

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CA 32/2017

Appeal from Magistrates Court Decision CS04/2012

[2018] SCSC 673

BEAU VALLON PROPERTIES LIMITED (TRADING AS CORAL STRAND HOTEL)

Appellant

versus

PHILIPPE COINTY

Respondent

Heard: 22 May 2018

Counsel: E Chetty for appellant

F Elizabeth for respondent

Delivered: 16 July 2018

JUDGMENT

Dodin J

[1] This is an appeal against the judgment of the Employment Tribunal delivered 24th October, 2017 after hearing the case when learned counsel for the Respondent moved the Tribunal for leave to withdraw as counsel for the Respondent on the day set down for the hearing of the case. Although learned counsel had filed an affidavit well in advance of the

hearing indicating that she would be moving the Tribunal for such leave to withdraw on the day of the hearing.

- [2] Learned counsel for the Appellant submitted that the appeal is solely based on the fact that the Appellant did not have representation. The Appellant submitted that a miscarriage of justice occurred when the Tribunal allowed for the case to be heard Ex Parte. Before the hearing the then counsel for the Appellant Mrs Aglae, submitted a notice of motion dated the 24th of August 2017 whereby she was warning the Tribunal she could no longer appear in this matter and she would be seeking leave to withdraw. The Appellant were also informed of Mrs. Aglae's decision and predicament and sought new counsel. The Appellant notified the Tribunal that on the date the case was schedule for hearing, the new counsel would be unavailable. Further the Chief Justice had sent out a memo to the Judiciary of which the Employment Tribunal forms part of to inform that counsel would not be available and in the jurisdiction because of a family medical predicament.
- [3] Learned counsel submitted that the tribunal on the date of its hearing was made aware of this and took the decision to proceed Ex Parte nonetheless. Learned counsel submitted that the Tribunal had a few options but it exercised the option of proceeding without the Appellant having any representation. The second option the Tribunal could have taken could have been to suggest to Mrs. Aglae that she will not be allowed to withdraw from the matter as it is within the discretion of the Tribunal to suggest that she commences and completes the case on the day. The final option would have been to adjourn the matter after having allowed Mrs. Aglae to withdraw her appearance in the case. Since the case was heard Ex Parte, the Appellant was deprived the right to representation. Learned counsel moved the court to overturn the judgment of the Tribunal and allow the appeal.
- [4] Learned counsel for the Respondent submitted that the appeal is not challenging the compensation award that was made by the Employment Tribunal. In fact the Tribunal did not award all the compensations that were being claimed by the Respondent. The Employment Tribunal discounted or disallowed the Appellant's claim for allowances including housing allowance, car allowance, for fuel allowance, food allowance,

telephone allowance as well as medical cover and school fees and all fringe benefits which the Tribunal concluded were not part of the contract.

- [5] Learned counsel submitted that the Employment Tribunal was extremely careful and cautious that even though the matter was undefended, it took the time to go into the merit of the case to ensure that the Appellant was not caused any injustice by their lack of representation. In the appeal, the Appellant has not challenged the award but has rather challenged the Order that was made for the case to proceed Ex Parte. Learned counsel submitted that the Court should look at this case in a holistic approach as hypothetically even if this Court were to decide to send the matter back to the Employment Tribunal for rehearing, the outcome would be the same because there is no allegation that the compensatory award was one which was contrary to the Employment Act.
- [6] Learned counsel submitted in the alternative that taking into account that this case has a long history; it has gone to the Court of Appeal on a plea *limine litis*; it has gone back to the Employment Tribunal; it has been adjourned several times for Judgment by Consent; the Respondent is a foreigner; he is French national. He is not ordinarily resident in Seychelles. He spent the whole night travelling from West Africa to arrive in Seychelles on the date of the hearing when he was told that there was a difficulty and the case may be adjourned again. That is one consideration which the Tribunal laid a lot of emphasis on; the fact that the Respondent is a foreigner, he had travelled two (2) nights to arrive in Seychelles for his case and the Tribunal was reluctant to adjourn it again for fear that we might not get this Respondent to attend his case in Seychelles.
- [7] Learned counsel submitted that Counsel Mr. Chetty should have advised his client that he would not be available for the hearing on the day and his client should have made alternative arrangements. Alternatively Mr. Chetty could have notified counsel for the Applicant that he would not be available for the hearing this afternoon. If that had been the case, counsel would have advised his client who arrived that morning after two (2) nights travelling to come to Seychelles for the hearing and was leaving the jurisdiction the same night.

[8] Learned counsel submitted that the Tribunal was trying to be fair to both parties and was trying to bring finality to this case and the balance swayed towards the hearing of the case. It declined to grant an adjournment with costs and proceeded with the hearing. Hence the Employment Tribunal did not commit any error on the facts or the law when they gave the judgment and the decision to hear the case did not to cause any prejudice or unfairness to the Appellant. Learned counsel moved the Court to dismiss the appeal.

[9] I have studied the records of proceedings in this case and I also find that the Appellant and Respondent agree that the case was heard after representations were made by counsel Samantha Aglae expressing her wish to withdraw as counsel for the Appellant and further representation by the representative of the Appellant Mrs Myona Vital that their new counsel, Mr Chetty had to leave the jurisdiction for urgent medical reasons.

[10] It is obvious therefore, that faced with this situation of having on one side an Applicant who had travelled a very long distance from overseas, at great expense to attend the hearing and on the other side, one counsel who wanted to withdraw appearance to be replaced by another counsel who was not available on that day due to a medical emergency, the Tribunal had a few options which would be fair to both sides.

- i. Refuse the motion to withdraw by counsel who had had carriage of the case until then and direct counsel to proceed with the hearing as she was the one who had agreed on the trial date and is well versed in the issues to be tried.
- ii. Allow counsel to withdraw with conditions that costs for the day's hearing and the costs of travel of the Applicant be paid by the Respondent and adjourn the hearing.
- iii. Proceed with the case after giving the Respondent sufficient time to prepare or obtain alternative legal representation, (Time given should not be days or hours but minutes).
- iv. Proceed with the case immediately after granting the application to withdraw, which was done in this case.

[11] Paragraph 6 of Schedule 6 of the Employment Act is relevant to the manner the Employment Tribunal conducts proceedings:

6(1)....

(2)...

(3)...

(4)...

(5) A party before the Tribunal may be represented by a lawyer or by a representative of a trade union or an employers' organization or any other person as the case may be.

(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.

[12] It is my considered opinion that in order to abide by the provisions of paragraph 6 of the 6th Schedule, certain basic norm of practice in hearing of civil matters need to be observed to ensure fairness. Section 65 of the Seychelles Code of Civil Procedure would be useful in guiding the Tribunal on how to proceed where the Respondent is absent on the date of hearing.

65. If on the day so fixed in the summons when the case is called on the Plaintiff appears but the Defendant does not appear or sufficiently excuse his absence, the court, after due proof of the service of the summons, may proceed to the hearing of the suit and may give judgment in the absence of the Defendant, or may adjourn the hearing of the suit Ex Parte.

[13] In this case the situation is slightly more intricate in that both the Applicant and the Respondent were present with the Respondent now (Appellant) being represented by Mrs Vital. There was no issue of the Respondent then being absent but counsel being unavailable to take over carriage of the case while the counsel who had carriage had applied to withdraw her services.

[14] The Employment Tribunal was therefore correct to consider the balance of convenience and choose one of the options available to it under its inherent discretionary powers. Paragraph 6(5) of Schedule 6 of the Employment Act states that "A party before the

Tribunal may be represented by a lawyer or by a representative of a trade union or an employers' organization or any other person as the case may be". It falls short of making it obligatory for party to be represented by a lawyer. I also note further that throughout the taking of evidence, the representative of the Appellant was asked whether she had any question in cross-examination. It shows there was representation by the Appellant although it is another matter whether it was adequate.

[15] In my opinion, the decision of the Employment Tribunal to proceed with the hearing the way it did was not the best of the available options but it was not unlawful either. It is not the function of an appellate Court to substitute its finding for that of the lower Court unless it is clear that the finding of the lower Court was wrong in law or was so perverse that no reasonable Court or Tribunal could have reached.

[16] This appeal therefore cannot succeed and is dismissed accordingly.

[17] Each party to bear its own costs.

Signed, dated and delivered at Ile du Port on 16 July 2018

G Dodin
Judge of the Supreme Court