IN THE SUPREME COURT OF SEYCHELLES

Lawrence Wells **APPELLANT**

v/s

Beau Vallon Properties Limited **RESPONDENT**
Trading as Coral Strand Hotel

AND

Beau Vallon Properties Limited **APPELLANT**
Trading as Coral Strand Hotel

v/s

Lawrence Wells **RESPONDENT**

Civil Appeal No: CA7 of 2010.

L. Pool for Lawrence Wells (Appellant and Cross-Respondent)

W. Herminie for Beau Vallon Properties Limited (Respondent and Cross-Appellant)

Lawrence Wells present

JUDGMENT

Dodin. J

This is an appeal against the judgment of the Employment Tribunal of Seychelles delivered on the 26th May 2010 which found the Respondent liable towards the Appellant for unlawfully and unjustifiably terminating the contract of employment and ordering the Respondent to pay the Appellant the following:

> *Compensation up to the date the Appellant contract of employment expired less any amount which may have been paid;*
>
> *Notice due by virtue of Appellant contract of employment or by law, less any amount which may have been paid;*

Any leave due up to the Appellant termination of employment less any sum that may have been paid;

Costs of repatriating the Appellant up to his country of residence;

Payment of salary at the rate of USD4500 per month from the date of termination of his contract of employment up to the date of determination less any amount which may have been paid; and

Costs to be taxed as per existing Magistrate's Court rate.

Both parties being dissatisfied with the determination of the Employment Tribunal filed appeals against the said determination. The 9 grounds of appeal of the Appellant Lawrence Wells are that:

The Learned Magistrate misdirected himself as regards an amended application being filed in respect of the Appellant and the Respondent adopting the same defence that was filed in the original application;

The Learned Magistrate was wrong to hold that the granting of a writ of certiorari meant that there were no decisions or determination in respect of the Appellant's application and that the Employment Tribunal was right to hear the Appellant's application on the merits;

The Learned Magistrate failed to take into consideration that the 2nd contract of employment was never signed by the parties and was therefore invalid;

The Learned Magistrate disregarded the evidence of several witnesses who testified to the long hours of work of the Appellant, however, he believed the Respondent who brought no evidence in rebuttal of the Appellant's evidence. He further failed to consider the testimony of the Respondent to the effect that management staff was being paid overtime. The Learned Magistrate furthermore failed to consider the whole of the evidence with regard to the Appellant's overtime payments;

The Learned Magistrate was wrong not to allow payment of annual leave up to the date of judgment in view that the Appellant was compelled to take his annual leave against his will;

The Learned Magistrate was wrong to allow compensation from the Appellant's termination to the date of expiration of the Appellant's contract. Compensation should have been calculated from the date of appointment to the date of judgment;

The Learned Magistrate misinterpreted the law with regard to food and shelter in the case of a non-Seychellois worker. He further refused to accept the original receipts for food tendered in evidence without valid reasons. Had he applied his mind to the fact that in a civil case, proof is on the balance of probabilities, he would have considered the evidence placed before him;

The Learned Magistrate was totally oblivious in his judgment to the fact that delay in processing the case was due to the collapse of the whole employment dispute system and that the Appellant was not at fault. Instead of applying the law correctly, he set out to punish the Appellant for the delay; and

The Learned Magistrate was wrong to refuse the adjustment of the Appellant's salary from Euro to US Dollar and he gave no explanation as to why he disallowed the Appellant's claim.

The Respondent cross-appealed the decision of the Employment Tribunal giving the following grounds of appeal:

The Honourable Employment Tribunal failed to appreciate that there was ample evidence to show that the Respondent was incompetent as a training consultant chef, in that he failed to produce a properly drawn up training plan with a proper syllabus and an evaluation of individual trainee; and

Having determined that the Respondent's contract of employment had expired on the 17th November, 2009, the Honourable Tribunal was wrong to

order that the Respondent be paid salary up to the date of judgment, i.e. 26th June, 2010, thus ordering that he be paid whilst not in employment.

The brief facts of the case are that Mr Lawrence Wells, an United States' citizen, was offered employment as chef consultant and training at the Coral Strand Hotel for a fixed period of 1 year with the option to extend. The letter of offer stated his salary would be Euro 4000 per month. In addition he was to be entitled to duty meals *whilst on duty* (my emphasis), official entertainment costs, a return air ticket to his home destination, accommodation, medical and social insurance, Rs 500 telephone allowance per month and 21 days annual leave. Mr Wells took up employment on the 17th November 2008 and received a salary of US$ 4000 which was later increased to US$ 4500 per month. On the 1st June, 2009, Mr Wells submitted a complaint to the Ministry of Employment and Human Resources Development claiming payment for overtime and the certificate of the Ministry dated 15th June, 2009, concluded that mediation was not successful. On the 8th June, 2009, Coral Strand applied to the Ministry of Employment and Human Resources Development for permission to terminate Mr Wells' contract of employment on account that he had failed to submit training proposal required by his contract of employment. By letter dated 16h June, 2009, Mr Wells' was sent on 12 days leave which he was to start on the 19th pending the Competent Officer's determination regarding the termination of his employment. On the 1st July, 2010, Mr Wells' filed a plaint before the Employment Tribunal on the issue of overtime and other benefits in the event that his employment was terminated. By letter dated 3rd July, 2009, the competent officer approved the termination of the employment of Mr Wells on account of the relationship between himself and his employer having been irretrievably broken down. Mr Wells appealed the decision and on the 31st August, 2009, the Minister maintained the decision of the competent officer. Mr Wells was not satisfied with the decision of the Minister and successfully applied for judicial review to the Supreme Court. The case was remitted to the Employment Tribunal which judgment is now being appealed against by both parties.

For expediency and clarity the court shall first consider whether the Employment Tribunal was correct to hear the case on the merits after the granting of the writ of certiorari by the Supreme Court.

Certiorari is a public law relief for which one asks the court in order to deal with an action of the Government, council or other quasi-governmental organisation. An order of certiorari is given by a senior court to quash a decision of a lower court or other quasi-governmental organisation. The order of certiorari is a discretionary remedy also known as a prerogative order in England and Wales. The order of *certiorari*, is also known as a "quashing order," which shows its literal application when granted.

In the American legal context the application of a writ of certiorari is quite different from the English law application of an order of certiorari. In the United States, certiorari is the writ that an appellate court issues to a lower court in order to review its judgment for legal error where no appeal is available as a matter of right. Hence in this context the granting of a writ does not necessarily mean the Supreme Court [in the U.S.] has found anything wrong with the decision of the lower court. Granting a writ of certiorari means merely that four judges feel the circumstances described in the petition are sufficient to warrant the full Court making a review of the case and of the lower court's action. Conversely, the legal effect of the Supreme Court's denial of a petition for a writ of certiorari is commonly misunderstood as meaning that the Supreme Court approves the decision of a lower court. However, such a denial "imports no expression of opinion upon the merits of the case, as the bar has been told many times.

In the Seychelles context whether the application is for a writ of certiorari or an order of certiorari the proper context to follow is the English law. In considering the submission of the Learned counsel for the Appellant it is clear that the argument put forward is based on the U.S. application of the order. Furthermore the grant of certiorari did not make the termination of the Appellant employment unlawful as the effect of such order is not to substitute the decision appealed against by another decision but to decide whether the decision under review should stand or be nullified. Since the order granted by the Supreme Court of

Seychelles quashed the decision of the Minister the Employment Tribunal was correct to hear the case afresh was the proper procedure to follow to give the order its proper legal application and to reach a decision following all legal procedures and principles of natural justice. Hence this Court finds that this ground of appeal was misconceived and it is rejected accordingly.

The Court now considers the 1st ground of appeal regarding which Application was being considered by the Tribunal. The first Plaint dated July, 2009 was in the process of being entertained by the Employment Tribunal when the Ministry of Employment and Human Resources Development agreed to the determination of the Appellant's contract of employment on the ground of the relationship between the employer and employee had irretrievably broken down. The amended Plaint was filed on the 25th February 2010. Hearing of the case had already started on the 5th February, 2010 and from the record of the hearing at no stage did the Tribunal grant leave to amend the Plaint or requested the Respondent to file amended defence. The Tribunal however treated the case based on the amended Plaint. The differences between the two Plaints were basically, that the amended Plaint addressed the fact that the Appellant's contract had already been terminated and the salary was being claimed in Euros instead of US Dollars.

The contention by Learned Counsel for the Appellant that the Amended Plaint was abandoned is also not supported by the records of the Tribunal. Learned Counsel for the Respondent submitted that since the Tribunal is empowered to regulate its own proceedings, such lacunae in the formalities was not fatal to the proceedings and the judgment of the Tribunal. Be that as it may it is clear that the Tribunal was of the view that the Respondent adopted the original defence and contested the Amended Plaint before the Tribunal. Learned Counsel for the Appellant failed to elucidate any detriment suffered or likely to be suffered by the Appellant as a result of the Tribunal's alleged procedural "faux pas". In fact by considering the Amended Plaint in lieu of the original Plaint, the Tribunal addressed a more comprehensive number of prayers made by the Appellant than it would otherwise have done as the original Plaint was restricted to overtime and possible remedies

in the event of termination. In the circumstances this Court finds this ground of appeal to be rather illogical and it s therefore rejected.

It is now logical to consider the grounds of the cross-appeal as the determination of those two grounds would also affect the determination of the remaining grounds of appeal.

The 1st ground of the cross-appeal concerns the competency of the Appellant. The Employment Tribunal heard evidence from both the Appellant and the Respondent on the issue and dealt with this issue at length in its judgment. The Tribunal concluded as follows:

> *"The Respondent's conclusion that because the Applicant failed to provide a training plan in the form it expected, he was therefore incompetent was too simplistic, and not backed by tangible evidence proving the Applicant's incompetency. The Respondent failed to do what it was expected to do by law, and by good management practice. It is not surprising therefore, that this Tribunal finds that the incompetency of the Applicant was never established or determined by the Respondent, and that no evidence were adduced before this Tribunal to prove that the Respondent was incompetent in carrying out his duties as chef, consultant and trainer. In the circumstances it follows that the termination of the Applicant's contract of employment by the Respondent was unlawful."*

The Employment Tribunal is a Tribunal of facts in the application of employment laws. It hears the evidence and evaluates the demeanor of the witnesses which this Court in its appellate jurisdiction is unable to do. It is therefore only in exceptional circumstances would a Court exercising its appellate jurisdiction, re-evaluate the evidence considered by a lower court or tribunal and substitute its own conclusion in the place of that of the lower court or tribunal. For an appellate court to perform such task there must be established sufficient grounds to show that the decision of the lower court or tribunal based on the specific facts in evidence was so unreasonable that no reasonable court or tribunal would ever have come to that decision. It is a similar principle that exists in administrative law

and well established since the case of ***Associated Provincial Picture Houses v Wednesbury Corporation*** *[1948] 1 KB 223* .

However, having stated the above, it is worth observing that from the records of this case and the chronology of events, there was not one question about the competency of the Appellant before he filed a grievance claiming overtime pay at the Ministry on Employment and Human Resources. Secondly, in the Appellant's Contract of Employment which is undated but signed by the Appellant and admitted as exhibit P3, there are specific provisions for termination of employment by either party in clause 12. Thirdly even the competent officer and the Minister only approved termination on the grounds of the relationship having been irretrievably broken down.

It is therefore clear that the Tribunal did not believe the Respondent on the issue of competency and it was not the first or only authority to conclude thus. Taken with the above finding this court must come to the ultimate conclusion that the decision of the Employment Tribunal on the issue of competency cannot be faulted and is hereby upheld. This ground of cross-appeal is therefore rejected.

The second ground of cross-appeal concerns the order for payment of salary up to 26th June, 2010.

As submitted by the Learned Counsel for the Respondent and supported by uncontroverted evidence adduced before the Employment Tribunal, the Appellant was on a fixed-term contract of 1 year from 17th November, 2008 to 16th November, 2009.

The Employment Act is clear about what benefits must be paid in the event of unlawful termination of a contract of employment. The benefits to be paid are also not in dispute since this Court has upheld the finding of the Tribunal that the contract of employment of the Appellant was unlawfully terminated. The contention now is what should be the period for which the terminal benefits should be paid.

Learned Counsel for the Respondent maintains that whether termination occurred or not the contract was for one year and automatically came to an end

on the 16th November, 2009. It was not therefore within the competence of the Tribunal to extend *de facto* the fixed-term contract of one year to the 16th June, 2010. Furthermore such an order would unjustly enrich the Appellant.

Learned Counsel for the Appellant responded that the Tribunal was correct to calculate the salary up to the date of judgment because no valid termination was deemed to have occurred until the Tribunal made its determination.

Section 46 of the Employment Act state as follows:

> *Section 46(1) "Workers under contracts of continuous employment are entitled to all employment benefits under this Act from the date of employment until lawful termination of the contracts."*
>
> *Section 46(2) "Workers under contracts of employment for a fixed-term are entitled to all employment benefits up to the day the fixed-term contract expires or the earlier lawful termination of the contracts, as the case may be."*

In calculating compensation for the termination of a fixed-term contract particular attention must be paid terms of the contract if any has been inserted as to what benefits shall be paid in the event of termination. In any event such benefits must not be less than the law requires. Where no such terms exist the Court must be guided by existing legal provisions and the general principles of common law which implies the restoration of the party who has suffered loss to a position he would have been had there not been a breach of contract. Damages or compensation are not means by which to punish a defendant who breaches a contract which means that such awards must not be punitive in nature. In calculating the award the court must not allow the claimant to be put in a better position than he would have been had the breach not occurred.

Had the Appellant been in continuous employment and requesting re-instatement, the order of the Tribunal to pay the up to the date of judgment might not have been open to contention. Save for some limited exceptions the same decision cannot be made for a fixed-term contract. It is evident that the Tribunal in ordering that the Appellant be paid up to the date of judgment made

an error which if sustained would be against the provision of Section 46(2) of the Employment Act and would in effect make the Appellant better off than he would otherwise have been had the contract been properly performed which in turn would have the effect of penalizing the Respondent. The Respondent therefore succeeds on the 2nd ground of cross-appeal and the order for payment of salary up to the 16th June, 2010 is accordingly set aside. The Appellant shall be entitled to salaries, compensation and annual leave only up to the 16th November, 2009.

The Court shall now consider the other benefits awarded by the Tribunal which are the subject of this appeal.

Grounds 5, 6 and 8 of the appeal shall be considered together. Learned Counsel for the Appellant submitted that Tribunal erred in not allowing the payment for annual leave and compensation up to the date of judgment relying on ground 8 of the appeal that the Tribunal failed to consider that it was not the fault of the Appellant that the case was not dealt with speedily by the Tribunal. Learned Counsel clearly failed to consider that it was also not the fault of the Respondent that the case was dealt with as it was. Taken to its logical end, Learned Counsel's argument would lead to the conclusion that it is be justiciable for an employer to be penalized so that an employee benefits from circumstances beyond both side's control. Not only does this argument goes against the principle of equality before the law but would also unjustly enrich the Appellant whilst it would penalize the Respondent. The alleged collapse of the dispute system which resulted in the delay in disposing of this case was not attributable to the either party to this case. Payment of compensation for a fixed term contract must be consistent with the period of employment envisaged by both parties.

Annual leave must also be taken by mutual consent of both employer and employee. The letter dated 16th June, 2009, clearly compelled Mr Wells' to take 12 days leave which he was to start on the 19th pending the Competent Officer's determination regarding termination of his employment. The Tribunal therefore erred in concluding that he was paid annual leave due up to the date of termination and further failed to appreciate that since the contract of employment was for 1 year and that since the termination was unlawful, he is

deemed to have remained in employment until the expiry of the contract. The Appellant is therefore entitled to the payment of 21 days annual leave due. He is nevertheless not entitled to public holidays as there is no evidence to show that he worked and it would be pure speculation to assume that he might have worked on any public holiday. Ground 5 of the appeal is allowed only to the extent that the leave due shall be 21 days for a period on one year's employment whilst grounds 6 and 8 of appeal are rejected.

Ground 7 of the appeal concerns the refusal of the Tribunal to consider the provision of food and shelter. Learned Counsel for the Appellant submitted that the Tribunal viewed the receipts for food purchases and heard evidence in support but failed to admit the receipts as exhibits and failed to consider granting relief as the Tribunal took the view that since the contract allowed for duty meals the Appellant was not entitled to such provisions when he was not on duty.

The Tribunal in its judgment in fact did consider the issues of food and shelter and concluded that the Respondent was still responsible for the apartment the Appellant was still living in but did not make a pronouncement as to whether this was a legal entitlement of the Appellant. On the issue of food, the Tribunal considered the evidence brought by the Appellant and his witness to be unreliable for various reasons and concluded that even if it would have wanted, the Tribunal could not have acted on such evidence. However, the main thrust of the Tribunal's decision regarding food rested on the conclusion that the Appellant was only entitled to meals whilst on duty.

It is not a foregone conclusion that an expatriate employee must be entitled to food and shelter at the employer's expense. To determine the extent of entitlement it was correct for the Tribunal to consider the provisions of the employee's contract of employment. In the case of the Appellant, he was entitled to shelter at the employer's expense but was only entitled to duty meals. In other words, when he was not on duty he was expected to live on his own means. Clauses 7 and 9 of Part II A of the Employment Act also make provisions for the provision of food and shelter to an expatriate employee during the period of grievance procedure and for such period until benefits are paid to that worker.

These provisions must nevertheless be interpreted judiciously so as not to unjustly enrich an employee at the expense of an employer whilst giving an employee the opportunity to pursue and contest proceedings in respect of his employment. It follows therefore that an employee who was entitled to shelter for the duration of employment should not be deprived of such shelter until the end of the contract of employment or until the conclusion of the grievance proceedings in the event of dispute. It was therefore necessary for the Tribunal to make an order compelling the Respondent to ensure the provision of shelter to the Appellant until the final determination of the proceedings or until all payments of benefit are made whichever is the latest.

As regards the provision of food and basic necessities, as soon as the Appellant ceases to receive a salary which would have allowed him to meet his alimentary and hygienic needs and it is established that the grievance procedure has been invoked, clauses 7 and 9 of Part II A of the Employment Act would become applicable and the Respondent must make available reasonable provisions to meet the basic needs of the Appellant. The Tribunal would nevertheless have had the discretion to order that such costs be deducted from the award of payment of arrears of salary if such award is then made. The Tribunal failed to appreciate that when a term of contract of employment is in conflict with an existing legal provision, the applicable provision must be the one that is to the advantage of the employee.

Secondly a term of contract of employment cannot exclude the application of a legislative provision. Hence the Tribunal erred in concluding that clauses 7 and 9 of Part II A of the Employment Act were qualified by the term of the Appellant's contract of employment that he was only entitled to duty meals.

Having so found, this court after considering the evidence on record and the enclosed receipts agrees with the Tribunal that the costs of food and basic necessities were not established to the satisfaction of the Tribunal. However it was wrong for the Tribunal to leave the Appellant without any means of sustenance when the law expressly provides that such should be provided. In such circumstances the Tribunal should have made an award based on the cost of living

whilst also considering that the Appellant would have to be completely self-reliant as he is an expatriate with no other means of support. Considering that the Court has ordered that the Appellant be paid full salary to the 16th November, 2009, the court consider that a sum of Rs 200 per day is reasonable to meet the daily needs of the Appellant after he longer became entitled to a salary and therefore makes an award of Rs 200 per day to be paid to the Appellant for each day from the 17th November, 2009, until all awards made in this case are paid.

The Court shall now consider grounds 3, 4 and 9 together. Ground 3 relates to the validity of the contract of employment of the Appellant. Ground 4 deals with the aspect of overtime which forms the basis of the initial claim made by Appellant in both Plaints, whilst ground 9 maintains that since only the first contract was valid the salary of the Appellant must be calculated in Euros and not US Dollars. There are two documents admitted by the Tribunal that refers to the terms of employment of the Appellant. The first is dated 16th October, 2008, titled "***LETTER OF OFFER FOR EMPLOYMENT"*** . The basic salary in this document is stated to be Euro 4000 per month. This document is signed by the Appellant only.

The second document is undated and is titled **"CONTRACT OF EMPLOYMENT".** The basic salary is stated to be US $ 4000. This document was not signed by the Respondent but was signed by the Appellant.

It may be correct to argue that the Appellant was enticed to come to Seychelles by the conditions of the letter of offer but careful perusal of the letter of offer discloses that it was subject to several conditions including the issuing of Gainful Occupation Permit and did not give any indication of many aspects of the proposed employment such as the number of hours of work per day. The number of working hours per day is of particularly significance because it is at the root of the dispute which led to the retaliatory termination of the Appellant's contract of employment.

The document termed **"CONTRACT OF EMPLOYMENT"**, was more detailed in nature than the document termed "***LETTER OF OFFER FOR EMPLOYMENT".*** It contained amongst others the length of working hours at a minimum of 54 hours per week and that the salary of the Appellant would be US$ 4000 per month.

Therefore not only is the argument that there were two contracts of employment misleading but it is evident that the Appellant is attempting to secure advantages from both documents by making contradictory submissions in grounds 3, 4 and 9. On the one hand in grounds 3 and 9, Learned Counsel for the Appellant argued that the contract of employment should be declared void due to lack of form and therefore the salary of the Appellant should be calculated in Euro as per the letter of offer whilst on the other hand in ground 4, Learned Counsel argued that the Appellant should be paid overtime for the hours worked above 54 hours per week, which provision for minimum working hours is found in the document termed contract of employment.

In considering what the terms of the Appellant's contract of employment were, the Court must have regard to the communications between the parties which created legitimate expectations of the parties and also such averments which a party would reasonably be expected to rely on as well as any statement reduced to writing which were within the knowledge and acceptance of both parties. The Court finds that the terms on offer to the Appellant, although subject obtaining of gainful occupation permit, were incorporated into the Appellant's contract of employment once the gainful occupation permit was obtained and the Appellant took up employment. Since the terms that regulate the salary were contradictory as they did not stipulate the same currency, the attitude of each party to the application of that term would provide reasonable indications of which term was in the contemplation of the parties.

The Court finds that although the letter of offer stated the salary to be Euro 4000 per month, the Appellant accepted a salary of US $ 4000 from the date of his appointment. In addition, he signed a contract of employment for a salary of US $ 4000 per month and he further filed his original Plaint for overtime in July 2009 claiming his salary to be US $ 4000 per month. These are to the Court clear indications that the Appellant understood and accepted his salary to be in US $ and not Euros as is now being claimed. The assertions made by the Appellant in ground 9 are contrary to the facts of the case. Hence grounds 3 and 9 of appeal are respectively rejected.

Ground 4 contends that the Appellant's claim for overtime payment was wrongfully rejected by the Tribunal despite evidence adduced that senior management staffs of Coral Strand were being paid for overtime work. Having considered the evidence on record before the Tribunal the Court agrees with the conclusion of the Tribunal that there was no record in respect of overtime worked by the Appellant. It may be true that other senior staff might have been paid overtime but the evidence showed that despite the procedures in place for claiming overtime the Appellant never submitted any overtime claim for payment by the Respondent during the period of his employment.

In addition to the above, whilst the Appellant sought to rely on the validity of clause2.2 of the document titled 'CONTRACT OF EMPLOYMENT" to establish that his working hours was 54 per week in the same breath the Appellant claims that the same document was not properly executed and should be declared void when it comes to applying clause 2.8 which states that

> "*the employee is required to work without additional payment*, *such additional hours as are necessary for the proper performance and conscientious discharge of his duties*".

No proof was brought to show that the other senior members of staff who were being paid overtime had similar clauses in their contracts of employment whilst it was evident that those who were being paid were submitting their claims in accordance with the procedures in place. The decision of the Tribunal on this issue was therefore correct hence ground 4 of appeal is hereby rejected.

There was no contention on the issue of the Appellant's return airfare which he should be provided with upon payment of all benefits ordered herein.

Having made the above findings on all the grounds on appeal the Court concludes and orders that the Appellant is entitled to and paid the following:

1. Compensation for length of service at the legal rate for the period of 17th November, 2008 o 16th November, 2009

2. Salary at US $ 4500 per month from the date of termination of his contract of employment to the 16th November, 2009;

3. One month's salary in lieu of notice;

4. 21 days annual leave;

5. SCR 200 per day from 17th November, 2009 to the date of full and final payment of all terminal benefits due;

6. Airfare or the equivalent cost of repatriation to the Appellant's country of origin; and

7. Costs of the Appellant as ordered by the Tribunal.

Subject to any appeal to the Court of Appeal, all the above orders must be complied with not later than 30 days of today.

Each party to bear its own costs of this appeal.

C. G. DODIN

JUDGE

Dated this 27th day of August, 2010.