

IN THE SEYCHELLES COURT OF APPEAL

Reportable

[2021] SCCA 32 13 August 2021
SCA 72/2018 SCSC 1031
(Appeal from CA 11/2018)

In the matter between

BEAU VALLON PROPERTIES
(*rep. by Serge Rouillon*)

Appellant

and

RAHUL BHASIN
(*rep. by Alexia Amesbury*)

Respondent

Neutral Citation: *Beau Vallon Properties v Bhasin* ([2021] SCCA 32 13 August 2021 SCA 72/2018 (Arising in CA 11/2018) SCSC 1031

Before: Twomey, JA, Tibatemwa-Ekirikubinza JA and Dingake JA

Summary: Appeal against the decision of Supreme Court dismissing an appeal from the Employment Tribunal on the grounds that Counsel had not filed arguments supporting the memorandum of appeal – Rule 20, Supreme Court Appeal Rules - the court must consider the record and make an order even in absence of the appellant or arguments

Heard: 4 August 2021

Delivered: 13 August 2021

ORDER

The appeal is allowed. The matter is returned to the Supreme Court to make an order as to the merits and/or the costs as required after considering the record.

TWOMEY JA

Introduction

[1] This is an appeal against the decision of the court *a quo* which dismissed an appeal by the Appellant, Beau Vallon Properties, from the decision of the Employment Tribunal because in the court’s view it could not be required to decide an appeal in the “absence of arguments ... supporting a memorandum of appeal.”

Background to this case

[2] Beau Vallon Properties, a limited liability company, employed an expatriate worker, the Respondent, Mr Bhasin as a chef in its Indian Restaurant. His contract of employment

had required him to work 54 hours a week with authorised additional hours worked to be paid as overtime under the provisions of the Employment Act. As he worked more and more hours, seven days a week, he asked for an increment. Unable to take leave or time off, he continued to clock up overtime hours. His contract was not renewed at its expiry in 2017 and Mr Bhasin claimed the payment of, inter alia, annual leave, public holidays, unpaid salaries in lieu before the Employment Tribunal who found in his favour on 14 March 2018.

- [3] Beau Vallon Properties appealed the decision to the Supreme Court by notice of appeal filed on the same day. The matter came before Judge Pillay for the first mention on 23 May 2018 who fixed the 6th of June for the filing of the memorandum of appeal.
- [4] On that date, Counsel for Beau Vallon Properties explained that he had served Counsel for Mr Bhasin with a copy of the memorandum of appeal and would leave a copy with the court but would file the official copy on a subsequent day. Counsel agreed that they would both file submissions in respect of the appeal and that important additional points would be heard orally on 14 September 2018. The proceedings on the court file indicate that the memorandum of appeal was actually filed on 7 June 2018.
- [5] On the date of the hearing, the court was informed that Counsel for Beau Vallon Properties was out of the jurisdiction and had asked for time to file written submissions. Counsel for Mr Bhasin had also not filed her submissions. The court gave a further extension for both Counsel to file their submissions in time for the court to render a decision on 24 October 2018.
- [6] The proceedings on the court file indicate that Counsel for Mr Bhasin duly filed her submissions on 20 September 2018. On 24 October on the date fixed for judgment, no submissions had been filed by Counsel for Beau Vallon Properties. The court granted a further extension to Counsel warning him that if his submissions were not ready it would still deliver a decision on the appeal on 14 November 2018.
- [7] In her judgment delivered on 14 November 2018 at 2.30 pm, Pillay J stated that the court had still not received the submissions of Counsel for Beau Vallon Properties and

dismissed the appeal as she did “not believe it [was] for the court to peruse the file and decide in the absence of arguments of counsel supporting his memorandum of appeal.”

- [8] It is not in contention that Beau Vallon Properties Ltd’s written submissions were received by the Supreme Court Registry fifteen minutes after the delivery of the court’s decision.

The present appeal

- [9] From this decision Beau Vallon Properties has appealed to this Court on the following ground:

The learned judge erred in failing to deliver judgment based on the merits of the case.

- [10] The only issue for this Court to decide, therefore, is whether the learned appeal judge should have given a decision based purely on the grounds as laid out in the memorandum of appeal together with the proceedings of the Employment Tribunal notwithstanding Counsel’s failure to support the same with written submissions or oral argument.

Submissions of parties on the appeal before this court

- [11] We must state at the outset that we are singularly unimpressed by either Counsel’s efforts to guide this court on the very narrow issue to be decided as reiterated in paragraph 10 above.
- [12] At the risk of repeating ourselves, this Court wanted to be guided on the law relating to what a court’s approach should be when a party appeals a decision of a lower court but neglects to substantiate or support the ground as raised in its memorandum of appeal.
- [13] Counsel for Beau Vallon Properties, Mr. Rouillon, has submitted in skeleton heads that it is incumbent on the court to at least consider the evidence on file regardless of whether Counsel has complied with orders regarding submissions or not. He has further submitted that section 53 of the Seychelles Code of Civil Procedure impels the court to direct how a hearing may proceed as it deems fit in the absence of the plaintiff. Relying on the Ugandan case of *P’Odur v Watmon* (Civil Appeal-2017/35) [2018] IIGHCCD 51 (04

October 2018), and other Ugandan authorities, Counsel also submitted that a litigant may not be penalised for the mistakes of its Counsel.

[14] Mrs. Amesbury, Counsel for Mr. Bhasin, has submitted that Beau Vallon Properties Ltd's ground of appeal is not supported by the authorities of *Pasacleda Co Ltd v Cleomax Mega Top Fun Water Sport Company & Ors* (2020) SCJ 187 and *Dhunputh v The State* (2026) SCJ 375 and that there is no breach of fair trial rights when a party is either denied the opportunity to view the submissions of the other party or file written submissions.

[15] We confess we have difficulty in identifying the relevance of these authorities to the present case.

The applicable law

[16] We also do not find the law as referred to by Counsel for either party as being particularly helpful in the particular circumstances of this case. This case concerns an appeal from the Employment Tribunal to the Supreme Court and the only rules that apply to procedures for such appeals are found in the Employment Act itself.

[17] Section 4 of Schedule 6 made under section 73 of the Employment Act provides:

“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.”

[18] The Appeal Rules relating to appeals from the Magistrates Court as contained in the Courts Act are to the effect that an appeal is deemed withdrawn only if the appellant does not comply with the rules relating to filing a memorandum of appeal and to pay fees and security for costs. It is not alleged here that these conditions were not met. It is my view therefore that these conditions were met.

[19] Of particular significance and application to the present circumstances is Rule 20 which provides:

“20. (1) When the appeal is called for hearing the appellant or his advocate, if present, shall be heard in support of the appeal; the respondent or his advocate, if

present, shall be heard if necessary and in that event the appellant or his advocate may reply.

(2) If the appellant does not appear but the respondent appears, the Judge shall consider the record and if necessary hear the respondent and may allow the appeal, in whole in part, or vary the judgment and may make any order as to the merits or as to costs which the justice of the case requires.

(3) If neither party appears the appeal shall be dismissed unless for special reasons the Judge orders an adjournment.”(Emphasis added)

The decision of this court

[20] There is no need to refer to comparative foreign jurisprudence or even query the necessity to do justice in cases where Counsel does not appear at appeal hearings when the law is crystal clear. Our law states in no uncertain terms that when the appellant does not appear, the court is duty-bound to make an order as to the merits and/or the costs as required after considering the record.

[21] As this was not done, this Court has no option other than to refer the case for the judge in the court *a quo* to “make any order as to the merits or as to costs which the justice of the case requires.” In order to make matters clear this Court emphasises that the consideration by the court *a quo* is on the record as contained in the court file on the date and time of the delivery of judgment, in other words, the submissions that were filed tardily by the appellant may not now be entertained.

Order

[22] This Court therefore orders that this matter be returned to the Supreme Court to make an order as to the merits and/or the costs as required after considering the record.

Dr. Mathilda Twomey, JA

I concur

Dr. L. Tibatewa-Ekirikubinza, JA

I concur

Dr. K. Dingake, JA

Signed, dated and delivered at Ile du Port on 13 August 2021.