplation of the Applicants at the time the summary judgment was read on the 13th May 2022.

[47] It is also averred by Mr Laurence, that he is advised, that for such an appeal there is no legal requirement to have the grounds of appeal particularised on the filing of the notice of appeal and that under the Appeals Rules, the Memorandum of Appeal can be filed later, and that the notice of appeal could have been filed by learned counsel Ms Kelly Louise before the 8th June 2022. Through his averment, Mr Laurence reminds the court, that the Respondent filed its Notice of Appeal on the 27th May 2022 (Civil Appeal 11 of 2022) insinuating that the Applicants could well have done the same thing.

[48] Those points are addressed in greater details by learned counsel for the Respondent, Mr Sabino, in his written submission which has been rehearsed in the preceding paragraphs of

this Ruling. Learned counsel for the Applicants/Appellants reply to these propositions, has been amongst other things, that the Applicants/Appellants could not have filed their Notice of Appeal prior to obtaining a copy of the entire judgment simply to preserve their right of appeal as this would have constituted on abuse of process.

[49] It now remains for the court to apply the principles developed by case law to the facts as transpired in evidence in order to make a final determination of the application. In that regard, learned counsel for the Applicants/Appellants finds the case of Kannus Supermarket vs Vaithiyanathan Uthrapathy (MA 200 of 2020) [2021] SCSC 320 (14 June 2021) to be one of the authorities that spelt out the factors for consideration in determining such an application. In his ruling Dodin J had cited Parcou v Parcou SCA 32/1994 LC 93 to confirm that this court does have a discretion to allow appeals out of time, and that the factors to be considered in exercise of such a discretion are length of delay, reasons for the delay, decree of prejudice to the Defendant, and whether there is an arguable case on appeal. Dodin J also cited the case of Farm AG v Barclays Bank SSC 2002, the court having said that "the court will exercise its discretion for the purpose of doing justice to the aggrieved given the particular facts of the case".

[50] Dodin J also cited the case of Germain v Republic Crim (1) (a) 2005, 5 March 2007, in which case the court held, that non-compliance of a procedural requirements is not fatal to an appeal, provided that the Appellants shows "good cause" to justify non-compliance. Interestingly, in this case, the court did say that, "the court should take into account all the circumstances of the case, including, the intention of the Applicant, diligence of counsel, proper explanation for delay, extent of delay, undue prejudice, and the merits of the application for leave to appeal".

[51] In his oral submission, learned counsel for the Applicants/Appellants, found it helpful to follow and recommend the approach illustrated in the English Court of Appeal case of Denton and Others v TH White Limited [2014] 1 WLR 3926. In that particular case, the court formulated a three staged approach for determining whether or not to grant leave to appeal out of time, as follows;

(i) The first stage is to identify and assess the seriousness or significance of the failure to comply with the Rule. If the court's finding is that the breach of the rule is not serious and significant, then the application for leave should be granted. On account of the whole facts and circumstances of this case as averred in the affidavit evidence, it is my considered opinion, that the breach is serious and significance. Therefore, I need to move on to the second stage which is;

(ii) Why did the failure or default occurred, and

(iii) The third stage is to consider all the circumstances of the case so as to be able to deal justly with the application.

[52] As regards to the second stage (ii) above, notwithstanding the explanations and excuses, the failure and default occurred, because the Applicants/Appellants lacked prudence, and quite significantly, counsel representing the Applicants/Appellants at the time lacked diligence. Contrary to learned counsel's opinion that one cannot file a notice of appeal simply to preserve its right of appeal, I am of the opinion, that one has to do so to be on the safe side and that cannot be construed as an abuse of process. Although speculative, in spite of the various reasons given by the Applicants/Appellants as to why they did not file their notice of appeal on time, it may well have been that they only thought of appealing against the judgment of the Employment Tribunal after receiving proper advice, and at that point, it was already too late.

[53] As regards to the third stage, I have considered all the facts and circumstances of this case, and have sought to do justice to the Applicants. I have realised, that to do so I will not do justice to the Respondent which has well on time filed its notice of appeal. To do justice to the case therefore, I have concluded, having employed the three staged approach, that the balance swayed towards not allowing the notice of appeal to be filed out of time.

[54] I have arrived at the same conclusion after considering the criteria enunciated in the case of Michel v North Island (Pty) Ltd (Supra) cited by learned counsel for the Respondent in his written submission, which are, (1) the length of the delay, (2) the reasons for the delay,

(3) the chances of the appeal succeeding if leave is granted, and (4) the degree of prejudice to the Respondent.

[55] I have also considered the words of the court of appeal in Wilfred Richmond v Gilbert Lesperance (unreported) SCA MA 9/2013 (4 September 2013) cited by learned counsel for the Respondent, the court having said, amongst other things, that "... 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.

[56] Clearly, on the facts of this case, there have been gross omissions by the Applicants as well as their counsel whose diligence has to be called into question.

[57] In determining this application, I am also guided by the judgment in the case of Darrel Green vs Seychelles C 43/1997, in which case the court said "that leave to file an application out of time is not the norm, but the exception and shall be granted not as of course but only if the Applicant shows sufficient reason to justify an extension of time".

[58] It is the finding of this court, that there has been a delay of six weeks, and that the Applicants have not shown good cause to justify non-compliance with the prescribed time limit. Although the reasons given for non-compliance are clearly understood, they are attributable to the Applicants' fault due to their failure to act prudently, and the failure of counsel who represented them at that time to act diligently. They knew what they had applied for and what they were awarded when the summary of the judgment was read.

[59] It cannot be good reason, that they could not have filed their notice of appeal because they didn't know at the time what their grounds of appeal that would be in their Memorandum of Appeal, because the law prescribed different rules to file Notice of Appeal, and Memorandum of Appeal. The filing of the notice of appeal under Rule 5 is to show an intension to appeal, whereas, the filing of the Memorandum of Appeal under Rule 11 is to

proceed with the appeal. The words "if the appellant wishes to proceed with the appeal" bear me out.

[60] Although one can argue that the duty to mitigate is not part of our law by relying on case law, when one takes up alternative employment prior to his case before the Employment Tribunal is determined, that person, although not under a duty to, effectively mitigates his loss. As such, he cannot be expected to unjustly enrich himself, or make a profit on the compensation or the terminal employment benefits that would be awarded to him. There would be a need to have the figures adjusted to take into account the benefits derived from the new employment (see Savoy Development Limited vs Salum (SCA 10 of 2021) [2021] SCSC 79 (17th December 2021).

[61] In the final analysis, on account of the totality of the evidence laid before this court for consideration within the sphere of the principles developed by case law, I cannot find how this application for an extension of time to file notice of appeal could succeed.

[62] In the process, I have also considered the submission of counsels representing both sides of the equation, and has been persuaded by the submission of learned counsel for the Respondent who amongst other things, in consideration of the various grounds of appeal has concluded, that the appeal has no chance of success.

[63] I therefore dismiss the application with cost.

Signed, dated and delivered at Ile du Port 21 March 2023.

B Adeline, J