

**IN THE SUPREME COURT OF SEYCHELLES  
HOLDEN AT VICTORIA**

**CIVIL SIDE NO. 257 OF 2009**

Lawrence Wells

Petitioner

v

Macsuzy Mondon, Minister for Employment  
Coral Strand Hotel

Respondent No.1

Respondent No.2

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*Lucie Pool for the Petitioner*

*David Esparon for the Respondent No.1*

*William Hermine for the Respondent No.2*

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**JUDGMENT**

**Egonda-Ntende, CJ**

1. This is an application for judicial review, seeking an order of certiorari, to quash the decision of the Respondent No.1 and in turn the decision of the Competent Officer and costs of this action.
2. The facts of this case are simple and hardly in dispute. The applicant is a United States citizen who was employed by the respondent no.2 as a chef with certain duties at its establishment in Mahe. At some point the respondent no.2 was dissatisfied with the performance of the petitioner. It initiated a negotiation procedure with a view of obtaining the approval of the Ministry of Employment and Human Resource Development to terminate the applicant's contract of employment. This is contained in their letter dated 8 June 2009. I shall set out the letter in full.

The Principal Secretary,  
Ministry of Employment & Human Resources  
Development Independence House Victoria  
Attention of Mr. J Raguin

Dear Sir,

RE: Lawrence Wells-Chef Consultant

Six months ago (17<sup>th</sup> November 2008) the above named expatriate was recruited as Chef Consultant to provide technical assistance to the daily operations of our kitchen outlets and his main purpose was to train

our kitchen staff. Regrettably, to-date no training proposal has been submitted to our management. In view that he is not fulfilling the hotel requirement vis a vis what was expected of him we seek approval from your Ministry to terminate his contract of employment.

It should be noted that the hotel cannot afford to delay his retention considering the key position he holds. Currently he has been sent on leave pending the process of negotiation procedure.

We appeal to your Ministry to urgently consider our request to minimize any unnecessary inconveniences. Please find attached our cheque amounting to SR 300/- being the negotiation procedure fee. Awaiting your prompt response. Thanking you.

Yours Sincerely,  
Fiona Denis (Mrs),  
Human Resources Manager.'

3. Proceedings before the Competent Officer commenced promptly and a decision was made on 30<sup>th</sup> June 2009. I will set out in *extensio* the the findings made by the Competent Officer.

#### **Conclusion**

Coral Strand Hotel initiated the Negotiation Procedure in accordance with Section 47 (1) of the Employment Act, 1995 to terminate the employment Mr. Lawrence Wells on grounds of interest of the organisation. According to Mrs Fiona Denis the grounds as to why they are seeking approval to terminate Mr. Wells' contract of employment are as follows:

◇The relationship between the hotel's management and Mr. Wells has irretrievably broken down and Coral Strand Hotel cannot afford to keep Mr. Wells in their employment since there is a presumption that he might cause serious prejudice to the hotel's undertakings.

◇  
Mr. Wells has failed to provide management with any training proposal for the kitchen staffs to-date.

The ground whereby Mrs Denis alleged that Mr. Wells has failed to provide management with any training proposal for the kitchen staffs to date has been disregarded by the Competent Officer in this matter since Mr. Wells has submitted evidence at folio 47 and 49 which shows that Mr. Wells was

providing training for the staffs.

The only ground submitted that has been considered is that whereby the relationship between the hotel's management and Mr. Wells has irretrievably broken down. This was evident during the meeting given the manner in which both parties addressed each other during the meeting. It is also to be noted that Mr. Wells is employed at management level it will not be in the interest of the hotel for Mr. Wells to remain in their employment.

The Competent Officer has not awarded Mr. Wells legal benefits up to the end of his contract i.e. Up to 16<sup>th</sup> October November 2009 given the time limit from now to the date his contract will come to an end.

Given the above circumstances and the fact that the relationship between Mr. Wells and Coral Strand Hotel has irretrievably broken down, the Competent Officer has determined that approval should be granted for Mr. Wells to be made redundant in accordance with Section 51 (c) of the Employment Act 1995.

**DETERMINATION**

In accordance with Schedule 1 Part 1C Section 4(a) of the Employment (Amendment) Act, 1999, approval is hereby granted for Coral Strand Hotel to terminate Mr. Wells' contract of employment on grounds of redundancy in view that the relationship between Mr. Wells and Coral Strand Hotel has irretrievably broken down.'

4. Following the issuance of the above decision the Competent Officer in a letter dated 3<sup>rd</sup> July 2009 to Respondent No.2 communicated that decision to the parties and advised them to appeal if dissatisfied. Both parties actually appealed to the Minister, being dissatisfied with the decision of the Competent Officer but the Respondent no.2 withdrew its appeal. In the petitioner's appeal dated 7<sup>th</sup> June 2009 he stated that his appeal was against redundancy and that the Competent Officer failed to take into account some relevant facts into consideration.
  
5. The Employment Advisory Board heard the appeal and reached its conclusion on 16<sup>th</sup> August 2009, as under, which was tendered to the Minister for her consideration and eventual determination of the appeal. The Board found,

'In this case the entire procedure was activated by the Respondent as they sought approval to terminate Mr. Wells,

for not providing training to the kitchen staff, where as the Competent Officer made his determination on the ground of interest of the organisation.

The Board found that there was absence of fact and reasons for the application of redundancy so as to terminate the employment of the Applicant. Under such circumstances the termination should not be allowed and the appellant reinstated. However the Competent Officer viewed that the relationship between the worker and employer has irretrievably been broken down in the absence evidence. For that reason he erred in his findings and in the first instance the application was not made on such ground and he is not empowered to make such determination as the Act does not provide for.

The Board is of the view that the case should be send back to the Competent Officer whereby the REAL CAUSE OF THE APPLICATION should be address. As a consequence the Board quash such determination.

It should also be noted that the Respondent's legal Counsel also made reference to the fact that the Officer did not apply the Act correctly although he feel that the determination was correct. One cannot reach a good conclusion if he/she failed to address the matter correctly especially in law.

**The Board advises accordingly.'**

6. The decision of the Minister, which is the subject of these proceedings was made 2 weeks later, on 28<sup>th</sup> August 2009. I shall set it out in its entirety.

I have carefully considered the appeal and the evidence of the parties. I have also given consideration to the advice of the Employment Advisory Board and the determination of the Competent Officer and I hereby rule as follows:-

- (i) The termination of Mr. Lawrence Wells' contract of employment with Coral Strand Hotel is allowed effective 28<sup>th</sup> August 2009.  
(ii) Mr. Wells be paid notice as per his contract of employment, accrued leave, salary up to date of termination, compensation and any other benefits that he may be entitled to under his contract of employment.

#### **REASONS**

The termination of Mr. Wells contract of employment is of a personal nature relating to his competency. This is in pursuance of Schedule 1, Part 1, 3(2) of Employment Act 1995 and is based on evidence submitted by Coral Strand Hotel.'

7. It is this decision of the Minister that these proceedings are directed against and seek to quash by way of the writ of certiorari, and consequently the decision of the Competent

Officer which was in effect the subject of the Minister's decision.

8. This petition challenges the Minister's decision in the following words,

'The finding of the 1<sup>st</sup> Respondent in paragraph 6 above is illegal, irrational, and procedurally improper as the 1<sup>st</sup> Respondent failed to consider any of the grounds of appeal before her and therefore gave a decision which is totally unjudicious and a total abdication of her appellate duty and powers.'

9. The response of the respondent no.1 to this petition is that 'the finding of the 1<sup>st</sup> respondent was lawful; rational and was procedurally proper. It was further asserted that the 1<sup>st</sup> Respondent considered the grounds of appeal before her and gave her decision judiciously and took all relevant matters into consideration in reaching her conclusion.

10. The response of the respondent no.2 was that an appeal is a re-hearing of the whole case and the Minister's decision was reached after taking into consideration all relevant matters as she is required to do, acting in a quasi-judicial capacity.'

11. Ms Lucie Pool, learned counsel for the petitioner submitted that in light of Act 21 of 2008 which amended the Employment Act, and in particular, Section 61 (1A) to (1E), the Competent Officer was mandated as far as the negotiation procedure was concerned to act only as a mediator, with no authority to issue binding decisions, which are now left to the Employment Tribunal. It was only cases under Section 51 of the Employment Act, hereunder referred to as the Act, that the Competent Officer could hold a hearing and reach a determination.

12. Section 51 of the Act set out the grounds upon which a competent officer may hear a matter between an employer and an employee, none of which was available to the proceedings against the petitioner. The competent officer should not have entertained this application at all. Worse still the grounds which he considered were not available under Section 51. She submitted that the Competent Officer acted *ultra vires*.

13. With regard to the decision of the Minister Ms Lucie Pool submitted that it was illegal, irrational and procedurally improper. The Minister failed to consider that the petitioner had been terminated on grounds of redundancy. Had the Minister considered all the facts of the case she would have come to a different conclusion. Ms Pool concluded that neither the Minister nor the competent officer had the basis to reach the decision that they did. Counsel prayed that the writ for certiorari should be granted and the decision of the Minister quashed.
14. Ms Pool referred to the cases of Council of the Civil Service Union v Ministry of Civil Service [1984] 3 All E R 935 and Leopold Javotte and Anor v Minister of Social Affairs and Employment, Supreme Court of Seychelles, Civil Side no. 91 of 2003 (unreported), in support of the petitioner's case.
15. Mr. David Esparon, learned counsel for the respondent no.1 submitted that under Section 65 of the Act, the Minister had powers to hear appeals from a decision of the Competent Officer. The Minister considered all the matters before her and came to the conclusion that the petitioner should have been terminated on grounds of incompetency and not redundancy. As the competent officer had been wrong the Minister was right to correct that decision and had arrived at the correct decision.
16. Mr. Hermine, learned counsel for the respondent no.2 submitted, that the points now being raised by the petitioner that the competent officer did not have jurisdiction were not raised before the competent officer and the Minister and should now not be raised. Before the Minister the petitioner was concerned only with quantum. Ms Pool took the view that the petitioner should have been paid for the whole duration of the contract. All along the petitioner had agreed that the contract should be terminated. He further submitted that the Minister did not act irrationally as she was entitled to review all the evidence and come to the conclusion which she did. In any event the contract of employment had now expired.
17. In Council of Civil Service Unions and others v Minister for the Civil Service [1984]3 All ER 935 Lord Diplock categorised the three grounds upon which a decision may be liable to judicial review as illegality, irrationality and procedural impropriety. He went on to say at 950,

'By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates

his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable. By 'irrationality' I mean what can now be succinctly referred to as 'Wednesbury unreasonableness'..... It applies to a decision which is outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.'

18. At page 951 Lord Diplock discussed procedural impropriety in the following words,

'I have described the third head as 'procedural impropriety' rather than failure to observe the basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of justice.'

19. Ms Lucie Pool raised all the three grounds referred to above in her attack on the decision of the Minister. I will consider the three grounds in relation to the impugned decision taking into account the statements of law by Lord Diplock referred to above as reflecting the law as it is in this jurisdiction.

20. The Minister was considering an appeal under Section 65 of the Act. As counsel for the respondents have both pointed out, this was an appeal against a decision made by the competent officer under section 51 of the Act. The competent officer had heard the matter by virtue of an application made by the respondent no.2 in which it alleged certain facts, initiating a grievance procedure. Under section 51 of the Act the competent officer was obliged to hear and make decision as to whether an employee may be redundant only on the grounds set out in that section. The competent officer could not look for other grounds not authorised in the Act. Neither could he look for other considerations other than those the law required him to consider.

21. I shall set out Section 51 (1) of the Act. It states,

'(1) Subject to this section, where as a result of an employer--  
(a) ceasing to operate, in whole or part, a business,

otherwise than as provided under section 50;  
 (b) temporarily suspending, in whole or part, the operation of a business for any reason specified in section 48 (1);  
 (c) reconstructing the operation of a business for the purpose of facilitating improvement in the business by which greater efficiency and economy can be effected;  
 or (d)  
 introducing new technology in a business,  
 a worker employed in the business has become redundant and it is necessary to terminate the contract of employment of the worker the employer shall, before terminating the contract of employment, initiate and comply with the negotiation procedure.'

22. It is clear that the competent officer exercised jurisdiction which he did not have. As was pointed out by Ms Pool, the competent officer could hear and determine proceedings for redundancy under Section 51 of the Act. The proceedings initiated by the respondent no.2 by their letter referred to above were not for redundancy. None of the grounds available to trigger an application for redundancy under section 51 was cited to the competent officer by the respondent no.2.
23. Ordinarily the duty of an appellate body is to reconsider the decision of the tribunal at first instance and determine, on the grounds submitted to it, whether such decision was arrived at correctly, given the law applicable and evidence adduced in the case. If the tribunal at first instance had no jurisdiction to consider a matter it would not be open to the appellate tribunal to claim jurisdiction to do that which the tribunal at first instance could not do, given that the proceedings before the tribunal of first instance would be a nullity or void *ab initio* for lack of jurisdiction. The duty of the appellate body would be to find that the tribunal at first instance acted *ultra vires*, without jurisdiction. Unless there was some extra jurisdiction conferred upon the appellate body by statute the appellate body could not in such a situation claim jurisdiction and make a fresh adjudication. The appellate body would only be able to exercise the jurisdiction that the tribunal at first instance had.
24. Learned counsel for the respondent no 2 submitted that it was not open to the the petitioner to raise the issue of jurisdiction which had not been raised before the competent officer and on appeal to the Minister. This reasoning may have been appealing if the current proceedings were an appeal. These proceedings are not an appeal. The application for judicial review is



precisely about whether the decision questioned was taken within the law or outside of it. Jurisdiction is a key element as to whether the impugned decision can or cannot survive the attack on it.

25. I am unable to accept the arguments advanced on behalf of both respondents that the Minister had authority to re hear the matter and reach the kind of decision she did. To attempt and establish authority for her decision, the Minister cited Schedule 1 Part 1, Rule 3(2) which states,

'Notwithstanding sub-paragraph (1), where the reason for the proposed termination of a contract is a personal one in the sense that it relates to the character, competence, loyalty or other attribute of the worker, the competent officer shall invite the worker's participation to consultations in pursuance of sub-paragraph (1).'

26. In order to best understand the duty and jurisdiction of the competent officer under that sub paragraph, I must bring in view sub-paragraph (1) of Rule 3, which states,

'As soon as possible after the date of registration of the notification and in any case not later than 7 days there from, **the competent officer shall invite** the union, the employer, or the employer's organisation to which the employer may belong, **for consultations with a view to exploring and agreeing on how the proposed terminations may be avoided or their effects minimised.**'

27. The competent officer did not engage in consultations with a view to exploring and agreeing on how the proposed termination may be avoided or its effects minimised. Neither did the Minister engage in exploring and agreeing on how the proposed termination may be avoided or its effects minimised. It is clear that paragraph 3(2) of Part 1 of Schedule 1 to the Employment Act, cited by the Minister conferred no jurisdiction on the Minister or the competent officer to reach the decision that the Minister reached.

28. Given that the Minister's decision was not authorised by the law she cited, and given that the Minister could not breathe 'life' into the decision of the competent officer that was void *ab initio*, I do find that the Minister acted outside or in excess of her jurisdiction. To that extent the Minister acted illegally.

29. It appears to me that the Minister's decision cannot survive the attack for irrationality. The termination is stated to be in pursuance of Schedule 1, Part 1, 3 (2) of the Employment Act, which, as shown above, is concerned with the competent officer holding ' consultations with a view to exploring and agreeing on how the proposed terminations may be avoided or their effects minimised.' It does not authorise a decision by the competent officer to allow termination. Secondly the Minister's decision does not in anyway demonstrate that any consultations were held for the purpose set out in the relevant rule, that is to seek agreement on how the proposed terminations were to be avoided or minimised.
30. The minister's decision raises another issue with regard to procedural impropriety. The decision lacked reasons. Though it purports to give its reasons for the decisions made in two sentences, those two sentences are devoid of any reason why the case for the respondent no.2 was preferred by the Minister to that of the petitioner. There is no reason provided for rejecting the advice of the Employment Advisory Board which the Minister sought and was tendered. The Minister's reasons do not fail for brevity. It is simply that the reasons stated by the Minister are in substance no reasons at all for the decision that she pronounced.
31. In the result the writ of certiorari quashing the decision of the Minister dated 28<sup>th</sup> August 2009 and that of the Competent Officer is granted. Those decisions are quashed. This petition is allowed with costs.

Signed, dated, and delivered at Victoria this 16<sup>th</sup> day of February 2010

FMS Egonda-Ntende  
Chief Justice