SUPREME COURT OF SEYCHELLES

Reportable
[2022] SCSC 1037
MA136/2022
(Arising in MC58/2021)

In the matter between:

BEAU-VALLON PROPERTIES TRADING AS THE CORAL STRAND HOTEL **Applicant**
(Represented by Mr. Serge Rouillon)

and

THE MINISTER MINISTRY OF EMPLOYMENT & SOCIAL AFFAIRS **Respondent**
(Absent / Unrepresented)

Neutral Citation:	*Beau-Vallon Properties vs. Ministry of Employment & Ors* (MA136/2022 (arising in MC58/2021) [2022] SCSC 1037 . (22 November 2022)
Before:	Adeline, J
Summary:	Judicial review / leave to proceed denied / leave to appeal to the Court of Appeal / Rule 8 of the Supreme Court (Supervisory Jurisdiction of Subordinate Courts, Tribunal and Adjudicating Authorities) Rules 1995
Heard:	By Submissions
Delivered:	22 November 2022

FINAL ORDER

The pleadings and the affidavit of facts upon which the decision whether to grant or not to grant leave to appeal to the Court of Appeal against the ruling of the 30th May 2022, is inadequate, in that, it does not contain any ground or grounds upon which the Applicant / Petitioner seeks for Judicial review. That being the case, I am therefore, not persuaded that the Applicant / Petitioner has a reasonable chance of success. In the circumstances, the motion is hereby dismissed.

RULING

Adeline, J

[1] By way of a notice of motion filed in Court on the 14th June 2022 by Beau-Vallon Properties Limited trading as Coral Strand Hotel ("the Applicant / Petitioner") against the Minister of the Ministry of Employment and Social Affairs ("the Respondent"), the Applicant / Petitioner applies to this Court for leave to appeal to the Court of Appeal against the ruling of Andre J, (as she then was) in MA165/2021 (Arising out of MC58/2021), delivered on the 30th May 2020.

[2] In support of its application, it is attached to the motion an affidavit of facts and evidence duly sworn by one Alexander Khlebnikov, a director, in which affidavit, *interalia*, Alexander Khlebnikov depones as follows;

> *"4. that by virtue of an Employment Contract one Mr. Steve Forte was employed by the Petitioner as a driver (hereinafter "the Employee").*
>
> *5. that the employee filed a grievance MED/W/0/2021/192 with the Ministry of Employment, Immigration & Civil Status (now the Ministry of Employment and Social Affairs) on 16th October 2020 as a result of his extended absence from work which he alleges were due to COVID-19 restrictions for what was supposed to be only a month's break on holiday overseas in Russia.*
>
> *6. that although the grievance was filed several months out of time there was no mediation process or proper determination of the reasons for the delay in filing the grievance and a simple letter from the Ministry was sent via post to the Petitioner on the 25th November 2020 stating, interalia, that the delay in filing the grievance would be condoned and was due to COVID-19 restrictions affecting Forte's travelling back to the jurisdiction and the matter was set for mediation of his Grievance on the 17th December 2020.*

7. that the Petitioner appealed the decision of the Competent Officer to the Respondent on 15th December 2020 and the Respondent by letter dated 30th June 2021, confirmed that the employee could not have filed his grievance earlier and agreed that the grievance was legally and duly out of time.

8. that the Petitioner genuinely and honestly believes the employee could easily have filed his Grievance within the statutory prescribed time limit under PART II of the Act of 14 days since becoming aware of the event, namely, non-payment of the monthly salary due to his absence from work.

9. that by an email dated as early as May 2020, the employee had already queried through a representative the non-payment of the monthly salary due to his absence from work with the Ministry yet took no steps to file his grievance until October 2020, and therefore under the law lost the right to do so as the failure to do so was attributable to the employee.

10. that the Petitioner feeling aggrieved by the decision of the Respondent applied for a judicial review of the decision of the Respondent and for an Order of Certiorari to quash the decision of the Respondent confirming the validity of a grievance filed well out of time under Part II of the Act during the course of employment by the employee.

11. that the Petitioner has a sufficient interest in the subject matter this petition is being made in good faith.

12. that by a ruling of her ladyship Samia Andre Judge in case MA165/2021, dated 30th May 2022, the Supreme Court refused us leave to apply for a judicial

review of the ruling of the Minister, for the reason, interalia, the petition was mute on the grounds the judicial review was sought.

13. The Petitioner wishes to appeal to the Supreme Court ruling on the basis that there is ample evidence in the Application and supporting affidavit and according to the statute that, the grievance was filed well out of time and the Competent Officer and the Minister should have applied the law as per the Act to exclude the Grievance which was filed substantially out of time.

14. that the learned Judge has erred in failing to not recognise the above principles or to see that there was a clear breach of the Act time limit for filing a grievance and for several months thereafter and hence the decision of the Minister was ipso facto illegal, improper and irrational in all senses of the word.

15. that it is for these reasons the Petitioner hereby seek leave to appeal the Supreme Court Judgment to the Court of Appeal against the Supreme Court Judgment.

16. That I am legally advised that the trial Judge has dismissed my application for leave to appeal on a technical point when the facts of the case and the law show that the Petitioner being the Employer affected by the decision has sufficient interest in the matter and since the entertaining of the grievance filed well out of time and illegal means that the Application was made in good faith and the said Judgment is erroneous in these respects to not grant the application for leave to apply for judicial review of these actions and lapses on the basis of the interests of fairness and justice and good Order.

17. that I reasonably believe that we have an overwhelming chance of success for the Supreme Court ruling to be set aside before the Seychelles Court of Appeal, and therefore seek leave of this honourable Court for;

a) an urgent hearing of this motion

b) an urgent hearing of an application for leave to appeal against the Order of her ladyship Justice S. Andre dated 30th May 2022 in MA165 of 2021 arising out of MC58 of 2021.

c) with cost for this application.

[3] In his affidavit in reply objecting to the grant of the motion, one Jules Baker, in his capacity as the Principal Secretary of the Department of Employment in the employment of the Ministry of Employment and Social Affairs, *interalia*, depones as follows;

4. that one Steve Forte filed a grievance with the Respondent on the 16th October 2020 registered as MED/W/O/2020/192 for the reason that Beau-Vallon Properties Limited (hereinafter "the Petitioner") has not paid him his salary from the period of May 2020 to September 2020.

5. that Mr. Steve Forte wrote to the Respondent on the 15th October 2020, stating that, "unfortunately due to the pandemic COVID-19, I was unable to leave Russia to enter Seychelles on the 14th April 2020. To note I have just recently returned to Seychelles and has completed 14 days quarantine on the 04th October 2020, and has resumed work at Coral Strand Hotel.

In May 2020 whilst I was still in Russia, my monthly payment of salary was stopped up to date and would appreciate if your Department will hear my complaint.

6. that as per Section 2 (3) of PART II of Schedule 1 of the Employment Act 1995, the Competent Officer allowed the registration out of time after being satisfied that the failure to do so was not attributable to the fault of the worker in a letter dated 25th November 2020, stating that;

"In view of the fact that he was in Russia and unable to return to Seychelles, yet he was supposed to and was not exactly aware when this would be possible, and had expectations to be able to do so at any time, being Seychellois, and that this may have changed his situation, or allowed him to approach your employer in person, to seek clarifications on the non-payment and to negotiate with it, registration of the grievance is allowed".

7. that the Petitioner appealed the decision of the Competent Officer on the 15th December 2020 on the ground that;

"the Competent Officer failed to take into consideration that Mr. Forte made no attempt to contact the Ministry of Employment to seek for assistance or and lodge the grievance prior to his arrival. This could easily been done by email, the mediation meeting could be arranged via skype".

8. that on the 06th May 2021, the appeal was heard before the Employment Advisory Board and the representative of the Petitioner and Mr. Steve Forte was present.

9. that the Employment Advisory Board gave their findings dated 11th May 2021, and concluded that;

"In view of the above findings, the board finds that the Appeal should not be allowed as it is clear following the hearing that the grievance out of time has reasonable ground to be registered".

10. that after considering the application for the appeal, the relevant evidence and the advice of the Employment Advisory Board in accordance with Section 65 (4) of the Employment Act, the Minister gave a ruling dated 17th June 2021, that;

"The decision of the Competent Officer allowing the registration of the employee's grievance out of time is confirmed."

14. that the appeal process was done as per the Employment Act, and the Minister confirmed the decision of the Competent Officer and reason was provided for the decision taken.

15. that the decision and reason provided to confirm the validity of the grievance filed out of time under PART II of the Act by Mr. Steve Forte is therefore proper, justified, legal and reasonable and were arrived at in a procedurally correct manner.

16. that the reasons stated in the Petitioner and affidavit are not acceptable grounds for this Court to grant the petition for an Order of certiorari to quash the decision of the Respondent confirming the validity of a grievance filed out of time under PART II of the Act. Henceforth, it is humbly asked that the petition is denied".

[4] I will not venture into giving a synopsis of the facts and circumstances of this case, given that the affidavit of facts and evidence in support of the application, and the affidavit in reply, give a comprehensive insight of the history of the case leading to this ongoing Court proceedings.

[5] Suffice to say, however, that aggrieved by the decision of the Respondent to register Mr. Steve Forte's grievance out of the prescriptive time limitation period, the Applicant / Petitioner, did enter proceedings before the Supreme Court, by way of a motion, for the exercise of its Supervisory Jurisdiction under the Supreme Court (Supervisory Jurisdiction over subordinate Courts, Tribunals and Adjudicating Authorities) Rules 1995, filed in Court as MC58/2021. In its application supported by an affidavit of facts and evidence, the Applicant / Petitioner sought for "a writ of certiorari to quash the decision of the Respondent confirming the validity of a grievance filed well out of time under PART II of the Employment Act during the course of his employment by the employer.

[6] The Applicant / Petitioner's application was followed by a notice of motion supported by an affidavit of fact and evidence filed in Court as MA165/2021, (arising from MC58/2021), by which application, the Applicant / Petitioner sought for leave of the Court "to apply for a judicial review of the decision of the Respondent and for an Order of certiorari to quash the decision of the Respondent confirming the validity of a grievance filed well out of time under PART II of the Employment Act during the course of the employment by the employee".

[7] In a ruling in MA165/2021 (arising out of MC58/2021) delivered on the 30th May 2022, Andre J, (as she then was), declined to grant the Applicant / Petitioner leave to apply for judicial review amid the objection raised by the Respondent. My reading and

understanding of her Ladyship's ruling is that the application for leave failed for two main reasons;

(i) "Firstly, the application for leave for judicial review did not succeed because it falls short of the substantive law requirements for judicial review. That is to say, because neither the pleadings, nor the affidavit evidence in support of the application for leave for judicial review disclose the ground or grounds for wanting the decision to be reviewed. In otherwords, the Applicant fails to make any averment as to the grounds which it seeks for review. For example, it is not known, from the perspective of the Applicant, whether the Respondent's decision making process was illegal, whether the Respondent acted irrationally or unreasonably, or it acted procedurally improper. Even when learned Counsel for the Applicant / Petitioner sought to argue that the Respondent's decision is irrational and unreasonable, Andre J observed, that it "did not explain or point out how the decision making process of the Respondent was illegal, irrational and unreasonable, or procedurally improper".

(ii) Secondly, the application for leave to apply for judicial review failed because the Petitioner had not complied fully with the procedural law, particularly, the rules under the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunal and Adjudicating Authorities) Rules 1995 (Supreme Court Rules 1995). Andre J found that, although there was compliance with Rule 2 (1), in that, the Applicant / Petitioner had made its application by "petition accompanied by an affidavit in support of the averments set out in the petition", it did not comply fully with Rule 3, in that, the petition did not contain a statement of "the relief

sought and the grounds upon which it is sought". Andre J concludes by saying that;

"Based on the petition lacking the grounds for judicial review, I am not satisfied, that the Applicant / Petitioner has sufficient interest in the subject matter of the petition and that the petition is made in good faith as required by Rule 6 (1). With this, I find that the application / petition as drafted and filed, cannot succeed for the purpose of leave to proceed".

[8] In his written submission, learned Counsel for the Applicant / Petitioner, at paragraph 1-5, rehearses the history of the case from the date the employee, Steve Forte, filed his grievance MED/W/0/2021 192 on the 16th October 2020. Learned Counsel contends, that by taking no steps to file his grievance until he effectively "lost the right to do so as the failure to do so was attributable to the employee". Learned Counsel maintains that the Applicant is aggrieved by the decision of the Respondent to allow Steve Forte to file his grievance "well out of time", and therefore, applies for judicial review of the decision ..... and for an Order of certiorari to quash the decision".

[9] Learned Counsel, making references to Andre J's ruling in MA165/2021 dated 30th May 2022, submits, that leave for juridical review was denied for the reason "that the petition was mute on the grounds on which judicial review was sought. Underlined emphasis is made by Counsel.

[10] Interestingly, although learned Counsel expresses his concurrence to the general principles of law as regards to the main grounds for judicial review as correctly elaborated and discussed in Andre J's ruling, learned Counsel fails to address the Court on Andre J's findings that "the petition was mute on the grounds on which judicial

review was sought". Instead, he seeks to rehearse the undisputed fact that Mr. Forte's grievance was filed out of time.

[11] It is contended by learned Counsel for the Applicant / Petitioner, that in its ruling in MA165/2021, "the Court has taken a liberal view of the Application for leave to apply for judicial review". Learned Counsel argues, that all that an applicant needs to do is to convince the Court that it has an "arguable case", and that is sufficient for the Court to grant permission to proceed to a full hearing.

[12] Learned Counsel refers this Court to the case of *Airtel (Seychelles) Ltd v. Review Panel of the National Tender Board & Anor (SCA70 of 2018)*, [2021] SCCA 36, in which case Dingake JA, is quoted as having said;

> *"Under the good faith requirement, this Court has explained that the Applicant should show that the issues raised in an application are arguable. If these two tests are met the Judge makes an Order for the case to move to the merits stage".*

[13] Learned Counsel cites the case of Karunakaran v. The Constitutional Appointment Authority SCA 33/2016, and submits as follows;

> *"The purpose of seeking leave is not to deny litigants access to the Court (something that should not be done lightly) but to weed out vexations and wholly unmeritorious litigation by busy bodies, what the Romans called "meddlesome Interlopers".*

[14] Learned Counsel cites the English case of *R v. Inland Revenue Commissioners, exparte National Federation of self-employed and Small Business Ltd [1982] AC 617, in which case, he submits, the Court indicated that, the leave stage, "enables the Court to prevent abuse by busy bodies, Cranks and Other mischief makers"..*

[15] It is submission of learned Counsel, that the law is well settled in this area, in that, "cases that are hopeless or bound to fail, or totally devoid of merit must not be allowed to proceed further. To do so would be to squander precious judicial time unwisely. Learned Counsel cites few cases amongst the plethora of authorities in this jurisdiction where this reasoning has prevailed, notably, the cases of Cable & Wireless (Seychelles) Ltd v. Minister of Finance and Communicating & Anor (MC42/2017) [2018] SCSC 348 (08th April 2018, and Karunakaran v. Constitutional Appointment Authority Civil Appeal SCA 33/2016 [2017] SCCA 9 (14 April 2017).

[16] On the law, learned Counsel finds it helpful to quote this extract from the Karunakaran's case (Supra);

> *"This Court opines that in any case where application for leave is sought, the Court must be careful that it does not unduly impede or frustrate the right to access the Court and have the real dispute determined by being too quick to deny a litigant the right to be heard on the merits, unless in situations where the application is plainly useless and a waste of the Court's time".*
>
> *"Put differently, it seems to us that in all situations where leave is an issue the best approach is to adopt a liberal and generous approach that facilitates a matter proceeding on the merits, than the contrary. We think that in order to give effect to the right to a fair trial, it is good judicial policy that where there are doubts about whether a case is arguable or not, the benefits of such doubt must accrue to the Applicant".*

[17] I have read the submission of learned Counsel, particularly, his submission on the substantive law in this area. I find no room for disagreement. He is, undoubtedly, well-versed about the law in this area. Nonetheless, he has not addressed in greater depth

the procedural issued raised by Andre J in the ruling she delivered in MA165 of 2021 on the 30th May 2020 at paragraph [16] and [17], and her finding which she summed up as follows;

> *"The petition before me only states that the Petitioner is aggrieved by the decision and is therefore seeking judicial review. The petition is mute on what grounds such review is sought".*

[18] Learned Counsel for the Respondent, at paragraph 1-8 of her written submission, gives a historical perspective of the case as known to the parties, the facts of which are not disputed. Learned Counsel then proceeds to discuss the law, particularly, the law of judicial review. Citing the English case of Council of Civil Service Union and Others vs. Minister for the Civil Service [1983] UKHL 6, [1984] 3 All ER 935, learned Counsel submits, that the English case law authorities have established that, there are three main grounds for which a decision can be subject to judicial review. These grounds are illegality, irrationality and procedural impropriety.

[19] Learned Counsel also submits, that similar approach has been followed by the Courts in Seychelles that it is now settled law, that judicial review is concerned with the illegality of the decision taken, the irrationality of the decision taken and procedural impropriety. Learned Counsel cites the case of *Wells v. Mondon and another* 257 of 2009 [2010] SCSC 7, *Le Meridien Barbaron v. Employment Tribunal* (51 of 2009). [2010] SCSC 35, and *Vijay Construction (Pty) Ltd v. Andre* (MC108/2014) [2016] SCSC 21.

[20] Learned Counsel further submits that, the proposition that when administrative decision or act or order is subject to judicial review, "the Court is concerned only with the "legality", "rationality", reasonableness and "impropriety" of the decision was

emphasised in Jivan v. Seychelles International Business Authority (MC15/2013) [2016] SCSC 108. Learned Counsel cites the case of *Jouanneau vs. Seychelles International Business Authority* (Civil Side No 90 of 2010) [2011] SCSC 48 (28 July 2011) in which case, the Court makes the following observation;

> *"The Court notes that in judicial review matters, the concern is not so much as to what decision was taken, but how the decision was reached. It is the process of the decision making that is reviewed".*

[21] It is the submission of learned Counsel, that in the case of Council and Civil Service Union and Others v. Minister for Civil Service [1984] 3 ALLER 935, the Court had this to say;

> *"By irrationality, I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" having its origin from the case of Associated Provisional Picture Houses Ltd v. Wednesbury Corporation [1948] 1 KB 223"*
>
> *Learned Counsel submits that, the "Wednesbury unreasonableness principle applies to a decision which is so outrageous in its defiance of logic or accepted".*

[22] It is my observation, that learned Counsel for the Defendant too is well-versed with the substantive law of judicial review as she submits on the grounds for judicial review supported by the relevant case law authorities. Nonetheless, she too fails to address or discuss the Applicant / Petitioner's short comings as regards to the procedural law highlighted by Andre J in her ruling in MA 65 of 2021 (Arising out of MC 58 of 2021). In essence, both parties seem to focus more on the merit of the judicial review petition, without much emphasis on the procedural issues and the short comings as regards to

the Applicant / Petitioner's petition and pleadings as highlighted in the ruling of Andre J delivered on the 30th May 2022.

[23] In the latter part of her submission, learned Counsel focusses on the relevant law under the Employment Act 1995, particularly, the law governing the grievance procedures whilst seeking to illustrate the fact that, the correct procedure was followed from the time Steve Forte registered his grievance until the end of the grievance procedure.

ANALYSIS AND DISCUSSION

[24] The Crux of this case is an application for leave to appeal to the Seychelles Court of Appeal against a ruling delivered by Andre J, (as she then was) on the 30th March 2022 refusing leave to the Applicant / Petitioner to proceed with judicial review on its merit. The application is made pursuant to Rule 8 of the Supreme Court (Supervisory Jurisdiction of Subordinate Courts, Tribunal and Adjudicating Authorities) Rules 1995.

[25] Rule 8 of the Supreme Court (Supervisory Jurisdiction of Subordinate Courts Tribunals and Adjudicating Authorities) Rules 1995 is couched in the following terms;

> *"Where the Supreme Court refuses to grant leave to proceed, the Petitioner may appeal to the Court of Appeal within 14 days of the Order of refusal with leave of the Supreme Court first had and received".*

[26] In the case of Morel vs. Registrar of the Supreme Court [2005] SLR 16, the Court explained that, "the object for obtaining leave to appeal is primarily to prevent cases which do not disclose any reasonable action, or which are scandalous, frivolous, vexatious or abuse of process from going before the Court of Appeal". In Morel (Supra), the Court proceeded to spell out the requirements for a successful application when it stated the following;

"In considering an application for leave to appeal to the Court of Appeal against a ruling of the Supreme Court refusing such leave in the first instance, the applicant should show that;

(a) the intended appeal raises issues of public interest, and

(b) there is an arguable ground of appeal, and such ground has a reasonable chance of success.

[27] I have thoroughly read the pleadings as well as the affidavit of facts and evidence in support of this application for leave to appeal to the Court of Appeal against the ruling of Andre J, (as she then was) delivered on the 30th May 2022 denying the Applicant / Petitioner leave to proceed with judicial review. In doing so, I have also read the ruling of her Ladyship, particularly, paragraphs [16] and [20]. I am at odds with the Applicant / Petitioner's averment that they have "an overwhelming chance of success". I say so, because clearly, the affidavit is inadequate and is deficient because, *interalia*, it does not disclose the ground or grounds upon which the application for judicial review is to be pursued.

In essence, the Applicant / Petitioner has not made up the case for them to succeed with their motion and obtain leave of this Court to proceed with their appeal to the Court of Appeal.

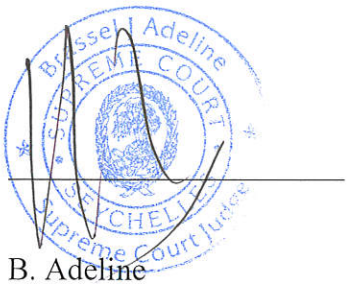
[28] In his submission, learned Counsel for the Applicant / Petitioner submits that, the Applicant / Petitioner has been denied leave to proceed with judicial review on a technical point. He does not suggest that, the technical point under which the decision was made to denied the Applicant / Petitioner leave has no legal basis in law, nor does he mounts any challenge of the legal point. We have to be reminded, that sometimes,

and it happens quite often, that cases are won and lost on technical points. The main reason for that, is because our Courts are there, to amongst other things, uphold the rule of law which is the bedrock of our democracy.

[29] In the instant case, clearly, the pleadings and the affidavit evidence upon which the decision whether to grant or not grant leave to appeal to the Court of Appeal against the ruling of the 30th May 2022 is inadequate, in that, it does not contain any of the grounds upon which the Applicant / Petitioner seeks for judicial review. That being the case, I am therefore not persuaded that the Applicant / Petitioner have a reasonable chance of success.

[30] In the circumstances, and for the reasons discussed in the preceding paragraphs of this ruling, the motion is hereby dismissed.

Signed, dated and delivered at Ile du Port on 22nd November 2022.



B. Adeline

Judge of the Supreme Court