IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CA 01/2017

Appeal from Employment Tribunal Decision ET124/2013

[2017] SCSC

ANDY LABONTE

Appellant

versus

CREOLE TRAVEL SEYCHELLES

Respondent

Heard: 20 September, 2017

Counsel: J Camille for appellant

T Christen for respondent

Delivered: 18 October 2017

JUDGMENT

Dodin J

[1] The Appellant Andy Labonte was employed by the Respondent, Creole Travel Services (CTS) as manager of Cap Lazare from 2008 until his resignation in 2013. From the year 2011 his terms of employment were amended to include *inter-alia* a yearly bonus of 3% of the total net revenue generated from activities organised at Cap Lazare. In 2011, the bonus paid was SCR8386.15; 2012 SCR17,246.64 and 2013, it was calculated at SCR3189.39 for the months of January to June, when the Appellant resigned.

[2] The Appellant being dissatisfied with the calculation of the yearly bonus brought a case before the Employment Tribunal claiming bonus at SCR23,085.72 for 2011; SCR52,519.67 for the year 2012 and SCR26,259.84 for January to June, 2013.

[3] The Employment Tribunal entered judgment in favour of the Respondent finding that

i. Appellant had no business to do with private functions involving the Arabs and his bonus entitlement was meant to derive from the total net revenue generated by activities organised by or on behalf of CTS as an employee of CTS;

ii. There was no proof that the parties agreed that 3 percent net revenue was inclusive of revenue obtained from the rent of Cap Lazare; and

iii. The net revenue is the net profit which the Tribunal believes as sales net all expenses which cannot therefore reasonably be expected to include the proceeds of rent.

[4] The grounds of appeal advanced by the Appellant are:

i. The learned Magistrate erred in law in having dismissed the application of the Appellant and having concluded that the tribunal finds no evidence that the Appellant and Respondent had agreed that 3% net revenue will include revenue from rent of Cap Lazare;

ii. The learned Magistrate erred in law and on facts in attaching insufficient weight and/or to address itself to the exhibits tendered by the Appellant relating to profits and loss account of the Respondent for the periods ending 2011 and 2012 and estimates of first half of 2013, which exhibits were at variance to the exhibits tendered by the Respondent in the case, relating to the profit and loss for the same period;

iii. The learned Magistrate erred in law and facts in attaching insufficient weight to the totality of evidence tendered by the Appellant and in concluding that the evidence of Mrs Annicke Albert and Mr David Nichol,

support their conclusions that a special arrangement existed between the Respondent and owners of Cap Lazare, in the absence of evidence of such a special arrangement by the Respondent.

iv. The learned Magistrate erred in law and on the facts to have concluded that there was a special arrangement between Respondent and the owners of Cap Lazare in regards to proceeds obtained by Cap Lazare.

[5] I note as this point that there has been used interchangeable terms with reference to the Employment Tribunal which is at times is referred to as the learned Magistrate on account of its chairman being a Magistrate. It should be noted that the decision of the Employment Tribunal is a collective one of at least 3 persons and not just the learned Magistrate.

[6] Learned counsel for the Appellant made the following submission in support of the grounds of appeal:

> *"Ground 1. Learned Chairman of the tribunal concluded at paragraph of its judgment that "we also find no evidence that the parties agreed that the 3% net revenues will include revenue from rent of Cap Lazare". It is submitted that this conclusion goes contrary to the evidence on records in this case.*
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> *In the same paragraph 54 of the tribunal has concluded (in agreeing to submissions made by attorney for Appellant) that there was no evidence tendered by Respondent of a 'special arrangement' between CTS (Respondent) and owners of Cape Lazare in regards to renting out of same place and proceeds from same renting. Yet the tribunal wrongly concluded that the evidence of Mrs. Albert "persuaded" them "into believing" that such special arrangement must have exist. In so doing the tribunal made an assumptions of what could have existed rather than being through evidence before it that such special arrangement did exist by way of proof. It is submitted that this finding is wrong in law given the fact that tribunal is guided by the principles of natural justice in considering and deliberating in any matters before it. Such rules of justice requires for a party to prove their case with evidence before the tribunal. The tribunal is wrong to have assume that which was not proved.*
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> *The Court further note that Mrs. Albert testified that she was unaware of any such special arrangement between Mr. Albert owner of Cap Lazare and CTS. On that basis the tribunal cannot conclude that they could be*

persuade into believing that such special arrangement must have existed. Court will further note that the issue of proof of special arrangement between Respondent and owner of Cap Lazare was central to the Appellant's claim. Appellant has submitted before the tribunal that the deductions as allegedly by Respondent has been a calculated attempt by Respondent to manipulate the accounts so as to deprive him of his totality of claim for the 3% annual bonus. Yet the Court will note from the records and as was submitted by Appellant after his case that no proof was ever tender of the special arrangement between CTS and the owner of Cap Lazare, Mr. Albert; no reasonable explanation could be given by Mr. Nichol of the payment made as per exhibit A8 and A9 which related to two private functions and of which the payment were made into the account of the Respondent; no proof were also tendered of any transfer of funds from Respondent; no proof were also tendered of any transfer of funds from Respondent's account to the account of any of the owners of Cap Lazare. Court will note that the tribunal itself has been satisfied of these submission by Appellant, at paragraph 52 of its judgment and in considering the evidence of Mr. Nichol, where it held that "we find that there are arguably good reason to doubt the credibility of his testimony because the transactions in practice did not match his words in theory."

Yet the tribunal again wrongly concluded that the evidence of Mr. Nichol is corroborated by that of Mrs. Annike Albert and proceeded to rely on same evidence in dismissing the Appellant's case. It is submitted that in coming to their conclusion in regards to Mr. Nichols evidence as stated above in paragraph 54, no reasonable tribunal would have proceed to accept same evidence and dismiss the Appellant's case.

Ground 2. Court will note that the tribunal has at paragraph 49 appreciated that this matter before it involved two sets of accounts which are very much in dispute. At paragraph 49 the tribunal narrated the accounts tendered by the Appellant and subsequently in paragraph 50 it referred to the Respondent own sets of accounts. Court will also note that the Appellant's accounts which were exhibited in A4 and A5 and of which forms the basis of Appellant's own computation in exhibit A6, were provided by staff of the Respondent from the Finance Department. Respondent has disputed the correctness of these accounts despite not disputing that same were indeed originated from their Finance Department.

It is submission of the Appellant that the testimony of Mr. Nichol in regards to the Respondent's own accounts which were admitted as R1, R2 and R3 and which they maintain to be the correct account cannot be believe on oath. Mr. Nichol cannot be taken to be a credible witness given his inability to explain the various anomalies outline above in these submissions. Hence his explanation that his accounts were the proper account cannot be believe given the fact that the never disputed that A4

and A5 originated form this own department, as per the normal process of which Appellant would be served with a copy. On that basis, Court is invited to consider the credibility of exhibits A4 and A5 more favourably than those tendered in R2, R2 and R3.

Ground 3. Appellant will adopt the same submissions referred to under Ground 1 of his appeal in regards to Ground 3 and 4 of this notice of appeal.

On that basis of the above, the Appellant moves the Honourable Court to be pleased to reverse the decision of the Employment Tribunal and grant the prayers of the Appellant, sought before the Employment Tribunal. "

[7] Learned counsel for the Respondent made the following submission in reply:

"The ownership of the property referred to as "Cap Lazare" is clear, this is seen in Exhibit R4 which shows a transfer deed of T74 from Surfrider Investment (Proprietary) Limited to CAP LAZARE (PROPRIETARY) LIMITED represented by Joseph France Albert. The property is not owned by Creole Travel Services. What is common though is the shareholdings, namely Mr Joseph France Albert is a shareholder in CAP LAZARE (PROPRIETARY) LIMITED and also a shareholder in Creole Travel Services as well as the rest of the Albert Sons.

The evidence further goes on to show that the Albert family allows Creole Travel Services to use Cap Lazare for its business ventures. This is seen in the evidence of Mrs Annike Albert, the Appellants own witness.

The evidence goes on to show that there was an arrangement whereby when certain guests would use the premises, the monies collected would go straight to the shareholder of the property, namely the Albert family and not to Creole Travel Services. Therefore this money is either not shown on the balance sheets R1, R2 and R3 or when it is, it is figure that is deducted from the accounts.

The evidence of Mrs Annike Albert states that page 20 that "sometimes the place is rented out to the Arabs' and that lower down on the page 20 when asked about how payments were made, whether all payments were received by Creole Travel Services including functions, she replies "it depends on the package". She further goes on to state at page 22 that she has no personal knowledge of the arrangement between Mr Albert and Creole Travel Services in respect of Cap Lazare. She further admits on the same page that when the Arabs came they sometimes brought their own goods, cooks, etc.

From the Appellants own witness we can deduce that there is a possibility that there was indeed a special arrangements. That this counters on a

balance of probabilities the testimony of Mr Labonte especially given that these statements come from his own witness who was meant to give evidence in support of his claims.

Further the witness of the Respondent Mr David Nichol's evidence is in complete support of his existence of a special arrangement. It is pertinent to note that Mr Nichol being the Chief Financial Officer and the person who prepares and signs off on the financial accounts would have intimate knowledge of the funds collected by Creole Travel Services. In his evidence at page 24 he states that "there are functions organized at Cap Lazare where the proceeds go to the account of the owner."

The only evidence that purports to state that there is no special arrangement with the owners is that of Andy Labonte himself. He is not in a position to know the intimate details of the business especially as to the ownership and how the shareholders have arranged their business and structured their assets.

The Respondent further in his evidence methodically explained at pages 25 and 26 how the breakdown works. It goes without saying that should a Tribunal rely on a document they would rely on the final version and not on in the process of being made. Mr Labonte himself admits at page 12 that A4, A5, A6 is his own computation.

The tribunal has first hand knowledge of the evidence given, the demeanour of the witnesses, their reliability and credibility. They were thereof in the best position to weigh on which sets of account ought to have been relied on and have correctly concluded that the audited accounts presented by Mr Nichol were the most reliable namely R1, R2 and R3.

Both parties are in agreement that Mr Labonte is to receive a bonus of 3% based on the net revenue of the business Creole Travel Services does with Cap Lazare (this is in his evidence at page 9). However Mr Labonte alleges that his bonus and no expenses deducted. It is the figure that is made up of all the income and no expenses deducted. It is the Respondent submission that his reasoning is absurd. It is completely contrary to the definition of net revenue. If we compare this to someone's salary, their net revenue is taxes etc. Similarly the net revenue for Creole Travel Services is their total income their expenses. This is only the reasoning that makes sense. If Mr Labonte's agreement was for him to be paid on a 3% bonus of the total income of the company then the agreement would have been payment of bonus on the gross revenue of the company. This is contrary to his own admission that his bonus is for net revenue. Further no person in his or her right mind would authorize such a payment on gross revenue as there may very well be a scenario where the company makes no profit and then has to fork out more money and increase its deficit/debt in order to

> *pay someone a bonus.*
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> *Therefore the Tribunal was correct to find that the net revenue is as described above and the learned Magistrate Adeline correctly summarises this point in his judgment at paragraph 55. It is pertinent to note that the judgment of the Tribunal in this matter is extremely thorough. There is an in depth recital of all the facts and all the witnesses testimonies in chronological order spreading over nearly 14 pages. The learned Magistrate then at pages 15, 16, 17 gives a detailed analysis of the contentious issues on this case. He cannot at all be faulted for failing to rely on certain pieces of evidence or relies too heavily on other pieces of evidence."*

[8] The contention in this appeal is on whether all income derived from the use of Cap Lazare was subject to a 3% bonus to be paid to the Appellant for each calendar year. From the terms of employment of the Appellant, it is clear that he would be entitled to 3% of net [emphasis mine] income derived from CTS activities at Cap Lazare. From the record of proceedings, it is obvious that the owners of Cap Lazare also used Cap Lazare for other activities which did not involve the Appellant. One such activity was the renting of the place exclusively to the Arabs. It is necessary to distinguish between the income generated by activities organised by the Appellant or the Appellant's employer as against the income generated by the renting of Cap Lazare by the owner.

[9] The Appellant' employer is CTS, the Respondent in this case. The owner of Cap Lazare is Cap Lazare (Proprietary) Limited. The individuals behind both legal entities may be the same but for legal purposes they remain two completely separate legal entities. It does not matter whether there was a special arrangement between Cap Lazare (Pty) Ltd and the Arabs or CTS or not as such activity was not one organised by the Appellant and the income derived from it was not paid to CTS, the Appellant's employer.

[10] The concepts of gross and net income have different meanings, depending on whether a business or a wage earner is being discussed. For a company, gross income equates to gross margin, which is sales minus the cost of goods sold. Thus, gross income is the amount that a business earns from the sale of goods or services, before selling, administrative costs, taxes, and other expenses have been deducted. Net income is the residual amount of earnings after all expenses have been deducted from sales. In short,

gross income is an intermediate earnings figure before all expenses are included, and net income is the final amount of profit or loss after all expenses are included.

[11] The concept of net income would certainly not include all income derived from the use of Cap Lazare because the terms of employment of the Appellant had two qualifications or limitations which are (i) being manager of Cap Lazare and an Employee of CTS and (2) he would participate to the extent of being paid annually 3% of net revenue of Cap Lazare. The renting of Cap Lazare by the owner and payment made directly to the owner is therefore implicitly excluded from the Appellant's management position as well as not being money generated by CTS activities at Cap Lazare. It is therefore not part of the net income of Cap Lazare and hence not subject to the 3% bonus.

[12] The Employment Tribunal was therefore correct to distinguish between the two activities and conclude that renting of Cap Lazare to the Arabs was no business of the Appellant and therefore the Appellant cannot claim a share of the rent. Grounds 1 and 4 of the appeal therefore cannot be sustained and are dismissed.

[13] Grounds 2 and 3 of the appeal are concerned mainly with the facts and evidence adduced and the treatment or consideration given to the same by the Tribunal. The Appellant's contention is that the Employment Tribunal did not lend equal weight or more credence to his evidence than it did to the evidence adduced by the Respondent.

[14] Appellate Courts must by necessity be disinclined to interfere with findings of facts of a lower Court. In the case of *Peters v. Sunday Post Limited (1958) EA 424 at page 429* the Court rightly stated:

> *"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion."*

[15] The same was stated by the Court in the case of *McGraddie v McGraddie [2013] UKSC 58; [2013] 1 WLR 2477:*

> *"It was a long settled principle, stated and restated in domestic and wider common law jurisprudence, that an appellate court should not interfere with the trial judge's conclusions on primary facts unless satisfied that he was plainly wrong."*

[16] In *Fage UK Ltd v Chobani UK Ltd* *[2014] EWCA Civ 5; [2014] ETMR 26*. At paragraph [114] Lewison L.J stated:

> *"Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applied not only to findings of primary fact, but also the evaluation of those facts and to inferences to be drawn from them. … The reasons for this approach are many. They include*
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> *i. The expertise of the trial judge in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.*
>
> *ii. The trial is not a dress rehearsal. It is the first and last night of the show.*
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> *iii. Duplication of the trial judge's role on appeal is a disproportionate use the limited resources of an appellant court, and will seldom lead to a different outcome in an individual case.*
>
> *iv. In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.*
>
> *v. The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).*
>
> *vi. Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."*

[17] Having read the record of the Employment Tribunal, I cannot find any ground that would persuade me to conclude that the Tribunal's reasoning or treatment of the evidence was so unreasonable as to warrant the re-evaluation of the evidence. The Tribunal that heard the evidence and observed the demeanour of the witnesses was better placed to make a judgment on credibility and reliability of each witness. This Court cannot review the

evidence and make findings only from the record unless it is satisfied that the Tribunal was plainly wrong or seriously biased by making conclusions not supported by facts.

[18] Having not found any illegality in the assessment of the facts by the Employment Tribunal and considering the above guidance on such grounds of appeal, grounds 2 and 3 of appeal cannot be sustained and are dismissed accordingly.

[19] This appeal is therefore dismissed in its entirety.

[20] I award costs to the Respondent.

Signed, dated and delivered at Ile du Port on 18 October 2017

G Dodin
Judge of the Supreme Court