

IN THE EMPLOYMENT RELATIONS COURT
AT SUVA
APPELLATE JURISDICTION

ERCA No. 26 of 2019

IN THE MATTER of an
application for leave to appeal
the interlocutory decision of the
Employment Relations
Tribunal in ERT Dispute No. 6
of 2019

BETWEEN : **MATRIX RISK MANAGEMENT LIMTIED**

APPLICANT

AND : **CONSTRUCTION, ENERGY AND TIMBER WORKERS
UNION OF FIJI**

RESPONDENT

BEFORE : **M. Javed Mansoor, J**

COUNSEL : **Ms. S. Naidu for the applicant**
Mr. U. Koroi for the respondent

Date of Hearing : **22 September 2020**

Date of Decision : **12 January 2023**

DECISION

PRACTICE & PROCEDURE

Leave to appeal interlocutory decision – Strikeout for want of the plaintiff's appearance – Reinstatement of case struck off by the Employment Relations Tribunal – Section 238 (2) (a) of the Employment Relations Act 2007 – Order 41 rule 5 of the High Court Rules 1988 – Order 30 rules 2 & 6 of the Magistrates' Court Rules

1. This is an application seeking leave to appeal the determination made on 23 September 2019 by the resident magistrate of Suva. By his determination, the resident magistrate set aside his order made on 10 May 2019 whereby he struck out the union's employment dispute for want of the respondent's appearance on the first day of the proceeding before the Employment Relations Tribunal (tribunal).
2. The resident magistrate's determination was after hearing the parties pursuant to a notice of motion filed by the respondent to reinstate the case on the tribunal's cause list on the ground that non-appearance was due to a miscommunication between the union and its representative, Mr. Noel Tofinga. The employer resisted the respondent's application for reinstatement of the case saying that the union did not adduce evidence to justify a reasonable explanation for its absence on 10 May 2019.
3. In his affidavit in support of the application for leave to appeal before this court, Mr. Armish Pal, a director of the applicant, took exception to the explanation given by the respondent's National Secretary, John Alexander. In his affidavit in support of the respondent's application to reinstate the case in the tribunal, Mr. Alexander said that he asked Mr. Noel Tofinga, a representative of the union, to appear when the case was called before the tribunal, but that Mr. Tofinga had misunderstood. Mr. Tofinga had assumed that Mr. Alexander, having been in Suva on the day of the case, would attend to the matter. Mr. Pal deposed that either documentary evidence or an affidavit from Mr. Noel Tofinga to supplement Mr. Alexander's affidavit would have been ideal to prove the alleged misunderstanding and assumption. For this reason, the applicant stated,

the respondent failed to satisfactorily explain its absence when the matter was called by the tribunal.

4. The union admitted that it did not appear when the case was called before the tribunal. The case was an employment dispute that was referred for the tribunal's determination by the mediator appointed to resolve the dispute between the parties. Mr. John Alexander explained in his affidavit that non-attendance on 10 May 2019 was due to a miscommunication, and was in no way intended to be disrespectful towards the tribunal. The respondent filed its notice of motion to reinstate the case in the tribunal within two weeks of the resident magistrate's decision to strike out the employment dispute, and explained the reasons for its non-appearance when the case was called in its supporting affidavit.
5. The thrust of the applicant's argument at the hearing was that John Alexander could not have deposed to the misunderstanding that Mr. Tofinga had, as that was not a matter within his personal knowledge. It was submitted that the burden was upon the respondent to establish the reason for its default of appearance when the case was called, and that in the present case, the respondent had not discharged that burden through its failure to comply with rule 5 of Order 41 of the High Court Rules 1988. The applicant submitted that the rules of court must be strictly complied with by litigants, and that any indulgence could only be made available to lay litigants that are not represented by a lawyer.
6. Section 238 (2) (a) of the Employment Relations Act 2007 provides for the application of Magistrates' Court Rules to proceedings before the tribunal. Order 30 rule 2 of the Magistrates' Court Rules allows court, if the plaintiff does not appear, to strike out the cause and order costs in favour of the defendant. However, rule 6 permits any civil cause struck out to be replaced on the cause list by leave of court and on such terms as the court sees fit.
7. The control of proceedings before the tribunal is a matter for the resident magistrate. He has the discretion to decide whether reinstatement of a case serves the interests of justice, and if so, the terms upon which an application for

reinstatement should be allowed. On the material before him, the resident magistrate was satisfied that the respondent's case should be reinstated.

8. The applicant raised issue concerning the affidavit filed in the tribunal on behalf of the respondent. Order 41 rule 5 (1) of the High Court Rules 1988 states that an affidavit must contain only such facts as the deponent is able of his own knowledge to prove. Rule 5 (2) provides an exception to this proposition in that when an affidavit is sworn for the purpose of an interlocutory proceeding, the affidavit may contain statements of information or belief along with the sources and grounds for such information and belief. The resident magistrate did not err in considering the contents of the affidavit filed on behalf of the respondent.
9. Leave to appeal an interlocutory order may be granted at the discretion of court where the applicant can show that the order could result in substantial injustice if it is not set aside. The applicant has failed to show that substantial injustice would be caused if the resident magistrate's determination is not set aside. Moreover, the matters urged by the applicant in his proposed grounds of appeal do not satisfy court that even if leave is granted, the appeal has prospects of success. The court is of the view that there is no basis to interfere with the resident magistrate's determination. No prejudice would be caused to the applicant by the resident magistrate proceeding to hear the employment dispute.

ORDER

- A. Applicant's summons for leave to appeal is struck out.
- B. The record is remitted to the Magistrate Court.
- C. The applicant is to pay the respondent costs summarily assessed in a sum of \$1,000.00 within 21 days of this decision.

Delivered at Suva on this 12th day of January, 2023



A handwritten signature in blue ink, appearing to read "M. Javed Mansoor".

M. Javed Mansoor
Judge