Lamusse Y-R. v TEX International Limited

2020 IND 26

Cause Number 309/11

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil side)

In the matter of:

Yves-Robert Lamusse

Plaintiff

v.

TEX International Limited

Defendant

Ruling

The salient averments of the present plaint are as follows:-

Plaintiff is a Mauritian citizen of 60 years of age. The Defendant (or "TIL") is a Mauritian company (holder of a category 1 global business licence) which trades clothing garments manufactured in India for export to Europe.

Mr. Bernard Maigrot was at all material times the Managing Director of TIL and Tex Services Limited ("TSL"), a Mauritian company which trades clothing garments manufactured in Madagascar and Mauritius for export to Europe (TIL and TSL referred to together as the "TEX Group").

Around late 2006, Plaintiff was approached by Mr. Maigrot in his capacity as TIL's Managing Director to discuss the Plaintiff's potential employment by TIL and which lasted until May 2007.

During the discussions, Mr. Maigrot explained among other things that the TEX Group's business was in financial difficulty. TSL's Mauritian and Madagascan business was becoming less and less competitive and was losing clients to Asian competitors, and TIL's Indian business (the "Indian Business") needed to be revived and by reason of a prohibition order preventing him from travelling abroad, he was looking to hire a General Manager for TIL of Plaintiff's calibre and expertise to implement and run this ambitious project.

> Plaintiff claims that TIL's meaning Defendant's unilateral variation of the Contract after the prohibition order preventing Mr. Maigrot to travel abroad was lifted, was *"substantielle"*, unjustified and unlawful. Such variation of the contract entitled the Plaintiff to treat the Contract as terminated and to hold himself constructively dismissed from his employment with TIL. Plaintiff consequently submitted his notice of resignation with immediate effect around December 2009 or early January 2010 to express his rejection of the unilateral variation of his terms of employment.

Defendant, for its part, has denied liability in its plea.

Plaintiff was deposing in Court when objection was taken as to the line of examination in chief adopted by his learned Counsel in order to rebut poor performance by reliance being placed on what two Indian Businessmen had to say when the cause of action of Plaintiff is Constructive Dismissal and arguments were heard.

The main thrust of the arguments of learned Senior Counsel for the Defendant is that the Plaintiff is travelling outside his pleading by eliciting evidence on the issue of poor performance for the benefits prayed for from the Court when the cause of action of Plaintiff is that of Constructive Dismissal.

Learned Counsel for the Plaintiff's contention boils down to the fact that claims for bonuses and other benefits do not form part of the cause of action of Plaintiff for constructive dismissal but for the other cause of action for breach of contract as per the averments of the plaint and that the plea of the Defendant is in relation to both causes of action viz. breach of contract and constructive dismissal.

Now my ruling went on appeal namely Yves-Robert Lamusse v TEX International Limited [SCR NO.6975 – 4/33/18] delivered on 9 September 2020. I have carefully and closely complied with the judgment of the Supreme Court.

True it is that objection was never taken as regards the plaint not disclosing any cause of action by learned Senior Counsel for the Defendant. However, objection was raised as to the line of the examination in chief embarked by Plaintiff's Counsel as she went outside the averments of the plaint which is a cause of action of constructive dismissal in order to press for the remedy sought by the Plaintiff. Now as per the line of examination in chief of learned Counsel for the Plaintiff as intimated by her was that she was eliciting evidence by trying to rebut poor performance as couched in the plea given that unpaid bonuses had nothing to do with constructive dismissal. According to her, one cause of action was for breach of contract namely unpaid bonuses, benefits and remuneration while another cause of action was for constructive dismissal and that the Plaintiff resigned because he was not given the responsibilities promised to him because the contract was unilaterally modified by Mr. Maigrot and that the Defendant has used the same defence that Plaintiff did not meet the target to defend both the unpaid bonuses and his constructive dismissal.

Therefore, the decision as to whether a valid cause of action has been formulated as per the material averments in a plaint is within the sole province of the Court and it has been made a live issue in the course of the arguments and represents the background for the thrashing out of the issue of admissibility of evidence in the course of the examination in chief of Plaintiff for which objection was taken namely on what two Indian businessmen had to say on poor performance in order to rebut the averments of the plea let alone that there has been no prayer for breach of contract.

Had there been a valid cause of action in the first place, Plaintiff would have been fully entitled while being examined in chief after having established the averments of his plaint to deny or rebut the averments of the plea with the rider that he is not embarking on hearsay evidence meaning in the absence of those two businessmen such examination in chief would not have been allowed given that there was no undertaking that they would have been called as witnesses so that the opposing party would have had all the latitude to cross-examine them and also in the absence of any exception to the hearsay rule being invoked.

In the present situation, as I have explained this live issue in my ruling that there is no valid cause of action in the first place. It is significant to note that *ex facie* the averments of the plaint that Defendant's Managing Director, Mr. Maigrot, has shown his interest to potentially hire Plaintiff (being given that they had known each other very well on a personal and professional level for a long time) for the said employment and which he had eventually done in relation to the business of Defendant already handled by him as he could not travel abroad because of his prohibition order to leave the country as he did not want the business of Defendant to suffer but instead to be revived. It is clear that the term *"hire"* is meant to be a temporary measure meaning that the very essence of the contract of employment of Plaintiff is a temporary one and conditional upon the waiving of the prohibition order against Mr. Maigrot to leave the country so that all the prospects, benefits forecast to be accrued, financial projections and other set -backs of Defendant are irrelevant for the purposes of recruitment of Plaintiff as it was of a precarious nature. Now that the prohibition order has been lifted and that Mr. Maigrot can travel abroad, it is abundantly clear that the contract of employment of Plaintiff is deemed to have come to an end and that Plaintiff has rightly resigned. Thus, the inescapable conclusion is that the material/essential facts averred do not lead to the conclusion that Defendant has unilaterally modified the contract of employment of Plaintiff leading to his resignation and as such it cannot be inferred that he was constructively dismissed and nor that there was any breach of contract and as such Plaintiff cannot adduce evidence to perfect that lack of material facts averred in the plaint, nor rely on particulars to fill those gaps in order to formulate a valid cause of action as explained further and lengthily in my ruling. Likewise, the plea is not the cause of action in the present case but the plaint. Rebutting the plea by way of evidence will not cure the lack of material averments of the plaint at the outset in order for the Plaintiff to obtain the remedy sought by him.

Thus, I did not allow any examination in chief along that line by learned Counsel for the Plaintiff with a view to eliciting evidence to rebut the poor performance of Plaintiff as canvassed in the plea of Defendant which necessarily meant to fill the gaps in the material facts averred in the plaint in order to formulate a valid cause of action of constructive dismissal when it is presently void and is the background against which the stand was taken by learned Counsel for the Plaintiff that there were two causes of action one for breach of contract and another one for constructive dismissal so that the objection raised could not be adjudicated without this live issue having been thrashed out depriving the Defendant of the ability to know what is the case exactly he has to meet after having joined issue let alone that the Appellate Court at no point concluded that there was a valid cause of action or a valid joinder of two causes of action as

per the averments of the plaint. Hence, all issues canvassed so far have shown that they pertain to a void cause of action which is tantamount to a nullity.

Therefore, the issue of a cause of action having been made a live one in the course of the arguments in line with the objection raised in relation to admissibility of evidence, its validity is an imperative issue to be determined prior to the issue of admissibility of evidence being adjudicated upon. Thus, the present plaint being itself a nullity and as such having been deprived of the guidelines of the higher Court as to how to proceed with the issues raised in examination in chief including the present live issue, I am in duty bound to dismiss the plaint as proceeding further with the present plaint unfolding into other issues to crop up would be tantamount to condoning a nullity and which to all intents and purposes is against the proper administration of justice. Hence, I do not condone further examination in chief of Plaintiff along the line objected upon and I dismiss the present plaint with costs.

S.D. Bonomally (Mrs.) *(Ag. President)*
22.9.2020