2021 IND 5

Cause Number 497/17

IN THE INDUSTRIAL COURT OF MAURITIUS

In the matter of:

Mr. Didier Castel

Plaintiff

v.

Identical Pictures Ltd

Defendant

Ruling

Plaintiff has averred that he was in the continuous employment of Defendant since 1 January 2011 and was last employed as Driver/Gardener/Assistant Skipper/Allrounder on a 7-day week basis.

Plaintiff was last remunerated at monthly intervals at the basic rate of Rs. 17,093/- a month and has worked from 5.11.2014 to 15.11.2014 for film shoot and

has been paid only Rs.2000 instead of Rs.5000. He has also worked on 4 normal days on 1,2,3 and 4.9.2015 and 1 Sunday on 6.9.2015 but Defendant did not remunerate him for the said period as alleged.

Plaintiff avers that on 5.9.2015 he was off duty and he last worked on 6.9.2015. He was absent on 7.9.2015 and notified his absence. He was absent without notification on 8 and 9.9.2015.

Plaintiff has further averred that on 10.9.2015 at about 10.00 hours, Defendant's Director informed him that he was to return to work only after having been contacted. On the same day 10.9.2015 at about 12.37 hours, he was informed by the Defendant that as regards his dismissal, payment was being looked into for six months but could not say how long it would take.

By way of a letter dated 17.9.2015, Defendant informed him that he has been absent from work without notice, authorisation, justification and without any medical certificate since 5.9.2015 and requested him to resume work forthwith upon receipt of that letter or else Defendant would consider that he had abandoned his work. He did not resume work but instead considered that Defendant had already terminated his employment on 10.9.2015 without notice and without justification. He has claimed the sum of Rs.262,682.11 from Defendant representing wages for period 5.11.14 to 15.11.14, outstanding wages for period 1.9.2015 to 4.9.2015 and Sunday 6.9.2015(4 hours), wages as indemnity in lieu of notice and severance allowance for 56 continuous months' service for unjustified termination of employment.

Now paragraphs (h) and (l) of the plaint are reproduced below:

"(h) on 7.9.2015, he registered a case of child abuse on his daughter which took place 2 years ago against Defendant's Director, one Mr. Andreas Habermeyer, at the Police Station and the CDU;

(l) on 10.09.2015, Defendant phoned him and told him that he would give 6 months wages for his length of service and Rs 5 millions for him to withdraw the complaint of child abuse he made at the Police and CDU;"

Learned Counsel appearing for the Defendant has moved that the contents of paragraphs (h) and (l) be expunged from the Plaint inasmuch as the said contents are vexatious, frivolous and irrelevant to the present matter. The motion was resisted and arguments were heard.

The main thrust of the argument of learned Counsel for the Defendant is that the correct test to strike out averments is set out in the Supreme Court case of **Modaykhan A.R. & Ors v SBM Bank (Mauritius) Ltd [2017 SCJ 350].** The mere fact that an allegation is unnecessary is no ground for striking it out as there is a further requirement in practice that it is embarrassing, that is, so irrelevant that to allow it to stand would involve useless expense and would prejudice the trial of the action by involving the parties in a dispute that is wholly apart from the issues. The **Modaykhan** case was applied in the Supreme Court cases of **Collendavelloo I.L. v Adebiro O.J. [2020 SCJ 281]** and **Jeetah Rajeswar(Dr.) v Jugnauth Sir Aneerood [2015 SCJ 147]** . The hallmark of a vexatious proceeding is that it has no basis in law at least no discernible basis that whatever the intention of the proceeding may be, its effect is to subject the Defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant and that it involves a use of the Court process for a purpose or in a way which is significantly different from the ordinary and proper use of the Court process.

Paragraphs(h) & (l) are unnecessary and vexatious and add nothing to the claim of Plaintiff for alleged termination of employment without notice and without justification. A criminal matter against one of the Defendant's Directors has nothing to do with the employment of Plaintiff with Defendant, it has nothing to do with the business of the Defendant and there is no reason why the Defendant should admit, deny or in any way plead to those paragraphs because they are not averments against the Defendant, but are more likely to embarrass the Defendant's Director rather than to determine the issues between the parties.

Cross-examination on this matter will need the calling of Police as witness and to produce the statements given to the police and numerous complaints and the court will have to go through all those matters if the paragraphs are maintained. Those averments are only meant to cause inconvenience and harassment as they are not relevant to the claim of termination. In no way do they assist the Plaintiff or further this case before the Industrial Court. It is a matter to be determined by the Competent Court which is to be done before the Criminal Court. It is not a matter which is to be brought before the Industrial Court for determination, it is not for this Court to determine whether the complaint is correct or not and if the complaint stands, it appears that the Plaintiff wants this Court to adjudicate on the matter which is wholly inappropriate. The averments have no relevance to the claim of severance allowance and have no bearing to the claim. The averments only contain an

imputation which amounts to a degrading allegation against one director and parties would be involved in a wholly different dispute regarding an allegation of child abuse, the outcome of which, the resolution of which has no bearing at all on the claim in severance allowance. Both paragraphs are to be struck off completely as Plaintiff is not claiming for 6 months wages nor is Plaintiff claiming for the five million rupees and thus, they are completely unnecessary and vexatious.

The main thrust of the argument of learned Counsel for the Plaintiff is on the criterion that has to be used by the Court when deciding whether pleadings have to be struck out. He relied on the case of **Hurnam D v The Commissioner of Police [2012 SCJ 387]** wherein the Court reiterated that the exercise of the discretion of the Court to strike out pleadings on the ground that they are vexatious and scandalous should be exercised with extreme caution and only in obvious cases. Defendant has terminated his employment on 10.9.2015 without notice and justification. We need to know what happened before. On 7.9.2015 Plaintiff registered a case of child abuse against his daughter by Defendant's director. Matters which suggest a motive why the employment of Plaintiff was terminated by Defendant have to be taken into account. Only a complaint has been made to the police to show the potential motive for termination of employment. It is relevant although it could embarrass the director of the Defendant as it is an important matter relevant in order for the Plaintiff to show what could have motivated his termination of employment. Hence, this power to strike off averments will have to be used very sparingly and only in exceptional circumstances because the said two paragraphs have not been put for the sole purpose of embarrassing the other side. They have a bearing and that is why he is moving that those two paragraphs be maintained.

I have given due consideration to the arguments of both learned Counsel put forward before me. At this stage, I deem it appropriate to highlight that given that our District, Industrial and Intermediate Court Rules 1992 are silent on the question of striking out or expunging of pleadings, we follow Supreme Court Rules for guidance in the absence of any repugnancy being caused to our rules of court. (see - **Jhundoo v. Jhurry[1981 SCJ 98]**).

Rules 15 and 16 of the Supreme Court Rules 2000 dealing with the provision of the law on the striking out or expunging of pleadings provide:

"15. Striking out pleadings

(1) Where any pleading contains a statement which is –

(a) unnecessary;

(b) made vexatiously; or

(c) made with unnecessary prolixity,

the Court or the Master may strike out that pleading or amend it with or without costs.

(2) The Court may after hearing any interested party order any pleading to be struck out where it discloses no reasonable cause of action or answer.

(3) The Court may after hearing any interested party order an action to be stayed or dismissed, or judgment to be entered on such terms as may be just and reasonable, where the plaint, the plea or the counterclaim, as the case may be, is –

(a) frivolous, scandalous or vexatious;

(b)** an abuse of the process of the Court.* ***(emphasis added)

16. Pleadings calculated to embarrass or mislead

(1) Where any pleading is, by reason of its duplicity, argumentativeness, uncertainty, omission, defect, lack of form or other imperfection, framed in a way to embarrass or mislead the other party, the latter may apply to the Master to have the pleading amended.

(2) Upon hearing the parties, the Master may order the appropriate party to amend the pleadings in such manner and on such terms as he may direct.

(3) Where the party fails to amend the pleadings as ordered by the Master, the pleading shall be struck out.

(4) Nothing in these rules shall be deemed to prevent alternative pleadings, including the pleading of averments in tort or alternatively in contract."

Therefore, in the light of the above provisions, it is clear that only Rule 15 will apply to our rules of Court and not Rule 16 because it involves the Master and as such will be repugnant to the rules obtained before the Industrial Court. Thus, the

point that I have to consider is whether the averments at paragraphs (h) and (l) are vexatious and unnecessary warranting their being struck off.

True it is that it has been propounded in the case of **Hurnam D v The Commissioner of Police** [2012 SCJ 387] that the guiding principle is that *"(…) the exercise of the discretion of the Court to strike out pleadings on the ground that they are vexatious and scandalous should be exercised with extreme caution and only in obvious cases (…)".* ***(emphasis added)***

The question that calls for consideration is whether the two impugned paragraphs of the plaint are obviously vexatious and unnecessary within the meaning of Rule 15(1) of the Supreme Court Rules 2000.

Now in the present plaint, the Plaintiff himself has admitted that he was absent from work on two consecutive days without notification namely on 8 and 9.9.2015 and on 10.9.2015, he was informed not to turn up for work and to wait until he was contacted. He was contacted anew later on the same day on 10.9.2015 that as regards dismissal, Defendant could not say the length of time it would take for 6 months' payment bearing in mind that he has never claimed for 6 month's payment or wages before this Court. In fact, he admitted that he was contacted by way of a letter dated 17.9.2015 wherein Defendant informed him that he had been absent from work without notice, authorisation, justification and without any medical certificate and had requested him to resume work forthwith upon receipt of that letter or else Defendant would consider that he had abandoned his work. He admitted that he did not resume work but instead considered that Defendant had already terminated his employment on 10.9.2015 without notice and without justification.

Thus, it is abundantly clear that paragraphs(h) & (l) of the plaint are unnecessary and vexatious and add nothing to the claim of Plaintiff for alleged termination of employment without notice and without justification. I agree that these averments only contain an imputation which amounts to a degrading allegation against one of the directors of the Defendant in relation to an allegation of child abuse yet to be inquired by the police, and I fail to see in what manner that would motivate his termination of employment let alone that Plaintiff is not claiming for 6 months wages nor is Plaintiff claiming for the five million rupees. Indeed, in the case of **Jeetah Rajeswar(Dr.) v Jugnauth Sir Aneerood** [2015 SCJ 147]**,** the Supreme Court quoted an extract from the case of **Attorney General v Barker [2000] QB** as regards the term "vexatious" which reads as follows:

"Lord Bingham stated that "vexatious" is a familiar term in legal parlance. The hallmark of a vexatious proceedings is in my judgment that it has little or no basis in law(or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process…."

Furthermore, this position was maintained in the Supreme Court case of **Collendavelloo I.L. v Adebiro O.J.** [2020 SCJ 281] an extract of which is given below:

"On the contrary, these paragraphs would introduce irrelevant and extraneous matters and protract the pleadings and hearing of the petition to such an extent that they can be said to be "unnecessary" for the purposes of Rule 15(1), as well as "embarrassing" in the sense of being "so irrelevant that to allow them to stand would involve useless expense, and would also prejudice the trial of the action by involving the parties in a dispute that is wholly apart from the issues" (see extract from ***Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice****, as referred to in* ***Ius Ad Vitam Association v The State of Mauritius & Ors*** *[2014 SCJ 142],* ***Modaykhan*** *and* ***Maudhoo****).*

We therefore order that paragraphs 10 to 21,22 to 25 and 57 to 64 of the said petition be struck out pursuant to Rule 15(1)."

It is worthy of note that the Supreme Court case of **Modaykhan A.R. & Ors. v SBM Bank (Mauritius) Ltd** [2017 SCJ 350] did not condone the proposition to have paragraphs in a plaint entailing *"useless expense"* and that would also *"prejudice the trial of the action by involving the parties in a dispute that is wholly apart from the issues"*.

Now, it is apposite to reproduce **Section 7(1) of the Criminal Procedure Act** as follows:

*"**7. State and civil action not to be joined***

(1) No prosecution at the suit of the State shall be joined with a civil action, but a private party in whose behalf a prosecution has been instituted may bring an action for damages in a civil court against the offender."

Indeed, by virtue of Section 7(1) of the above Act in line with the Concept of Separation of Powers as entrenched in our Constitution between the Executive and the Judiciary, a prosecution at the suit of the State cannot be joined with the civil suit contemporaneously like in the impugned two paragraphs, because then, the Court (the Judiciary) might well be trapped into ruling in favour of a Defendant who has asked for particulars when the enquiry is still ongoing by the Executive and thus even running into the risks of going into the extent of having privileged information divulged and that would obviously be condoning an infringement of the Concept of Separation of Powers between the Executive and the Judiciary.

Thus, I am persuaded by the arguments of learned Counsel for the Defendant concerning the two impugned paragraphs that it is a matter to be determined by the Competent Court which is to be done before the Criminal Court. It is not a matter which is to be brought before the Industrial Court for determination and it is not for this Court to determine whether the complaint is correct or not as it is only in the event that the complaint stands that it can be said that it is a motivation to terminate the contract of the Plaintiff and which is obviously vexatious and unnecessary. It is clear enough that Plaintiff is seeking to use the two impugned paragraphs to have his admission in the other paragraphs of the plaint namely his absence from work on 2 consecutive days without notification condoned by the Court by initiating a criminal case which is degrading in nature against one of the directors of the Defendant in order to call into question his admitted facts that he did not turn up at work when requested to do so by Defendant after his repeated absences which is obviously vexatious. Furthermore, in the same breath, I agree with the arguments of learned Counsel for the Defendant that the presence of those two paragraphs would involve useless expense, and thus being unnecessary and would also prejudice the trial of the action by involving the parties in a dispute that is wholly apart from the issues because their prejudicial effect will far outweigh whatever probative value that they may contain as far as the evidence to be adduced in relation to them is concerned.

For all the reasons given above, I find that the point taken by learned Counsel for the Defendant as regards the two impugned paragraphs of the plaint was well taken as it is obvious that they are vexatious and unnecessary within the meaning of

Rule 15(1) of the Supreme Court Rules 2000. Accordingly, I strike off both paragraphs(h) & (l) of the plaint.

This case is fixed *proforma* on 17 December 2021 for both learned Counsel to take a stand.

S.D. Bonomally (Mrs.) *(Vice President of Industrial Court)*

8.12.21