

**SUPREME COURT OF SEYCHELLES**

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**Reportable**

[2021] SCSC ...

CA 19/2021

(Appeal from Employment Tribunal  
Decision 4/2020)

In the matter between:

**MA & SUN TRADING CO. LTD**

(Represented by Mr Shah)

**Appellant**

Versus

**YADAV SUDAMA**

(Rep by Mr Frank Elizabeth)

**Respondent**

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**Neutral Citation:** *MA & Sun Trading Co. Ltd v Yadav Sudama* (CA 19/2020) [2021] SCSC 417 (9 July 2021)  
**Before:** Govinden CJ  
**Summary:** Appeal from Employment Tribunal dismissed  
**Heard:** 1<sup>st</sup> April 2021  
**Delivered:** 9<sup>th</sup> July 2021

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**JUDGMENT**

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**Govinden CJ**

[1] The Respondent before this court had filed a case before the Employment Tribunal, Case No; ET/24/20 in which he had applied for the adjustment of his salary from 17<sup>th</sup> of March 2017 to the 12<sup>th</sup> of February 2020; salary for annual leave not taken in this period; overtime money and unpaid Food Allowance. He sought the adjustment based on the statutory minimum wage under the Employment Act, herein after also referred to as “ *the Act*”. His case was that the difference between his actual wage earned and that which he

should have earned for the said period should be paid to him by the Appellant, his employer.

- [2] The proceedings before the tribunal shows that the Respondent gave sworn evidence. He produced his contract of employment whereby he claimed that it provides for a salary of RS 5500 and food allowance of RS 1200. That contrary to the terms of the contract he worked overtime from 8am to 5.30pm from Monday to Saturday without being paid overtime allowance. He was only afforded a 10 to 15 minutes break during his working hours and on Sundays he would work at his boss place from 10 am to 6 or 7 pm. He was not granted any leave. Since December 2018 he requested for his free passage to India and he got his ticket only in March 2019. He has been paid his Annual Leave which he had not taken. As a result he filed his grievance.
- [3] The Appellant before the Tribunal gave evidence through its Director. He denied making the Applicant work on Sundays and said that he had his Saturday afternoon off. She disputes making the Applicant plant for her and testified that he was given 30 minutes lunch break every working day and two fifteen minutes tea breaks per day. She admitted that the minimum wage was RS33.50 per hour when he started employment and that he did not make the necessary adjustment when this was increased but that she is ready to pay any salary if she owes.
- [4] Being aggrieved by the decision of the Employment Tribunal, the Appellant has filed an appeal before this Court on the following grounds:
- (i) *The Tribunal erred in awarding the sum under the heading adjustment of salary when it was not claimed by the Respondent, thus it amounts or Ultra Petita. The Tribunal failed to appreciate that the salary and other emoluments payable to the Respondent were mutually agreed upon to be paid.*
  - (ii) *The Tribunal ought not to have omitted the evidence of this Appellant in respect of the whole claim of the Respondent and that this Appellant. The Appellant submits that in particular the element of overtime.*

*(iii) The Tribunal erred in arriving at the conclusion on the issue of overtime when it lacks evidence to support.*

- [5] In respect of its 1<sup>st</sup> ground of appeal, the Appellant raised the issue of Annual Leave in its submission and argues that as the Tribunal did not rule on this entitlement and given that there was no Cross Appeal this issue is *ultra petita* before this court. It is further submitted that the tribunal made awards that were far above the quantum of compensation being sought for by the Respondent. The Appellant contests the basis of computation of the total salary for the Respondent contractual period and argued that the wrong minimum wage figure was used. Moreover, the Appellant argues that the law exempts the application of statutory minimum wage for non-Seychellois workers in the construction industry.
- [6] The 2<sup>nd</sup> and 3<sup>rd</sup> grounds of appeal were taken together and it was submitted that the tribunal erred when it came to the sum it did for overtime payment without explaining how the sum was arrived at. It is also submitted that it was erroneous to shift the burden of proof on the appellant to disprove the assertion of the Respondent on overtime payments.
- [7] As a result, the Appellant prays that this court reverses the decision of the Employment Tribunal and order that the Respondent is not entitled to the awards given in the said decision.
- [8] On perusal of the Judgment of the Employment Tribunal, paragraph 11 of the Judgment reads as follows:

*“The Applicant appeared truthful when he testified before the tribunal as to his conditions of work. Despite not having an interpreter he managed to defend his application and was able to explain his case to the Tribunal without much difficulty. In the circumstances, the Tribunal accepts that the Applicant was justified in stopping work and reporting his grievances to the Ministry of Employment.*

*The Tribunal will now consider the claims made by the Applicant individually.*

### *Minimum wage*

*As per the contract of Employment and the evidence of the Applicant he was earning SR5, 500.00 gross and worked Monday to Sunday from 8:30 a.m. to 5:30 p.m. As such, his basic salary was less than the statutory minimum wage and therefore in contravention of the Employment Act. As such the Applicant is entitled to claim an adjustment of salary as owed to him from 16<sup>th</sup> March 2017 until 12<sup>th</sup> February 2020.*

### *Overtime*

*As per the contract of Employment, the Applicant was to work 9 hours per day with a 30 minute per break per day and additionally he shall be granted a day off on Sundays. According to the evidence on record he in fact worked 9 hours per day 7 days a week and therefore was working 9 hours overtime per week. I am satisfied that the two breaks taken by the Applicant amount to his 30 minutes break per day. Section 40 (3) of the Act prescribes the maximum number of hours of work permissible per week as well as the rate at which additional hours of work shall be calculated. As per the evidence of the Applicant to which the Respondent could provide no documentary evidence to counter, the Applicant worked 9 hours of overtime per week.*

### *Food allowance*

*The Tribunal has already ordered that the Respondent Company as per section 7 of the schedule part II A of the Act continue to provide the Applicant with food allowance (as per contract) until the final determination of the case. The Respondent was to provide a food allowance to the Applicant in the sum of SR1, 200.00 per month”.*

**[9]** The Tribunal thereafter pursuant to section 60 (2) (b) and (c) of the Employment Act made the following orders against the Appellant;

- i. *Adjustment of Salary from the 16<sup>th</sup> March 2017 until 12<sup>th</sup> February 2020 in the sum of SR 86, 351.24.*
- ii. *9 hours of overtime per week from 16<sup>th</sup> March 2017 until 12<sup>th</sup> February 2020 in the sum of SR 46,304.74.*

iii. *The total award of compensation being in the sum of SR 132, 655.98.*

iv. *.Food allowance at the rate of SR 1200 to be paid by the Respondent to the Applicant until he is repatriated.*

v. *Additionally, the Respondent shall be responsible for the costs of the Applicants repatriation back to his home country.*

**[10]** This court has scrutinised the different grounds of appeal and the reply thereto in the light of the facts and circumstances of the case and the decision of the tribunal and has come to the following determination. In doing so, the court bears in mind the special nature of the tribunal below and the uniqueness of its procedural rules as highlighted in the case of ***Ghiani v Cote d’or Lodge (Vacanze Limited) CA 18/16.***

**[11]** As to the issue of credibility, it is the view of this court that the Tribunal was in a better position to assess the demeanour and the evidence of both parties at the time they gave evidence. Therefore this court, will not seek to interfere with the findings of the Tribunal in accepting the evidence of the Respondent as truthful. It has not been shown to this court on appeal that the evidence in this instant case is so improbable that no reasonable Tribunal would believe it as outlined in the case of ***Akbar v R (SCA (Criminal Appeal) 5/1998).***

**[12]** The 1<sup>st</sup> ground of appeal is to the effect that the adjustment of salary was not claimed by the Respondent and accordingly any finding of fact by the Employment Tribunal in that regard was *ultra petita*. I have considered the facts led before the tribunal. The “*WORKER: GRIEVANCE APPLICATION FORM*” which was filed by the Appellant and which formed the basis of his grievance gave the following as one of the details of the complaint “*Adjustment of salary 17<sup>th</sup> March to 12<sup>th</sup> February.* Moreover, the Appellant himself being aware of the issue of possible infringement of the Minimum Wage Regulation had admitted in evidence and uttered the following, “*If I owe salary adjust, I agree to pay*”. Clearly, therefore it cannot be said that the Tribunal erred when it went to take the decision on this issue. There was before it an unequivocal and a specific demand for salary adjustment and admission by the appellant that this claim was live in the case

- [13]** The 2<sup>nd</sup> and 3<sup>rd</sup> grounds of appeal are in respect of the issue of overtime. It avers that the tribunal totally disregarded the evidence of the Appellant when it comes to the issue of overtime and that there was a lack of evidence to support the tribunal findings. This court has carefully analysed the facts led before the tribunal below. The Respondent testified to the fact that he was made to work over and above the weekly hours that he had contracted for and the fact that he was made to work on Sundays. The Appellant had denied this, but the trier of fact in coming to its determination had seen that this consists of a breach of the Section 40 (3) of the Act which prescribes the maximum number of hours of work permissible per week as well as the rate at which additional hours of work shall be calculated. Taking into consideration the advantage that the original tribunal had in assessing the evidence, this court on appeal will not overturn its decision.
- [14]** Having considered the aforementioned factors, I therefore see no reason to interfere with the findings of fact as the findings are not perverse or arbitrary in nature but based on analysed and well considered grounds. Therefore this Court will proceed to uphold the employment benefits ordered payable by the Appellant.
- [15]** For all the aforementioned reasons, I reject all the grounds of appeal and proceed to dismiss the appeal.

Signed, dated and delivered at Ile du Port on 9<sup>th</sup> July 2021

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Govinden R  
Chief Justice

