SUPREME COURT OF SEYCHELLES

Reportable
[2022] SCSC 174
CA 11/2018
(Appeal from ET 61/2017)

In the matter between:

BEAU VALLON PROPERTIES LIMITED **Appellant**
(rep. Serge Rouillon)

and

RAHUL BHASIN **Respondent**
(rep. by Alexia Amesbury)

Neutral Citation:	*Beau Vallon Properties Limited v Bhasin* (CA 11/2018) [2022] SCSC 174 ..... (2nd March 2022)
Before:	Pillay J
Summary:	Appeal
Heard:	By way of submissions filed September 2018
Delivered:	2nd March 2022

ORDER

On appeal from the Employment Tribunal sitting as court of first instance.

The appeal is dismissed. The decision of the Tribunal is maintained.

JUDGMENT

PILLAY J:

[1] By way of a judgment dated 13th August 2021 the Court of Appeal allowed the Appellant's appeal and "returned [the matter] to the Supreme Court to make an order as to the merits and/or the costs as required after considering the record."

[2] The brief facts of the case as came out before the Tribunal is that the Respondent is a foreigner and former employee of the Appellant. The Appellant is a limited company registered and incorporated in Seychelles. On 13th April 2017 the Respondent registered an application at the registry of the Employment Tribunal for the following:

(1) Compensation for overtime

(2) Compensation for annual leave at the end of contract

(3) Compensation for pending air ticket for year 2015 – 2016

(4) Compensation for public holidays

(5) Compensation for living expenses till case gets sorted out

[3] Having heard the matter the Tribunal delivered a judgment on 14th March 2018 giving judgment in favour of the Applicant now Respondent, concluding at paragraph 44 that:

> *Given, that, because of the problems encountered with the HR system, the respondent were unable to provide credible and reliable records in evidence to show the contrary in terms of the number of hours the applicant worked overtime, when, as an employer, they were bound to keep proper and credible records, this tribunal determines this tribunal determines as follows;*
>
> 1. *That the respondent pays the applicant a total of 1975.24 hours of overtime, of which 118.09 hours were overtime carried out on public holidays, and 1857.15 hours carried out on normal working days, less 10% as a margin of error.*
>
> 2. *As agreed by the respondent, Beau Vallon Properties Limited, I also order;*
>
>   (i) *Payment of annual leave in lieu 34.5 days*
>   (ii) *Payment in lieu of public holidays in the sum of Euro 124.47, and*
>   (iii) *Payment in lieu of 19 days as unpaid salary.*
>
> 3. *Payment of airfares for the applicant and his family to repatriate them to their home land country. The applicant cannot be entitled to*

payment for his so called "unused or refund tickets, because under clause 7.2 (b) of his contract of employment, he and his family is only entitled to economy class air passage from India to Seychelles and Seychelles to India to take up, and upon completion of employment. Completion of employment was in April 2017.

4. *Refund of SR 5000 per month from May 2017, upon the production of receipts, showing rent paid. This is because the respondent's obligation towards the applicant for housing was no longer under their contractual agreement, but rather, under the provisions of Part 11 A (7) of the Employment Act 1995 from the date the applicant registered his grievance until the grievance is determined which is today 14th March 2018.*

5. *This Tribunal declines to make an order for payment of immigration fees because it was the applicant's choice to remain in this country until his case is determined, when his presence in this country, after he had given evidence on his own behalf, was unnecessary to conclude the case.*

6. *This Tribunal also declines to order payment for the additional monthly expense allegedly incurred by the applicant. Under his contact of employment at clause 7.2 (c)it is only the applicant who was entitled to meals which was limited to when he was on duty. After he terminated his contract of employment, and registered his grievance, the applicant's entitlement to food became a statutory entitlement under Part II A (7) of the Employment act 1995, which applies to him only, and*

7. *This Tribunal declines to order payment of school fees because the claim has no legal basis. The option to keep the wife and children in this country after the contract of employment was terminated was not the only option available to the applicant. The wife and children could have been repatriated into their homeland country, and the decision to keep them in this country should be at his own costs.*

[4] These orders were based on the Tribunals findings at paragraph 39 that:

1. *The applicant, Rahul Bhasin, did work overtime and that same was expressly authorised by the then General Manager, Mr. Denis Verkhorubov, his immediate supervisor then, and by implication, he worked overtime to meet the needs of the Mahek Restaurant's significant increase in its daily opening hours and weekly opening days between November 2009 up to April 2017.*

2. *The respondent, Beau Vallon Properties Limited, through their General Manger then, Mr. Verkhorubov, knew or ought to have known, that with the introduction of the restaurant new opening hours, and the increase of its opening days a week to 7 days, with the same number of Human Resources, the applicant had to work in excess of his contracted number of hours daily, weekly and monthly, and that the extra hours worked were overtime...*

3. *The records from the HR clock in and out system produced were fraught with "errors" which the parties called "abnormalities", and therefore, were incorrect, misleading and unreliable to produce credible figures about the applicant's overtime...*

4. *In the absence of credible and reliable records of the applicant's overtime which should have been kept by the respondent, the applicant produced his own computation partly based on the HR clock in and out system, reconciled with the records in a log book kept in the kitchen at the Mahek Restaurant.*

[5] The Appellant being aggrieved by the decision of the Tribunal appealed the Judgment by way of a Notice of Appeal dated 21st March 2018. On 4th June 2018 the Appellant filed its Memorandum of Appeal. The grounds of appeal were as follows:

(1) The tribunal erred when it failed to interpret the correct provisions of the Employment Act;

(2) The tribunal erred when it found overtime was performed;

(3) The tribunal erred when it calculated the overtime period;

(4) The tribunal erred when it imposed additional payment for accommodation not prayed for and beyond the terms of the contract;

(5) The tribunal erred when it found the Appellant needed to pay for food and shelter;

(6) The tribunal erred when it failed to seize all the fact and pronounced a bias and unbalanced verdict;

(7) The tribunal erred when it found the case should proceed despite being brought against the wrong party;

(8) The tribunal erred when it placed too much weight on the evidence of the Respondent and rejected the documentation of the Appellant;

(9) The tribunal erred when it failed to consider the implication of the renewal of contracts on an yearly basis;

(10) The tribunal erred when it accepted that overtime was being performed despite no corroborating evidence was provided to show approval.

[6] In returning the case to the Supreme Court, the Court of Appeal emphasised that "the consideration for the court a quo is on the record as contained in the court file on the date and time on the delivery of judgment, in other words, the submissions that were filed tardily by the appellant may not now be entertained."

[7] The Supreme Court judgment which was subject of the appeal was delivered on 14th November 2018. The record shows that on 24th October 2018 counsel for the Appellant, Mr. Chetty, indicated that submissions would be filed by the following Monday, which would have been the 29th October 2018, while 14th November 2018 was scheduled for delivery of the Judgment. The submissions from the Appellant were received by the Registry on 14th November 2018, on the date the judgment was delivered, hence were not filed within the time allotted. In view of the judgment of the Court of Appeal dated the 13th August 2021, those submissions, having been filed tardily, they are not to be entertained. The only submissions to be entertained are those of the Respondent filed on 20th September 2018.

Ground 1 - The tribunal erred when it failed to interpret the correct provisions of the Employment Act;

[8] The Learned counsel for the Respondent submitted on the first ground of appeal that the Appellant has failed to state which provision of the Employment Act has been wrongly interpreted. The Learned counsel for the Respondent queried whether the Appellant was contesting the provision in regard to the payment for food and shelter or another which she did not elaborate on.

[9] The only provision of the Employment Act which was referred to by the Tribunal and had any bearing on their decision is Part IIA (7) of the Employment Act 1995.

[10] I will come back to this later.

Ground 2 - The tribunal erred when it found overtime was performed;

[11] With regard to ground 2, the Learned counsel for the Respondent submitted that the Tribunal made a decision "based on the facts, by way of evidence adduced by the Respondent". The Learned counsel for the Respondent referred to paragraphs 41 to 44 of the judgment and to the Respondent's submission to the Tribunal. She submitted that the evidence produced being the "emails, logbook sheets, and the Affidavit of the General Manager, who was the immediate supervisor of the Respondent, who acknowledged the overtime was performed and also acknowledged that, the Respondent was has not been refunded the day off, thus, in view of the fact that the Respondent is no longer in the employment of the Appellant, thus the overtime is converted into cash." In support of its arguments Learned counsel relied on the case of **Driver v Air India Ltd Case No 172/2010/1919 at page 41**.

[12] At paragraph 28 of the Judgment the Tribunal "analysed" the evidence of the Respondent and made a finding of fact to the effect that

> *... he [the Respondent] has produced ample evidence to prove, that to turn the Mahek restaurant into a profit making business there was a cost to it. That meant, that the restaurant had to increase its opening hours daily as well as to open 7 days*

a week. That, required him to work longer hours thus making it impossible for him to take his days off or to proceed on annual leave as he would have wished. This became a concern to him and through the various emails he sent or received, he made it known that he was working longer hours that he contracted to do. Therefore, on his oral evidence, corroborated by documentary evidence produced as exhibits, we find that for the period from the year 2012 – 2017, AW1 did work overtime. The question is how many hours he worked overtime.

[13] In the case of **Searles v Pothin Civil Appeal SCA07/2014 (21 April, 2017)** the Court referred to the observations of the Court of Appeal in **Akbar v The Republic Criminal Appeal SCA5/1998 (3 December, 1998)** that the role of an appellate court in an appeal against findings of facts by a trial court is not to *"rehear the case. It accepts findings of facts that are supported by the evidence believed by the trial court unless the trial judge's findings of credibility are perverse".*

[14] In the case of **Citizens Engagement Platform Seychelles v Bonnelame (CA 28/2019) [2020] SCSC 990 (28 December 2020)** Dodin J in coming to a decision on appeal from the Tribunal relied on

the England and Wales Court of Appeal case of Clydesdale Bank v Duffy [2014] EWCA Civ 1260 wherein it was found that:

"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".

The same was adopted by the Supreme Court of Canada in Housen v Nikolaisen [2002] 2 SCR 235:

"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] I have gone through the record, there is no basis for this Court to come to a conclusion that the findings by the Tribunal was perverse. For that reason this ground of appeal fails.

Ground 3 - The tribunal erred when it calculated the overtime period;

[16] With regard to ground 3 of the appeal, Learned counsel for the Respondent submitted that the Appellant failed to disclose the errors that the Tribunal made. She further added that the Tribunal regulates its own proceedings under the Employment (Amendment) Act 2008 pursuant to section 73A and more specifically under schedule 6 6(7).

[17] Per paragraph 37 of the Judgment the Tribunal found that:

> *The simple fact is that, the respondent [Appellant] relied entirely on the clock in and clock out HR system in compiling the records, and for the reasons that came out in evidence and outlined above, they did not reflect an accurate figure of all the overtime hours the applicant worked, and therefore, that made the records of his overtime unreliable and not credible.*

[18] The Tribunal found however that the Respondent "produced his own computation partly based on the HR clock in and out system, reconciled with the records in a log book kept in the kitchen at the Mahek Restaurant" which in the absence of proper and credible records kept by the Appellant, the Tribunal relied on. The reasoning of the Tribunal cannot be faulted. The evidence showed that the records kept by the Appellant was not credible and not reliable. In the absence of credible evidence from the Appellant the Tribunal relied on the evidence from the Respondent.

[19] On the basis of **Citizens Engagement Platform Seychelles** there is no compelling reason in my view to overturn the findings of the Tribunal on this issue. For the reasons given this ground of appeal also fails.

Ground 4 and 5 - The tribunal erred when it imposed additional payment for accommodation not prayed for and beyond the terms of the contract;

The tribunal erred when it found the Appellant needed to pay for food and shelter

[20] With regard to ground 4 and 5 of the appeal, Learned counsel for the Respondent submitted that the provision for accommodation as well as food and shelter is statutory and falls under schedule 1 Part II A (7). She further submitted that the award of the "SR5000 monthly was rightly made by the Tribunal because the "obligation towards the Applicant for housing was no longer under their contractual agreement but rather, under the provision of part II A (7) of the Employment Act 1995 from the date the Applicant registered his grievance until the grievance is determined which is the 14th March 2018."

[21] She further submitted that in accordance with Schedule 6 (7) of the Employment Act 1995 as amended by Act 21 of 2008 the Tribunal is empowered to make any other orders which may not have necessarily been prayed for.

[22] In terms of ground 4 suffice it to say that the Respondent's application to the Tribunal clearly states at paragraph 5 that one of his demands was for "compensation for living expenses till case gets sorted out".

[23] Hence it is clear that there was a prayer for accommodation.

[24] In terms of ground 5, the mechanism for the grievance procedure is provided in Schedule 1 of the Act, Part II. The provisions in relation to grievance procedure is applicable to circumstances arising under sections 53(5), 61 and 64.

[25] Section 64 of the Act provides that; "Wherever a dispute, other than one for which the grievance procedure is expressly provided under other provisions of this Act, arises between employer and worker and internal dispute procedures, if any, have been exhausted without agreement, either party to the dispute may initiate the grievance procedure."

[26] Part IIA of Schedule 1 provides for "Special provisions relating to non-Seychellois workers"

[27] Section 7 of Part IIA provides that "An employer of a non-Seychellois worker shall continue to provide such worker with food and shelter while the grievance of the worker is being dealt with by the competent officer or the Tribunal."

[28] The Respondent started the process for his claim for payment of overtime before his contract ended in April 2017. There is no evidence that he was terminated but rather that his contract ended and was not renewed. The Respondent having registered a grievance and subsequently an application before the Tribunal, in relation to the payment of his overtime dues, falls within the ambit of section 64 of the Act. Part IIA (7) of the Act applies to grievance procedures started under section 64 amongst others. Having thus initiated the grievance procedure and subsequently filed an application before the Tribunal, being a foreigner, the provisions of section 7 of Part IIA are applicable for the benefit of the Respondent.

[29] In the circumstances the Tribunal was correct in its finding that the claim for payment housing and food became a statutory entitlement when he filed the grievance as opposed to an entitlement under the contract.

[30] Therefore, there was no error in the Tribunal's finding that food and shelter had to be provided by the Appellant.

[31] In the circumstances, grounds 4 and 5 of the appeal fail.

[32] It follows from the above that ground 1 of the appeal also has to fail.

Ground 6 - The tribunal erred when it failed to seize all the fact and pronounced a bias and unbalanced verdict

[33] The Learned counsel for the Respondent with regard to ground 6 submitted that the Tribunal does not deliver a verdict but a ruling or a judgment. She submitted that the Tribunal's decision is based on evidence adduced before it, and the appellant, produced "evidence" which was rebutted by the Respondent. She further submitted that the Tribunal found the Appellant's evidence unreliable and inaccurate when it failed to provide credible and reliable records to show the contrary in terms of the number of house the Respondent had worked overtime, records which she submitted the Appellant was obliged to keep pursuant to section 75 of the Employment Act 1995.

[34] I agree with the submissions of Learned counsel for the Respondent. The Judgment clearly shows that the Tribunal addressed the issues raised by the parties and gave a reasoned and

balanced decision as to how it came to the conclusion it did in that it found the records of the Respondent's overtime produced by the Appellant to be "unreliable and not credible".

[35] Accordingly ground 6 of the appeal fails.

Ground 7 - The tribunal erred when it found the case should proceed despite being brought against the wrong party

[36] With regard to ground 7 of the Appeal, Learned counsel for the Respondent submitted that the point was raised and dealt with by the Tribunal in a ruling delivered on 16th Many 2017, against which the Appellant did not appeal. She relied on the case of **Ghiani v Cote D'Or Lodge (Vacanze Seychelles Limited) 2016 SCSC 901** as well as the case of **Bonnelame v Citizens Engagement Platform Seychelles (CEPS) SCSC 1006**.

[37] Indeed as Learned counsel for the Respondent submitted, the Tribunal dealt a preliminary point raised by Mr. Chetty who appeared for the Appellant at the time to the effect that the application should be struck off for the reason that the application has been registered against the wrong party. Paragraph 11 of the Ruling of the Tribunal dated 16th May 2017 reads as follows:

> *One can therefore conclude, that given that, Rule 7 of Schedule 6 of the Employment Act 1995, as amended by Act 21 of 2008, allows this Tribunal to regulate its own proceedings, this therefore, permits this Tribunal to do away or not to follow the strict rules of procedure applicable to the Courts in this country.*

[38] Though it made no formal orders for substituting Beau Vallon Properties LTD for Coral Strand, by the time the Tribunal delivered its judgment on 14th March 2018 the parties read as Rahul Bhasin v Beau Vallon Properties LTD.

[39] Substitutions are permissible under section 108 of the Seychelles Code of Civil Procedure which provides that

> *Where a suit has been commenced in the name of the wrong person as plaintiff, or where it is doubtful if it has been commenced in the name of the right plaintiff, the court may, if satisfied that it has been so commenced through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do,*

order any other person with his consent to be substituted or added as plaintiff upon such terms as the court thinks just.

[40] However the Tribunal is not bound to follow the procedure laid down in the Seychelles Code of Civil Procedure. Per Rules 6 (6) and (7) of 6 to the Employment Act:

> *(6) (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.*

[41] Twomey CJ allowed the appeal in the case of **Ghiani v Cote d'Or Lodge (Vacanze Seychelles Limited) (CA18/2016) [2016] SCSC 901 (18 November 2016)** on the basis of Rules 6 of Schedule 6 to the Employment Act and reminded parties

> *...that the Tribunal is not comparable to a court in the sense that it provides an informal setting where parties may represent themselves and put their case forward. Its rules of procedure should therefore be more relaxed than that of the formal setting of the court.... Procedures should be adhered to as far as possible ... [the rules of natural justice should be] viewed through the prism of an informal forum...*

[42] Indeed as argued by the Respondent's counsel before the Tribunal, the leave application forms, emails (@coralstrand.sc), payslip bears the name of Coral Strand Hotel. True it is that the contract of employment is between Beau Vallon Properties LTD as the employer and the Respondent. However, as found by the Tribunal, justice required that the matter be allowed to proceed.

[43] No prejudice was caused to the Appellant by the filing of the case against Coral Strand Hotel instead of Beau Vallon Properties LTD. The Appellant was aware at all times that the matter was being pursued against it as the owner of Coral Strand Hotel and the real matters in dispute were determined. On that basis this ground of appeal fails.

Ground 8 - The tribunal erred when it placed too much weight on the evidence of the Respondent and rejected the documentation of the Appellant

[44] With regard to ground 8 of the Appeal, Learned counsel for the Respondent submitted that the Tribunal "relied on the Applicant's now Respondent's documents, in the absence of credible and reliable record adduced by the Appellant o violation of it statutory obligation." It was her submission that the Tribunal found that the documents produced by the Appellant were not credible and reliable.

[45] It is clear from paragraphs 37 that the Tribunal rejected the documentation of the Appellant as "they did not reflect an accurate figure of all the overtime hours the applicant worked, [and was therefore] unreliable and not credible."

[46] At paragraph 39 the Tribunal further found that the "applicant [Respondent in the present appeal] produced his own computation partly based on the HR clock in and out system, reconciled with the records in a log book kept in the kitchen at the Mahek Restaurant."

[47] On the evidence there was no other conclusion the Tribunal could have come to other than the one it did. In the circumstances ground 8 of this appeal fails.

Ground 9 - The tribunal erred when it failed to consider the implication of the renewal of contracts on a yearly basis

[48] With regard to ground 9 of the Appeal, Learned counsel submitted that "the renewal of the contract of employment on a yearly basis, does not invalidate a previous contract and the obligations of the employer remains the same in the event there has been a breach." It was her submission that "in the given circumstances, there was a breach, in respect to the hours of work that has to be undertaken in a weekly basis, which is 54 hours per week, and the Respondent, has been working on top and above the requirement as set out in his contract of employment (sic)."

[49] Learned counsel referenced paragraph 4.5 of the contract for the period 27th May 2011 to 26th May 2013 in relation to overtime; paragraph 4.6 of the contract for the same period in relation to public holidays; paragraph 4.8 of the contract for the same period in relation to the person to whom the Respondent reported. She submitted that the overtime not paid is

a debt to the Respondent by the Appellant. She further adopted and repeated the findings of the Tribunal found at paragraph 28 and 29 of the Judgment.

[50] At paragraph 42 the Tribunal in addressing the "point [made] that since the applicant entered into a new contract on a yearly basis, then, the only contract that this Tribunal should make reference to for the purposes of determining a claim of overtime should be the last contract" concluded that in their view "the only possible bar would be prescription."

[51] It is the finding of this Court that the Tribunal did consider the yearly renewal of the contracts and clearly stated that it did not agree with the "proposition, because that would mean, that if an employer still owes the employee a balance of annual leave due on the previous contract, for example, which the latter says he did not take or was not paid, then he cannot now that he has a new contract claim the same". The reasoning of the Tribunal cannot be faulted.

[52] Accordingly ground 9 of the appeal fails.

Ground 10 - The tribunal erred when it accepted that overtime was being performed despite no corroborating evidence was provided to show approval

[53] With regard to ground 10 of the Appeal, Learned counsel submitted that the "extension of the operating opening hours of the Restaurant, is an automatic extension of his [Respondent] time of work, and that implies and automatic approval of his hours of work, thus making any hours of work on top and above the 54 hours of work weekly, an automatic overtime work." She further submitted that "paragraphs 31 and 32 of the Judgment" as well as "paragraph 28 of the Judgment proves that the Tribunal accepted as reliable and truthful the documents adduced by the Respondent and his oral testimony".

[54] The Tribunal at paragraph 39 found that:

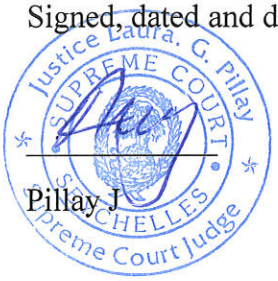
> *1. The applicant, Rahul Bhasin, did work overtime and that same was expressly authorised by the then General Manager, Mr. Denis Verkhorubov, his immediate supervisor then, and by implication, he worked overtime to meet the needs of the Mahek Restaurant's significant increase in its daily opening hours and weekly opening days between November 2009 up to April 2017.*

2. *The respondent, Beau Vallon Properties Limited, through their General Manger then, Mr. Verkhorubov, knew or ought to have known, that with the introduction of the restaurant new opening hours, and the increase of its opening days a week to 7 days, with the same number of Human Resources, the applicant had to work in excess of his contracted number of hours daily, weekly and monthly, and that the extra hours worked were overtime...*

[55] It is the view of this Court that the conclusion of the Tribunal is in line with the evidence on record. The Appellant required the extension of the opening hours of the Mahek Restaurant from November 2009 to April 2017. Same was done without any change in the number of staff and even resulted in an increase in sales. On that basis it cannot be said that the Tribunal's finding is contrary to the evidence.

[56] In the circumstances the appeal fails. The decision of the Tribunal is maintained.

Signed, dated and delivered at Ile du Port on ..... 2nd March 2022



Pillay J