**SUPREME COURT OF SEYCHELLES**

**Reportable**
**Reportable**
[2023] SCSC 639
CA18/2021

In the matter between:

**Desire Rouillon** — **1st Applicant**
*(rep. by Mr. Brian Julie)*

**Davis Simeon** — **2nd Applicant**
(*rep by Mr Brian Julie*)

**Queency Croisee** — **3rd Applicant**
(*rep by Mr Brian Julie*)

and

**Seychelles Port Authority** — **Respondent**
*(rep by Mr Joel Camille)*

**Neutral Citation:** *Desire Rouillon & Ors v Seychelles Port Authority* (CA18/2021) [2023] SCSC639 (23 August 2023)
**Before:** Esparon J
**Summary:** Appeal from the decision of the Employment Tribunal- Appeal dismissed.
**Heard:** 3 July 2023
**Delivered:** 23 August 2023

**ORDER**

Appeal from the decision of the Employment Tribunal-Appeal dismissed.

**JUDGMENT**

**D. Esparon, J**

## Introduction

1. This is an Appeal against the Judgment of the Employment Tribunal in ET/2/2018, ET/3/2018 and ET/13/2018 which held that the Applicant's conduct did amount to an offence under paragraph (K) of the Act and that the termination was lawful.

2. The Grounds of Appeal are as follows:

   (1) The Employment Tribunal erred in law when it failed to specify the nature of the prejudice caused to the Employer.

   (2) The Employment Tribunal erred by not identifying the party affected by the alleged disciplinary offence.

   (3) The Tribunal failed to consider the following facts:

      i. The Appellants were denied the assistance of a legal representative during the first disciplinary hearing;
      ii. Allegation of coercing the employees was not proved;
      iii. Coercing is not an offence.

   (4) The Tribunal erred in law when it ruled that the act of signing a Petition was an offence.

   (5) The Tribunal also failed to establish the fact that the petition was directed against an employee and not the employer.

   (6) The Tribunal erred when it considered the signing of a Petition as a disciplinary offence and failed to acknowledge that 'Petition' is a lawful and peaceful form of protest.

   (7) The Tribunal admits at paragraph 53 of the Judgment that 'we wish to make it clear that we are of the view that it is not automatic that all instances of signing of a petition to remove your superior would cause termination under sub paragraph (K) of the Act. For an employee with no other option nor redress, it is his right to sign a Petition to request that something is done'.

   (8) Further in Paragraph 53, the Tribunal admits that 'petitions' must be the last resort, implying that signing a petition is not a disciplinary offence.

   (9) The Tribunal has failed to prove that the Applicants committed an offence.

**Submissions of counsels**

3. Counsel for the Appellant submitted to the Court that the dismissal of the Appellants was unfair and that the burden is on the employer to prove on a balance of probabilities that there was a fair reason in law for the dismissal.

4. Counsel for the Appellants relied on the case of **British Home Stores Ltd V Burchell (1978), IRLR 379** and also further submitted to the Court that the Employment Tribunal should have ascertained whether the alleged offence (if any) caused any prejudice to the Respondent as opposed to the reputation of an employee of the Respondent. Furthermore, according to Counsel, the Employment Tribunal should have taken note of the fact that the Appellants were never given a chance to defend themselves in the presence of the complainants.

5. Counsel for the Appellants further submitted to the Court that the facts of the case revealed that the employer was not able to show a genuine belief of misconduct of which the employer should have grounds and that according to Counsel the Applicants pursuant to their right to freedom of expression possess every right to express their opinion about the management of the Seychelles Ports Authority. Hence it is submitted that the Employer has failed to prove on a balance of probabilities that the Appellants committed a disciplinary offence.

6. Furthermore, Counsel for the Appellant submitted to the Court that coercion is not an offence unless you put a gun to someone's head and tell him to sign, then it is not coercion and that the allegation of coercion was not proved.

7. On the other hand, Counsel for the Respondent submitted to the Court that the Tribunal adopted the proper procedure and was satisfied that termination under sub-paragraph k of schedule 2, part II of the Act was justified. Counsel further submitted that during the hearing before the panel, Mr. Rouillon did not appear and that both Mr. Simeon and Ms. Croisee appeared but they remained silent.

8. Counsel for the Respondent submitted that now the Appellant is making heavy weather as to their right to counsel. Counsel for the Respondent relied on section 53 (3) of the Employment Act and submitted that none of them turned up with either a representative or a union representative or with a colleague. Counsel further referred to the case of Savoy development V Salome (Court of Appeal case) and submitted to the Court that it could not be said that the investigation was not conducted fairly.

9. Counsel for the Respondent further submitted to the Court that the Tribunal had assessed the credibility of the witnesses and invited the Court to look at page 8 paragraphs 38,39,40 where the Court assessed the credibility of the 2 witnesses which testified for the Respondent as regards to coercion. Counsel for the Respondent further submitted that it is not an issue of signing the petition but it is an issue of abusing your position since both Simeon and Croisee were seniors, they were supervisors to both Theresette and Bouzin and that they used their power to coerce to get somebody to sign a petition. Therefore, since the said employees that were coerced or misled into signing the petition were subordinates to both Croisee and Simeon, the Tribunal was satisfied that they had abused their power.

10. Counsel submitted to the Court that when Mr. Rouillon was asked what was the reason why he signed the petition, he mentioned that his reason was in regards to safety. He further submitted that the Tribunal found that there has been a breach of trust since he could have used various internal procedures that he had used in the past in relation to his grievances being a leader instead of signing the petition.

**The Law**

11. Schedule 2, part II of the Employment Act provides that 'A worker commits a serious disciplinary offence wherever, without a valid reason, the worker causes serious prejudice to the employer or employer's undertaking and more particularly, *inter alia*, where the worker—

(a) fails repeatedly to observe working hours or is absent from work without authorization on 3 or more occasions within a period of 12 months.

(b) is absent from work without justification for a whole day on 3 or more occasions within a period of 12 months;

(c) fails repeatedly to obey reasonable orders or instructions given by the employer or representative of the employer including orders or instructions relating to the use of care of protective equipment; And

(d) fails to keep a secret connected with the work of the worker, the production of goods or the provision of services, where the failure results in serious prejudice to the undertaking or the general interests of the Republic;

(e) willfully or intentionally damages the property of the undertaking thereby causing a reduction or stoppage of production or serious prejudice to the undertaking;

(f) is unable to carry out the duties of the worker due to the effect of alcohol or dangerous drugs or refuses to comply with a requirement of an employer under section 53A;

(g) commits any offence involving dishonesty, robbery, breach of trust, deception or other fraudulent practice within the undertaking or during the performance of the work of the worker;

(h) in the course of the employment of the worker assaults, or inflicts bodily injury upon a client of the employer or another worker;

(i) commits any active or passive bribery or corruption;

(j) commits an offence under this Act whereby the worker causes serious prejudice to the employer or employer's undertaking;

(k) does any act, not necessarily related to the work of the worker, which reflects seriously upon the loyalty or integrity of the worker and causes serious prejudice to the employer's undertaking;

(l) shows a lack of respect to, insults or threatens a client of the employer or another worker whether it be a superior, a subordinate or a colleague.

(m) willfully, repeatedly and without justification fails to achieve a normal output as fixed in accordance with standards applicable to the worker's work;

(n) knowingly makes false statements in an application for special leave under the Employment (Coronavirus Special Leave) (Temporary Measures) Regulations, 2020.'

**Analysis and determination**

12. For the purpose of this Appeal, this Court shall first deal with grounds 4,6,7,8 and 9 of Appeal as they relate to the same issue. As regards to Mr. Desiree Rouillon, it is not in dispute that he was terminated for reasons of signing the Petition to remove the CEO of which the Employment Tribunal held that this amounted to a serious disciplinary offence under schedule 2, part II of the Employment Act. We have gone through the grounds of

Appeal as regards to the 1st Appellant and the main issue to be determined by this Court is as to whether signing a petition to remove a CEO amounts to a serious disciplinary offence in terms of Schedule 2, part II (K) of the Employment Act. As regards to this issue, admittedly there is no case law locally which prompted this Court to search for jurisprudence in foreign jurisdictions.

13. The case of ***National Union of Public Service & Allied Workers and Others v National Lotteries Board* [2014] ZACC 10**, the Constitutional Court of South Africa had to deal with a similar issue whereby the Employees had signed a petition to remove the CEO from office where the Constitutional court of South Africa, Zondo J. stated the following;

"I have already found that, in saying what they said in the petition, the union and employees were engaging in a lawful activity of the union, were exercising their rights, and were taking part in conciliation proceedings and collective bargaining. Their dismissal for such conduct was contrary to section 5(2)(c) and fell within section 187(1)(d)(i) and that means that their dismissal was automatically unfair in terms of section 187(1) of the LRA. Once it is accepted that the main or real or dominant reason for dismissal was, or related to, such conduct, there is no room for a conclusion that the dismissal was not automatically unfair but only substantively unfair. In other words, to reach the conclusion that the dismissal was only substantively unfair one would have to conclude that the dismissal had nothing or very little to do with legitimate union activities and the conciliation proceedings. In my view, both on the facts and the law that cannot be said.

A dismissal of employees for supporting the lawful activities of a union and for exercising their rights under the LRA is a very serious violation of workers' constitutional rights given effect to in the LRA that may be committed by an employer. The dismissal of employees for that conduct is even more serious when the employer is a public institution or an organ

of state because government departments and other organs of state are expected to take a lead in the protection and promotion of these rights in our society".

14. It is obvious from the record of the proceedings in the present case that the concerned employee was not pursuing or engaging in the legitimate activities of his union, exercising his rights, nor was he taking part in conciliation proceedings and collective bargaining as in the case of ***National Union of Public Service & Allied Workers and Others v National Lotteries Board* [2014] ZACC 10**. Furthermore, he was not following or engaging in any grievance procedures as provided for under the Employment Act. Hence the present matter should be distinguished from the case of *National Union of Public Service & Allied Workers and Others (supra).* In fact, the concerned employee had not resorted to any internal procedures of the said organization, such as bringing his grievance to the Board of Directors or to the HR as per the evidence of Mr Didon. Hence it is to be taken that the concerned employee wanted the instant removal of the CEO and had signed a Petition for the removal of the CEO, without going through any internal procedures available to the Employee such as bringing his grievances to the Board of directors or to the HR.

15. Counsel for the appellant has cited Article 22 of the Constitution which provides that 'Every person has a right to freedom of expression'. Although it is a cardinal principle of interpretation of the Constitution that the Court shall give a purposive interpretation to a provision of the Constitution, we disagree with Counsel for the Appellant that Article 22 of the Constitution relating to the freedom of expression can be used as a 'cart blanche' by an employee who decides to wake up one day and sign a petition for the removal of a CEO without going through any internal processes to bring his grievances before the board or the HR or following the grievance procedures under the Employment Act in the event there is any such grievances.

16. We are in agreement with the Employment Tribunal when it stated at paragraph 36 of its Judgment that petitions must be of last resort, when it is clear that nothing else is working. This Court is of the view that if this was the case there would be chaos at the work place whereby economic activities may come to a temporary halt of the business operations as a result of which surely this was not the intent of the legislator when they enacted the Employment Act thereby regulating the relationship between the Employer and Employee.

17. It is clear that signing a petition by such a senior employee such as the 1st Appellant reflects seriously on the loyalty of the employee and causes serious prejudice to the employer's undertaking especially when he has not availed himself of any internal procedures to bring forth his grievances of which such a senior officer should know better instead of dragging his employer into the mud at that length.

18. For the above reasons, this Court finds that the Employment Tribunal did not erred on the law and on the facts of the case when it held that 'having found that the 1st Appellants conduct did amount to an offence under paragraph K of the Act, we find that his termination was lawful'. For these reasons, I accordingly dismiss ground 4,6,7,8 and 9 of Appeal as regards to the 1st Appellant.

19. As regards to the 2nd and 3rd Appellants, it is not in dispute that their employment was terminated for coercing employees to sign the petition to remove the CEO. Counsel for Appellants submitted to the court that coercion is not an offence. This Court has to resort to case law in order to attempt to define the word coercion. The case **Rookies V Barnard (1964), 1 All ER, 367** may be helpful, where Lord Devlin stated at 400, the following;

    "The nature of the threat is immaterial because... its nature is irrelevant to the Plaintiffs cause of action. All that matters to the Plaintiff is that, metaphorically speaking, a club has been used. It does not matter to the plaintiff what the club is made off- whether it is a physical club or an economic club or a tortious club or an otherwise illegal club. If an immediate party is improperly coerced, it does not matter to the –plaintiff how he is coerced".

20. This Court is of the view that coercion is much broader than duress whereby a physical threat is required. As for coercion, it could be a physical or a moral threat or even an economic one. This Court has perused the record of the proceedings of the Employment Tribunal relating to the evidence of witnesses namely Theresette Dogley and Jacqueline Bouzin relating to the employees which allegedly have been coerced.

21. At paragraph 21 of the proceedings, Theresette Dogley states the following;

    'Simeon and Croisee said everyone signed, I also have to sign. I refused to sign. Crosee said I'm stupid. First person to be fired will be me because I did not sign'.

    During cross examination she stated the following;

    "They force us, every day they said sign".

22. At paragraph 30 of the proceedings of the Employment Tribunal, the witness Jacqueline Bouzin states the following;

    "No gave us paper say sign another worker next to me, I said let's read first. Davis said not worth it, it's about money to a co-worker said let's sign. So I did".

23. At page 31, the Witness Bouzin states the following;

"At night I met Davis. Asked him if petition still with him. He said yes want to sign again. I said yes.

I want to remove. Andy Pierre was there as well. I said I didn't want to remove Ciseau.

Yes, he refused".

24. At paragraphs 38,39, 40 of the judgment of the Employment Tribunal, the Employment Tribunal dealt with the issue of the credibility of witnesses and held the following at paragraph 39;

"We also find that both Miss Bouzin and Ms Dogley to be credible about the threats made against them and the manner in which the signing of the Petition happened. In that light, we are of the view that the testimony of Simeon cannot be accepted and find that he did probably refuse Bouzin when she asked her name to be removed".

At paragraph 39 of the said judgment, the Employment tribunal held the following;

"This adds to the credibility of Bouzin who says she heard Miss Croisee say they had enough signatures".

25. In the case of **Young Kong v/s Islam (CA 13 of 2020)**, the Court examined the issue of appeal on facts in the case of **Citizens Engagement Platform Seychelles v Bonnelame (Civil Appeal 28/2019 2020 (28 December 2020)**, where the Court made reference to decided cases reproduced hereunder;

The England and Wales Court of Appeal in **Clydesdale Bank v Duffy [2014] EWCA Civ 1260**, 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".

The Supreme Court of Canada in **Housen v Nikolaisen [2002] 2 SCR 235**, further 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".

In the case of **McGraddie v McGraddie [2013] UKSC 58 [2013] 1 WLR 247**, Lord Reed quoted Lord Thankerton from the case of **Thomas v Thomas,1947 SC (HL) 45, [1947] AC 484;**

"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".

26. This Court shall follow the above case laws and is of the view that it shall not interfere with the findings of the Employment Tribunal on issues of credibility of witnesses and the Employment Tribunals findings as to facts that the said witnesses namely Dogley and Bouzin had been coerced since the Employment Tribunal has seen and heard these witnesses and hence is in a better position to assess the credibility of these witnesses.

27. Hence for the above reasons, this Court is of the view that the Employment Tribunal did not erred when it found that the 2nd Appellant and the 3rd Appellant did coerce the Employees of the Respondent of which the ultimate aim of such coercion of the employers was to get the maximum signatures on the petition with a view of attempting to remove the CEO from office. In this respect through it is that there was no physical threat. However, this Court is of the view that the threat was a moral or an economic one i.e. going as far as saying the concerned employee is the 1st one to be fired.

28. It is also not in dispute that they also signed the petition. I am therefore in agreement with the findings of the Employment Tribunal in holding that "we are of the view that this would qualify as an act that reflects seriously upon the loyalty or integrity of the Applicants. As we are of the opinion that Mr Simeon and Miss Croisee did coerce their colleagues to sign

the petition, we therefore find that termination under sub-paragraph (K) of schedule 2, part II of the Act was justified".

29. Since this Court has also held that signing a petition reflects seriously on the loyalty of the 1st Appellant at paragraph 13 of this judgment, in order to avoid repetition in the said judgment, this Court adopts the reasoning of this Court at paragraph 14,15,16,17 and 18 of this judgment as regards to the 2nd and 3rd Appellants since being supervisors in their sections, they should have set an example and availed themselves of the internal procedures available to them namely by bringing their grievances to the board or to their HR or by following the grievance procedures under the Employment Act in the event there was a need to do so.

30. This Court is of the view that by signing the petition or acting in such a way as to coerce or mislead Employees which were their subordinates in order to get the maximum signatures to remove the CEO from office should be of last resort when nothing has worked out for them.

31. As a result of the above, I therefore dismiss grounds 3 (ii) and 3(iii), 4,6,7,8 and 9 of Appeal as regards to the 2nd and 3rdAppellants.

32. As regards to ground 3 of Appeal namely that he Appellants were denied the assistance of a legal representative during the first disciplinary hearing, we hereby reproduce section 53(3) of the Employment Act which reads as follows;

"The Employer shall ensure that investigation pursuant to subsection (1) even where it consist in no more than requiring an explanation for a self-evident act or omission, is conducted fairly and that the worker has if the worker so wishes, the assistance of a colleague or representative of the union, if any, and of such witnesses as the worker may wish to call".

33. This Court has considered the submissions of Counsel for the Appellants and Counsel for the Respondent on this issue and also section 53(3) of the Employment Act and is of the view that since the said provision is silent on the issue of whether the employee has a right to be represented by a legal representative during the investigation but only mentions that ' the worker has if the worker so wishes, the assistance of a colleague or representative of the union if any, this Court shall not add anything to the wording of the said provision, since in the event that the Court does so, it shall be engaging itself in an area of judicial activism of which this Court is precluded to venture into.

34. Furthermore, it could not be said that the Respondent did not follow the fair procedures as provided for under section 53 of the Employment Act since it is evident on record that the 1st Appellant did not Appear before the panel of investigation of the Respondent and that the 2nd and the 3rd Appellant appeared and chose to remain silent when they were called

upon to give an explanation and they were given all the opportunities to defend their case of which they chose not to do so.

35. As a result, I accordingly dismiss ground 3(i) of Appeal of the Appellants.

36. As to ground 1 and 2, namely that:

    i) The Employment Tribunal erred in law when it failed to specify the nature of the prejudice caused to the Employer.

    ii) The Employment Tribunal erred by not identifying the party affected by the alleged disciplinary offence,

    this Court finds no merit in both grounds of Appeal since it has already been decided in this ruling that by signing the Petition or coercing employees with aim of having maximum signatures in view of attempting to remove the CEO, the Employees were effectively causing serious prejudice to the employer's undertaking and hence I accordingly dismiss ground 1 and 2 of Appeal of the Appellants.

37. As regards to ground 5 of Appeal namely that the petition was directed against the employee and not the employer, this Court is of the view that this ground of Appeal has no merits since it cannot be said that signing a petition to remove the highest ranking officer in the organization being the CEO from his employment, that the petition was not directed towards the employer but only an employee. Furthermore, it could not be said that coercing the employees to sign a petition in view of attempting to remove the CEO was directed only against the employees not the employer since the ultimate aim of doing this was to attempt to have the CEO removed which is the highest officer in rank in the employment of the Respondent and the Appellants were his subordinates. Hence this Court is of the view that by coercing the workers to sign the petition with the aim of having maximum signatures in order to try to remove the CEO, in effect such an act was directed against the employer. For these reasons I accordingly dismiss ground 5 of Appeal of the Appellants.

38. As a result of the above, I accordingly dismiss this Appeal

Signed, dated and delivered at Ile du Port on the 23rd August 2023.

Esparon Judge