

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2020] SCCA ...
SCA38/2017

In the matter between

DENIS VERKHORUBOV
(rep. by Kelly Louise)

Appellant

and

BEAU-VALLON PROPERTIES LIMITED
(rep. by Elvis Chetty)

Respondent

Neutral Citation: *Verkhorubov v Beau-Vallon Properties Limited* (SCA38/2017) [2020] SCCA
21 August 2020

Before: Fernando PCA, Twomey JA, Tibatemwa- Ekirikubinza JA

Summary: second appeal from Employment Tribunal- dismissal for non-attendance of
counsel and party at Tribunal hearing- breach of natural justice

Heard: 6 August 2020

Delivered: 21 August 2020

ORDER

The appeal is dismissed with costs.

JUDGMENT

TWOMEY JA

[1] This is an appeal from the decision of Pillay J regarding an appeal from the Employment Tribunal – in effect, this is a second appeal of the Tribunal decision, which dismissed the Appellant’s case on the 27 June 2017 for want of prosecution in view of the Appellant’s absence.

[2] By way of background, it must be noted that the Appellant filed a grievance with the Employment Tribunal on 20 April 2017 alleging constructive dismissal. This Court notes from the transcript of proceedings that Counsel for the Appellant was absent on 30 May 2017. A medical certificate dated 29 May 2017 appears on file stating that he was unfit for work and was to return to work on 1 June 2017.

[3] On 20 June on the date fixed for hearing, Counsel was again absent and the proceedings are to the effect that Counsel was attending court at Anse Royale, and that his client had a medical report and a certificate stating that he was fit to return to work on 23 June 2017. The hearing was again adjourned to 27 June 2017.

[4] On 27 June 2017, the proceedings note the following order by the Tribunal:

“This is the ruling of the tribunal; this case is fixed for hearing. The Applicant is absent and the Counsel representing the Respondent has moved that the case be dismissed. Learned Counsel for the Applicant has produced a medical certificate which sought to show that the Applicant’s child is sick. This tribunal is of the view that the Applicant should have made the necessary arrangement to make himself available for the hearing. This court (sic) therefore dismisses the case for want of civil prosecution.”

[5] Despite the ruling above it is clear from the proceedings that Counsel for the Applicant was also absent but represented through Ms Denis, presumably Counsel’s clerk, who had no audience before the courts or tribunals of Seychelles.

[6] On appeal to the Supreme Court of the dismissal of the suit, the Tribunal’s decision was maintained and the appeal dismissed, the learned appeal judge holding that the Tribunal’s decision could not be impugned as there was no medical certificate excusing the Appellant on that date and that, although the report certifies that the Appellant’s child was sick, the Tribunal did not accept the Appellant’s absence as being justified.

[7] From this decision the Appellant has now appealed to this Court on the ground that:

The learned Justice (sic) of the Supreme Court erred in finding that the Learned Chairman of the Employment Tribunal had correctly decided to dismiss the application of the Appellant for want of prosecution in light of the fact that:

a. The Appellant’s counsel had a medical certificate for the 27th June as is clear from the records on 27th June 2017.

b. The Learned Justice (sic) of the Supreme Court erred in finding that the absence of the Appellant for medical reasons was not valid and warranted the dismissing of the Appellant’s case

[8] Counsel for the Appellant has submitted that the learned appeal judge applied the procedural rules of the Tribunal too strictly and in doing so went against the rules of natural justice. In reply, Counsel for the Respondent has submitted that the learned appeal judge had a discretion “within the realms of sound reasoning when applying the rules of natural justice” and did so judiciously in this case.

[9] Rules 6-7 of Schedule 6 to the Employment Act (the Act) provide in relevant part:

(6) The Tribunal shall before making any decision—

(a) afford the parties the opportunity to be heard;

(b) generally observe the rules of natural justice.

(7) Notwithstanding the foregoing, the Tribunal shall have power to conduct proceedings in whatever manner it considers most appropriate.

[10] The above rules are the only rules of procedure guiding proceedings of the Tribunal. In *Ghani v Cote d’Or Lodge (Vacanze Seychelles Limited)* (CA18/2016) [2016] SCSC 901 (18 November 2016), the Supreme Court on an appeal from a Tribunal decision which had also dismissed the Appellant’s case stated that:

“[T]he Tribunal is not comparable to a court in the sense that it provides an informal setting where parties may represent themselves and put their case forward. Its rules of procedure should therefore be more relaxed than that of the formal setting of the court. I am not in this respect advocating a free for all situation where anything goes. Procedures should be adhered to as far as possible but viewed through the prism of an informal forum the rules of natural justice would dictate reasoned and genuine excuses for absences should be considered by the Tribunal.”

[11] I am of the view that that indeed should be the approach of any forum when conducting a hearing and a party does not appear. With regard to the phrase “natural justice” contained in section 6 (b) of the Act, its meaning is not defined by the Act. It is my view that it is

not the Aristotelian concept that is meant here but rather the common law meaning derived from the rule of law developed in the grant of prerogative writs and consisting of two concepts: first, the rule of *audi alteram partem*, relating to the right to be heard; and secondly, *nemo nemo iudex in causa sua*, the right to an unbiased tribunal.

[12] In the particular circumstances of this case, it would appear that it is the first right that is being invoked, namely that the Appellant should have been given the opportunity to be heard. In this respect, the transcript of proceedings indicates that neither Counsel nor the Appellant turned up for the hearing and this was the third time the hearing had been put off for non-appearance of either Counsel or his client. The proceedings also indicate that both Counsel and the Appellant had notice of the dates of the hearing.

[13] Sections 67 and 133 of the Seychelles Code of Civil Procedure (SCCP), though, not applicable to these proceedings, provide for dismissal of a suit for non-appearance of the plaintiff and are a useful guide on the present context. Commenting on these provisions Domah J in *Gill v Film Ansalt* (2013) SLR 137, stated:

“A plaintiff comes willingly to court but a defendant is literally “dragged” to court by the coercive order of a summons issued at the request of the plaintiff. The defendant does not come to court leaving his home or business out of joy or out of choice unlike a plaintiff. What a court should do or not do, when a plaintiff has used the Court’s summons to secure the attendance of a defendant in court and he himself has the temerity of not showing up on the day without good cause, is laid down in mandatory terms in our procedural law...”

The rationale behind the mandatory provision in the law and its strict interpretation lies in the court’s responsibility to assume control of the judicial process under the rule of law and introduce the degree of certainty required for the courts, the profession and the litigating public...

A court of law is a court of law and justice is to be administered according to law.”

[14] As I have stated, the provisions of the SCCP have no direct application to the Employment Tribunal; but the rules of procedure for the Tribunal contained in Rules 6 and 7 (supra), the reference to natural justice, and the rule relating to the discretion of the Tribunal to conduct proceedings in whatever manner it considers most appropriate would

in my opinion have to be infused with similar principles as expressed in provisions of the SCCP and by Domah J.

- [15] Parties and Counsel cannot file cases before the Tribunal and then proceed willy-nilly to turn up or not turn up for spurious reasons. Apart from the rules above, it must also be pointed out that the Practice Direction dated 20 June 2017, in order to ensure the smooth and expedient running of the courts of Seychelles and in the public interest, reminds legal practitioners that when they have accepted instructions from a client and cannot appear or act personally on behalf of the client for any particular reason including illness, they are required pursuant to Rule 8 of the Legal Practitioner's Act (Professional Conduct) Rules 2013 to brief another legal practitioner to appear on behalf of the client; and that where Counsel defaults appearance in Court, civil cases will either be listed for ex-parte hearing or dismissed for want of appearance.
- [16] I cannot therefore find fault with either the Tribunal's decision or specifically the well-reasoned decision of the learned appeal judge dismissing the appeal.
- [17] Further, given the facts of this case, I do not find that the Tribunal departed from the rules of natural justice.

[18] This appeal is dismissed with costs.

Signed, dated and delivered at Ile du Port on 21 August 2020

Twomey JA

I concur

Fernando PCA

I concur

Tibatemwa- Ekirikubinza JA