

IN THE SUPREME COURT OF SEYCHELLES

Reportable

[2022] SCSC 275
CA16/2020
(MA200/2020)

In the matter between

KANNUS SUPERMARKET
(Mr. Elvis Chetty)

APPELLANT

and

VAITHIYANATHAN UTHRAPHATHY
(Ms. Lucie Pool)

RESPONDENT

Neutral Citation: *Kannus Supermarket vs Vaithiyanathan Uthrapathy (CA16/2020) [2022]*
SCSC

Before: G. Dodin

Heard: Written Submissions

Delivered: 15 March 2022

ORDER

All the grounds of appeal are dismissed. Costs awarded to the Respondent.

JUDGMENT

Dodin J

[1] The Appellant being dissatisfied with a judgment of the Employment Tribunal delivered on the 24th September 2020 and amended on the 15th October 2020 appeals the judgment raising the following grounds of appeal:

- i) *The board erred in law and fact when it sat to alter its judgment;*
- ii) *The board erred law and fact when coming to its final quantum;*

- iii) *The board erred in law and fact when awarding compensation;*
- iv) *The board erred in law and fact when believing the Respondent's version of events;*
- v) *The board erred when showing clear sign of biases;*
- vi) *The board erred in not thoroughly considering the Appellant's case.*

[2] Learned counsel for the Appellant made the following submission in respect of each ground of appeal:

Ground 1.

"The Court sat subsequent to the original judgment and made alternative to the original judgment. The position of the Appellant is that the Tribunal does not have the powers to make changes to the original judgment.

The Employment Tribunal merged to make changes to its judgment upon being moved by the Respondent's Attorney. The Respondent's Attorney moved to amend the judgment without using the process set out in the law. The Respondent failed to follow the correct process and therefore on this basis alone the amended judgment should be set aside.

Further, the Employment Tribunal does not have the power to amend its judgment. Once it stops sitting it was FUNCTUS. Thereby ineligible to sit and amend its judgement. Schedule 6 (7) of the Employment Act empowers it to conduct its own proceedings in the manner it sees fit, but this must be done within the context of the Rule of Law.

Ground 2

The Employment Tribunal erred in giving the quantum it did to the Respondent. The Respondent's claim should be limited to someone who self-terminated

himself. That is to say the salaries, leave and or public holidays if any at all that was outstanding.

Despite the Respondent not having established the requirements under the law the Employment Tribunal without legal reasoning awards quantum. Further, the award is not backed by any documents or any reliable evidence. It is simply that the Tribunal wished to give an award to the Respondent.

Ground 3

Compensation is normally awarded if a party has been unlawfully terminated. In these circumstances the tribunal agreed that the Respondent self-terminated his employment. The Appellant in this ground submits that the tribunal erred in awarding compensation. It had no legal grounds in law and facts. The facts are that the Respondent terminated his employment and in law he is not entitled to it. The Tribunal states it is guided by a particular case and yet fails to elaborate as to why. It fails to give reasoning to its supposition. In order for the compensation to be awarded it must be grounded on solid legal and factual basis. As such the Appellant submits that the compensatory award should be quashed.

Ground 4

The Appellant raise the issue of bias in this case as it is clearly shown throughout the judgment of the Tribunal. The previous grounds are repeated in order to add weight to this ground.

It's sufficed to say that throughout this judgment the Tribunal only adds weight and believes the Respondent. Despite the presentation of the Appellant's not much weight is given to it. Further, despite the limitations the Tribunal felt the need to make awards not founded in law.

Ground 5

The Tribunal fails to thoroughly consider the case of the Appellant. The Appellant made its case based on the law yet from the outset the Tribunal was

focused on making awards in favour of the Respondent. The witness of the Appellant was cogent and clear. The Respondent was not clear, his evidence was full of gaps and was discredited thoroughly.

[3] Learned counsel for the Respondent submitted as follows:

On grounds i), ii) and iii)

1. *It is clear from the evidence on record that the Appellant did not show great enthusiasm in defending its case before the Employment Tribunal. It would appear that their main purpose was to punish the Respondent for having dared to invoke the grievance procedure in order to claim unpaid benefits due to him. After a lengthy mediation by the Ministry of Employment which got nowhere, the Applicant (now Respondent) proceeded to bring his claim before the Employment Tribunal.*
2. *The stance adopted by the Appellant is reflected on Page 2 Paragraph 2 of the Judgment of the Learned Chairperson of the Employment Tribunal, who, after reviewing the evidence with regard to the lack of interest shown by the Appellant in defending its case, said the following: (Quote) “The case was closed by the Tribunal and the Applicant (now Respondent) was invited to make submission”. It to be noted that only the Applicant submitted written submissions to the Tribunal.*
3. *At the hearing of the case before the Tribunal, the Appellant’s representative one Mr Shammugasudaram Pillay did not testify. They called only one witness who was a part time employee in the Human Resources Department of Kannus, based at Michel Building in Victoria. She was unable to answer pertinent questions in cross-examination which could have shed light on the case. However she admitted that the Respondent was owed salaries and leave. She did not produce the Respondent’s contract of employment nor his pay slips.*

4. *On Page 6 of the Judgment, the Learned Chairperson sets out the relevant sections under the Employment Act which govern the employee's termination and his entitlement to benefits. Having considered the evidence and the demeanour of the Respondent in the witness box, the Learned Chairperson held that the Appellant/Respondent had not brought any proof to deny the averment of the Applicant/Respondent that he was assaulted by the Appellant's representative Mr. Pillay. She further held that the act of the Appellant was a breach of the Employment Act as this was harassment which constituted an offence under the said Act.*
5. *The Learned Chairperson rightly referred to the burden of proof under S53 (5) of the Employment Act on Page 11 of her Judgment and stated that the burden is on the Appellant (employer) to prove that the assault did not happen and the Appellant did not discharge that burden. On this finding the Learned Chairperson proceeded to award legal benefit and 6 months' compensatory award to the Respondent. Compensation for length of service was not awarded since the Respondent was a foreign worker on a fixed term contract. It is submitted that the Learned Chairperson was right in awarding the benefits that the Respondent was entitled to.*
6. *There was an error calculation of the benefits and the error was brought to the notice of the Tribunal. As the Learned Chairperson pointed out on Page 2 of the Ruling, the Act regulates its own proceedings and as provided under the Civil Procedure Code, clerical mistakes and errors are allowed to be rectified. It is not an alteration of the judgment but a correction in the addition of the final figures. It was a human error that could have been made by anyone.*
7. *The Court is referred to the case of Mahe Builders Company Ltd v/s Didier Madeleine CA29/2018 Judgment delivered on 5/4/2019. It was held that the Court will not interfere with finding of facts.*

8. *It is submitted that the Tribunal came to the right decision with regards to the final award of compensation.*

On grounds iv), v, and vi

9. *The Learned Chairperson was right to believe the Respondent's version as the true version of events as there was no challenge on the part of the Appellant. On Page 11 of her Judgment she refers to the evidence of the Appellant's witness and states as follows:*

“the Respondent's witness did not deny the aggression, in effect she could provide no evidence for or against it. As the burden of proof is on the employer and in this case it must be to disprove the assault, we find that the Respondent (Employer) has not satisfied this burden and hence we must find that the Applicant's allegation that he was assaulted as true”

10. *It is submitted that there was no bias either in favour of the employer or employee. The record shows that the Appellant was accommodated and given all the opportunities to defend their case fully. They cannot now complain of bias.*
11. *Accordingly the Respondent urges the Court to find in his favour.*

[4] This appeal comes down to the determination of 3 issues:

1. Whether the Employment Tribunal was right to amend its judgment after having delivered the same;
2. Whether the awards of as per the final quantum and compensation were lawfully made; and
3. Whether the facts of the case justify the findings and determination of the Employment Tribunal.

- [5] The general rule is that once a court or tribunal has delivered judgment, it becomes functus officio. Its jurisdiction or designated authority comes to an end once it has performed its functions. However in most democratic jurisdictions, it is now law that a court or tribunal may at any time correct an accidental slip or omission in a judgment or order provided of course it does not affect the fundamental integrity of the judgment or order. It is important to note that the sole purpose of the amendments to judgments or orders is for the correction of typographical errors, accidental omissions or genuine miscalculations particularly mathematical errors. This allows for good administration of justice and enhance the prevalence of the rule of law. It does not allow for the insertion of additional clauses into a judgment and order that did not reflect the thinking and the intention of the court at the time the judgment or order was given.
- [6] This was well illustrated by the Australian cases of Bristol-Myers Squibb Co v Baker Norton Pharmaceuticals Inc [2001] EWCA Civ 414 and Vucicevic & Anor v Aleksic & Ors [2020] EWHC 2236 (CH), where it was ruled that the power is only applicable to give effect to the court's first thoughts or intentions at the time of making the order. It cannot be used to correct findings of facts made in the judgment and not recited or set out in the order. Any substantive mistake such as a mistake of law may only be rectified by way of appeal.
- [7] Considering the judgment of the employment Tribunal delivered on the 24th September, 2020, the Tribunal awarded the Respondent inter alia 6 months compensatory award. It is obvious that the total award must amount to SCR105,538.51 and not SCR 69,538.51. It is also obvious that the compensatory award amounted to SCR36,000. The sum of SCR69,538.51 is the total for 3 months' salary, SCR18,000, plus annual leave due at SCR5,326.27; plus 24 days public holidays at SCR6,641.28 and overtime due for 2 years at SCR39,570.96. It is therefore clear that upon adding the sums to be paid, the sum of SCR36,000 was mistakenly not added. It is a purely clerical calculation error since the compensatory award had already been given.
- [8] Consequently, I find that this correction did not alter or add to the judgment but only ensured that the proper calculation was inserted to reflect the awards given in the

judgment. Not to have done so would have amounted to an injustice to the Respondent. Ground 1 of appeal is therefore dismissed.

[9] Grounds ii and iii are taken together. Section 62 (c) of the Employment Act provides as follows:

62. *Where-*

(c) a contract of employment is terminated by the worker and the Tribunal determines pursuant to section 61(2)(b)(i) that the worker is justified in terminating the contract,

compensation is payable to the worker, in addition to his wages and any benefits earned, in accordance with section 47(2)(b) or (c).

[10] Learned counsel argues that where the employee terminates his own employment, he is not entitled to payment of compensation but only to salaries, leave due and public holidays outstanding. Compensation is payable only where employment has been unlawfully terminated. In its findings, the Tribunal found that the Respondent had self-terminated his employment by not turning up for work for 3 whole days and therefore he was not entitled to compensation for length of service. He was entitled to 3 months of unpaid salary; 27 days annual leave; 17 hours per week overtime for 2 years totalling 1716 hours; 24 days public holidays and 6 months compensatory award.

[11] The Employment Act allows for payment of all the above terminal benefits irrespective of the manner of termination. I therefore find that the Employment Tribunal granted the awards allowed by law. These two grounds have no merits and are dismissed accordingly.

[12] The remaining grounds concern the facts and evaluation of the evidence by the Tribunal. As a tribunal of facts which heard the parties evidence, observed the demeanour of the witnesses. As rightly pointed out in the judgment of the tribunal in paragraph 55, when the grievance procedures are initiated, the burden of proof lies on the employer to prove that termination was lawful or that the claims by the employee are not justified. An appeal is not an opportunity for the Appellant to have its case reheard or an appellate Court to re-evaluate the evidence from the records of proceedings.

[13] In the case of *Clydesdale Bank v Duffy* [2014] EWCA Civ 1260 the England and Wales Court of Appeal stated:

“The Court of Appeal is not here to retry the case. Our job is to review the decision of the trial judge. If he has made an error of law, it is our duty to say so, but reversing a trial judge's findings of fact is a different matter.... persuading an appeal court to reverse a trial judge's findings of fact is a heavy one. 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 applies not only to findings of primary fact but also to the evaluation of those facts and to inferences to be drawn from them”.

[14] In *Housen v Nikolaisen* [2002] 2 SCR 235 (Canada) the same principle was stated:

“The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged.”

[15] In the case of *McGraddie v McGraddie* [2013] UKSC 58 [2013] 1 WLR 2477”, Lord Reed quoted Lord Thankerton from the case of *Thomas v Thomas* 1947 SC (HL) 45; [1947] AC 484, at pp 54 and 487-488:

“(1) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion. (2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. (3) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.”

[16] It is obvious that the main thrust of the Appellant’s appeal is that the Employment Tribunal either erred in their assessment of the facts or did not give credence to the Appellant’s evidence. Having gone through the records and read the judgment, I find that

the Employment Tribunal did consider the facts in issue and it cannot be said that the findings of the Employment Tribunal were so perverse that no tribunal or court could have reached based on the facts before it. I therefore find that grounds iv, v and vi have not been supported by the record or judgment of the Employment Tribunal and are also dismissed.

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

[18] I award costs to the Respondent.

Signed, dated and delivered at Ile du Port on 15 March 2022.

G Dodin

Judge