DILMOHAMED N. A. v ARICENT TECHNOLOGIES MAURITIUS LTD

2025 SCJ 104

Record No. 125205

THE SUPREME COURT OF MAURITIUS

In the matter of:-

Noor Ahmad Dilmohamed

Applicant

v

Aricent Technologies Mauritius Ltd

Respondent

JUDGMENT

This is a motion for an order granting the applicant leave to appeal outside delay to the Judicial Committee of the Privy Council under **section 81(1)(b) of the Constitution** against a judgment dated 11 October 2023 in which the Supreme Court dismissed an appeal lodged by the applicant against a judgment of the Industrial Court dated 25 August 2020. The Industrial Court had dismissed the applicant's claim for severance allowance from the respondent.

Leave to appeal outside the statutory delay is being sought by the applicant on the following grounds –

(a) when he became aware of the judgment of the Supreme Court, he tried to get advice *"from all quarters"* and enquired as to whether he could get legal aid. He was told that there was no such possibility and he *"gave up"*;

(b) on or about 28 October 2023 his legal advisers informed him that they had received a part payment in the sum of Rs 600,000 in virtue of another judgment of the Industrial Court dated 29 May 2023 in his favour in a case which he had brought against Baker Tilly (Mauritius) ("Baker Tilly");

(c) he acknowledged receipt of the said cheque on 28 October 2023 and credited it in his bank account *"during the course of the week"*. In a second affidavit, he claims to have credited it in bank on 31 October 2023;

(d) he informed his legal advisers that, once the cheque was cleared, he would give them formal instructions to proceed with the application for leave to appeal;

(e) by the time he instructed his legal advisers to proceed with the application for leave to appeal, the statutory delay of 21 days had already elapsed on 31 October 2023;

(f) since 1 and 2 November 2023 are public holidays, the next working day was Friday 3 November 2023. The legal advisers became aware that the cheque had been cleared *"by"* 7 November 2023. In the circumstances, he was *"aware that it was impossible to proceed with the application for leave to appeal within the statutory delay"*.

The grounds of appeal on which the applicant is proposing to rely read as follows –

"(a) That the Learned Judges were wrong in Law to conclude that the dismissal was justified according to Section 46(5) of the Employment Rights Act 2008, when in fact the respondent had never pleaded that it had given notice to appellant to the effect that the contract of the employment will be put to an end on 31st October 2014 on such ground or any other ground.

(b) The Learned Judge (sic) ought to have found that the dismissal was summary and that it took place on the last day of October 2014 that is on the 31st October 2014.

(c) The Learned Judges misdirected themselves in law when they decided to consider the non-Mauritian legal entities of the Aricent Group worldwide in order to conclude as to whether there was a need for restructuring of the respondent under Section 46(5) of the ERA.

> *(d)* *<u>The Learned Judges were wrong in law</u> when deciding that the alleged economic situation of the respondent required a restructuring when in fact the Audited Financial Statements showed a profitability of US$ 35,185.104 million in the year of the dismissal of the appellant."*

(the underlining is ours).

The respondent is praying that the present application be set aside with costs. It has in an affidavit averred that the applicant ought to have followed the prescribed procedure and lodged his application strictly within delay; that a number of averments in the applicant's affidavit are not supported by documentary evidence; that there is no evidence to explain, let alone justify, the delay between 3 and 16 November 2023; that the applicant has *"flagrantly and fatally failed to demonstrate … a reasonable and/or reasonable justification"* for granting leave to appeal to the Judicial Committee; that there is a need for finality in litigation; and that none of the grounds of appeal raises an arguable case to justify leave being given to appeal outside delay.

At the hearing learned Counsel for the respondent laid emphasis on the fact that the delay has not been explained and this Court should not exercise its discretion to allow the application for leave to be made outside delay. He also submitted that the proposed grounds of appeal do not disclose any arguable point of law of great general public importance.

Learned Counsel for the applicant submitted in reply that the length of the delay was immaterial. As he starkly put it, *"once you are delayed, you are kaput"*. The only issue for the Court, according to him, is whether the delay is so unreasonable that leave should be refused. Since the applicant was unable, through lack of funds, to apply for leave earlier, he should be allowed to exercise his right of appeal. Further the judgment of the appellate Court goes against the case-law on summary dismissal.

We have carefully considered the affidavit evidence and the submissions of learned Counsel.

Section 3 of the Mauritius (Appeals to Privy Council) Order 1968 reads as follows –

> *"Applications to the Court for leave to appeal shall be made by motion or petition within 21 days of the date of the decision to be appealed from, and the applicant shall give all other parties concerned notice of his intended application."*

While an application to the Supreme Court for leave to appeal to the Judicial Committee has to be made within twenty-one days of the date of the impugned decision, it is accepted however, that, in a fit case, where the delay beyond twenty-one days can be justified, the Court may exercise its discretion in order to entertain an application for leave made outside the prescribed delay (see **Sewraz Frères Ltd (In receivership) v British American Tobacco** [2013 SCJ 400] and **Guilliey v OCAPAC Mauritius Holding Ltd** [2025 SCJ 18]).

In **Sewraz Frères Ltd**, the Court of Civil Appeal had delivered judgment on 25 January 2013 and the delay of twenty-one days from that judgment expired on 14 February 2013. The affidavit in support of the application for leave was affirmed on 14 February 2013 while the notice of motion and the motion paper were dated 15 February 2013. The Court found that the applicant was effectively outside delay by six clear days as the respondent was served with the papers on 20 February 2013.

The Court hearing the application for leave referred to the golden rule regarding delays governing appeals to the effect that *"time limits in such matters are peremptory unless the appellant can show that the fault is not his or that of his attorney"*. It appears to have recognised that the delay may be extended where it has been explained by a justifiable reason or where there are *"exceptional circumstances on record which would warrant the exercise of any discretion we may have in favour of allowing this application to be entertained out of time"*. It also noted that in **Ramtohul v The State** [1996 MR 207], the Court observed that, in appropriate cases, the grounds of appeal may be considered by the Court in deciding whether to exercise its discretion to grant an extension to appeal outside delay.

We may also usefully refer to the judgment of **Espitalier-Noël Ltd v Serret** [1980 MR 279], although it concerned failure to comply with Rules of Court governing

an appeal from an interlocutory ruling of a trial Judge to the Court of Civil Appeal and not an application for leave to appeal outside delay to the Judicial Committee. The Court of Civil Appeal laid down the following clear principle –

> *"On the authorities, it seems clear that while the Court may allow an appeal to proceed if the failure to comply with the requirements of the relevant enactment is due to circumstances over which the appellant has no control (e.g. force majeure, such as an epidemic, or a mistake on the part of an officer of the Court), it will decline to do so if the failure is due to an act or an omission attributable to the appellant or his legal adviser."*
>
> (the underlining is ours).

In the present case the 21-day delay from the impugned judgment of the Supreme Court expired on 31 October 2023 so that the application for leave to appeal should have been made by that date. We are of the considered view that an application for leave to appeal is *"made"* for the purposes of **section 3** on the date when the motion paper is lodged in the Registry, and not when it is eventually served on other parties, nor when the notice of motion is filed before the Chief Justice. Indeed the applicant has no control over the two later dates.

With regard to when exactly the motion paper is lodged in the Registry, we can only reiterate the view expressed by the Court in **Espitalier-Noël,** as far back as in 1980, to the effect that *"the Registrar should, to avoid any misunderstanding, clearly set out on the notice (of appeal) that it was lodged in the Registry on a certain date"* instead of inviting parties and the Court to surmise from the handwritten note on the notice of appeal regarding payment of the fees that the notice was filed on the day on which the fees were paid, as per the handwritten note.

Ex facie the original Court record, the motion paper was dated 16 November 2023 and was supported by an affidavit affirmed by the applicant on 16 November 2023. The notice in denunciation was also dated 16 November 2023. We are duty-bound to observe however, with utmost concern, that the brief, that was provided to us at a very late stage before the hearing, contained at pages 2 and 4 a motion paper and a notice in denunciation both dated 30 November 2023.

As per the handwritten note dated 16 November 2023 confirming payment of fees of Rs 1500 on the motion paper, the motion paper was lodged in the Registry on

16 November and served on the respondent on 13 December 2023. For all intents and purposes the application for leave to appeal outside delay was therefore made on 16 November 2023, that is, thirty-seven days after the judgment was delivered by the Supreme Court on 11 October 2023.

Having carefully considered the affidavit evidence and the submissions of learned Counsel, we find that it can hardly be said that this lengthy delay has been satisfactorily explained or justified by the applicant. At all material times the applicant, and his legal advisers in this case (who were, as admitted by learned Counsel for the applicant in Court, the same as those in the applicant's Industrial Court case against Baker Tilly), were fully aware that the present application for leave to appeal to the Judicial Committee had to be filed within twenty-one days of the judgment of the Supreme Court, but also that payment of a sum of Rs 1.1 million was due pursuant to the judgment of the Industrial Court since May 2023. The applicant's explanations based on alleged lack of funds are therefore lame and unconvincing.

Even if we were to accept that the applicant, pending receipt of the cheque, lacked the means to retain the services of legal advisers within twenty-one days of the date of the judgment of the Supreme Court, the long delay after he acknowledged receipt of the funds on 28 October 2023 has not been satisfactorily explained. We cannot ignore the fact that the matter is not a particularly complex one and that his legal advisers, being those who had handled both the Industrial Court plaint and the appeal to the Supreme Court, must be taken to be very familiar with the facts of the case and the applicable law. We were further informed by learned Counsel for the applicant that the cheque had been paid into the bank account of his instructing attorney on 28 October 2023. We can only observe that the legal advisers would in all the circumstances of the case be expected to handle the matter diligently in view of the 21-day delay running from the date of the judgment of the appellate Court. The delay in this matter is clearly attributable to the applicant or his legal advisers.

We have for the sake of completeness considered the arguability of the proposed grounds of appeal. As the applicant has himself stated in his second affidavit, all the proposed grounds of appeal are to the effect that the Supreme Court erred in law in determining that this was not a case of summary dismissal. We find that they amount in effect to no more than a second attempt to appeal from the

judgment of the Industrial Court. We agree with learned Counsel for the respondent that this is clearly not a case raising a far-reaching question of law or a matter of dominant public importance which would warrant our discretion being exercised to entertain an application made outside delay for leave to appeal to the Judicial Committee.

In the light of the above, we decline to exercise our discretion to grant leave to the applicant to appeal outside delay to the Judicial Committee and we set aside the application. With costs.

A.D. Narain
Judge

S. B. A. Hamuth-Laulloo
Judge

19 March 2025

Judgment delivered by Hon. A.D. Narain, Judge

For Applicant : Mr G. Ramdoyal, Attorney at Law
Mr J. Tsang Mang Kin, of Counsel

For Respondent : Mrs F. Maudarboccus-Moolna, SA
Mrs U. Boolell, SC together with
Mr N. Boolell and Mr F. Soreefan, of Counsel