Cause Number 131/20

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

Mr. Keeren Maraye

Plaintiff

v.

A & N Khoyrattee Co Ltd

Defendant

Ruling

The averments of this plaint are as follows. Plaintiff was in the continuous employment of Defendant as Head of Proglass Department since 6.11.2014 and was working on a 5-day week basis from 8.30 a.m. to 5.00 p.m.

Since he joined employment with Defendant, he has always been remunerated at monthly intervals at the basic rate of Rs 12,000 per month.

Defendant has failed to pay him the additional remunerations for the years 2015,2016,2017,2018 and 2019 at the monthly rate of Rs 600, Rs 250, Rs 200, Rs 360 and Rs 400 respectively.

He should have been paid Rs 12,600 a month as from January 2015; Rs 12,850 a month as from January 2016, Rs 13,050 a month as from January 2017, Rs

13,410 a month as from January 2018 and Rs 13,810 a month as from January 2019.

Consequently, his yearly earnings for period 1.2.2018 to 31.1.19 should have amounted to Rs 174,730 so that his average monthly earnings should have been Rs 14,560.83.

By way of a letter dated 7.1.2019, he gave Defendant written notice of his intention to retire on 7.2.2019 on the ground of age, his date of birth being 25 June 1951.

He retired on 7.2.2019 and Defendant has up to now failed to pay him the gratuity on retirement to which he is entitled.

Defendant has failed to refund him 19 days' outstanding annual leave for the years 2017, 2018 and 2019 respectively.

Defendant has failed to pay him the End of Year Gratuity 2019.

He has performed extra hours of work as follows:

(i) 15 hours to be remunerated at 1.5 times the normal rate and 32 hours at twice the normal rate in December 2016.

(ii) 12 hours to be remunerated at 1.5 times the normal rate and 40 hours at twice the normal rate in December 2017.

(iii) 12 hours to be remunerated at 1.5 times the normal rate and 40 hours at twice the normal rate in December 2018.

Defendant has failed to remunerate him for the aforesaid extra hours performed.

Plaintiff is, therefore, claiming from Defendant the sum of Rs. 86,906.87 made up as follows:

(i) Gratuity on Retirement for 51 months' continuous service [(Rs 14,560.83/26 days] x 15 days x (51 x 12) years: Rs 35,702.04.

(ii) Arrears on Additional Remunerations for years 2017, 2018 and 2019 giving a total of Rs 7,720.00 as per breakdown below.

(a) 2017: Rs 250 x 12 months = Rs 3,000.

(b) 2018: Rs 360 x 12 months = Rs 4,320.

(c) 2019: January: Rs 400.

(iii) Refund of outstanding annual leaves for the years 2017,2018 and 2019 giving a total of Rs 24,523.38. as follows:

(a) 2017: Rs 13,050/26 days x 19 days x 5/6 = Rs 7,947.11.

(b) 2018: Rs 13,410/26 days x 19 days x 5/6 = Rs 8,166.34.

(c) 2019: Rs 13,810/26 days x 19 days x 5/6 = Rs 8,409.93.

(iv) End of year Gratuity Prorata 2019: (Rs 13,810 x 1 month) /12 = Rs 1,150.83.

(v) Wages due for extra work performed:

(a) December 2016: (Rs 12850/26x8 x 15 hours x 1.5) + (Rs 12850/26x8 x 32 hours x 2): Rs 5,343.97.

(b) December 2017: (Rs 13050/26x8 x 12 hours x 1.5) + (Rs 13050/26x8 x 40 hours x 2): Rs 6,148.57.

(c) December 2018: (Rs 13410/26x8 x 12 hours x 1.5) + (Rs 13410/26x8 x 40 hours x 2): Rs 6,318.08.

Thus, Plaintiff has prayed for the Court for a judgment condemning and ordering Defendant to pay him the aforesaid sum of Rs 86,906.87.

Plaintiff has also prayed the Court to order Defendant to pay him:

(i) interest at the rate of 12% per annum on the amount of gratuity on retirement payable from the date of retirement to the date of payment;

(ii) such amount by way of compensation for wages lost or expenses incurred in attending Court.

Defendant in its amended plea has raised a plea *in limine* as follows:

1. Defendant has moved that the plaint be dismissed with costs in that:

(a) *it does not disclose any cause of action,* and

(b) *it is frivolous, vexatious and an abuse of the process of the Court.*

The plea *in limine* was resisted and arguments were heard. It is significant to note that the plea *in limine* is followed by a plea on the merits which is followed by a counterclaim.

The main thrust of the argument of learned Counsel appearing for Defendant is that some of Plaintiff's claim is time barred by virtue of Article 2279 of the Civil Code and that Plaintiff could not claim Gratuity on retirement as he joined employment after the age of 60 and as such was not entitled to same or to arrears on such gratuity as per the Employment Rights Act 2008 by virtue of Section 49(1). However, he has conceded that there are some issues that cannot be thrashed out *in limine* by the Court. But in the event that the Court rules in favour of Defendant, the counterclaim will still subsist as it runs concurrently with the plaint the moment there is a connection between the two as per the case of **Broquere v D'Unienville[1981 MR 300]**.

The main thrust of the argument of learned Counsel for Plaintiff is that there is no dispute that the Employment Rights Act 2008 is applicable to the present matter. Although Plaintiff was 63 years old when he joined employment, he could not retire before the age of 60, that is, before he reaches retirement age. So, no matter when he has started working, if he retires after the age of 60, then he is entitled to a gratuity on retirement. Thus, section 49(1)(a) of the Employment Rights Act 2008 means that this worker can retire at any age after 60 and he is entitled to gratuity on retirement.

As regards the refund for outstanding annual leave for the years 2017,2018 and 2019 he has relied on Section 27(5) of the Act which reads as follows:

"Where a worker has not taken or been granted all the leave to which he is entitled under this section, he shall be paid a normal day's wage in respect of each day's leave still due at the end of the period of 12 consecutive months."

According to that provision, if an employee has not taken all the leave, then he must be paid that amount of leave in cash as he does not lose it. Concerning the time bar as provided in Article 2279 of the Civil Code, he has no issue as regards regular payments that are normally time barred by 3 years. But the refund payable for

the year 2017 cannot be at the start of the year 2017 because the cash amount for refund for annual leave for 2017 can only be made after the year 2017 is over meaning on 1.1.2018 and not before. The plaint was lodged on 10.3.2020. So, the claim for leave for 2017 is still within the delay of 3 years, because the plaint has been entered 2 years and 3 months after the end of year 2017 and which is not more than 3 years. Thus, there is no time bar applicable for the refund of annual leave and even if there were, his learned friend's arguments would not dispose of the years 2018 and 2019. The plea *in limine* would not dispose of the claim. The question of wages cannot be thrashed out *in limine* and it has to be taken on the merits.

As regards the counterclaim, *"Defendant avers that as a result of wrongful acts and wrongdoings which constitute 'faute', he has suffered damages and prejudice which he assesses at the amount of Rs 500,000."* His learned friend has submitted that the counterclaim subsists but his contention is that the counterclaim cannot survive as it is not even alive in the first place and the issue of *'faute'* comes under Article 1382 of the Civil Code. As per Section 3 of the Industrial Court Act 1973: *"There shall be an Industrial Court with exclusive civil and criminal jurisdiction to try any matter arising out of the enactments set out in the First Schedule or of any regulations made under those enactments and with such other jurisdiction as may be conferred upon it by any other enactment."* Nowhere has the Civil Code been listed in the First Schedule to the Industrial Court Act 1973 and that the Court should *proprio motu* strike out the counterclaim on the issue of jurisdiction.

Learned Counsel for Defendant has replied that as regards the issue of retirement, Plaintiff should have been in continuous employment with the same employer up to the time he reaches 60 for which he is entitled to gratuity. Someone who takes up employment for the first time when he is above 60, he is not entitled to gratuity as there is no retirement. Someone cannot retire twice otherwise people will take employment after 60 and then retire several times. In relation to the time bar he has mentioned which is three years, he agrees with learned Counsel for Plaintiff that the time bar will apply for the years earlier than 2017. As regards the counterclaim, the Court has jurisdiction.

I have given due consideration to the arguments of both learned Counsel. It is common ground that the Employment Rights Act 2008 as amended applies in the present case.

First of all, I deem it appropriate to consider whether the conditions of Article 2279 of the Civil Code have been met for the applicability of the limitation period of 3 years in relation to arrears on payment of monthly earnings in the present case.

The provisions of Article 2279 of the Civil Code read as follows:

"Les arrérages des rentes perpétuelles et viagères, ceux des pensions alimentaires;

Les loyers des maisons, et le prix de ferme des biens ruraux;

Les intérêts des sommes prêtées, et généralement tout ce qui est payable par année, ou à des termes périodiques plus courts.

Se prescrivent par trois ans." (**Emphasis added)**

It is significant to note that in the Supreme Court case of **Keep Clean Ltd v The University of Mauritius [2020 SCJ 268]**, it was held that a "*créance déterminée*" is an essential condition required in order to enable the Defendant to invoke the Article 2279 in that such *a "créance"* would therefore fall within the ambit of Article 2279 *"where it can be factually established that it is possible for the "créancier d'effectuer le calcul au moment de l'échéance".*

In **Keep Clean Ltd (supra)**, it was further held that all the information necessary to compute the short payment every month was readily available at the material time in order to compute with precision the "*créance*" at the time of the "*échéance"* in conformity with the contractual agreement.

In the present case, evidence will have to be adduced in order for the Court to thrash out the issue as to whether it could be factually established that it was possible for the *"créancier d'effectuer le calcul au moment de l'écheance"* in conformity with the contractual agreement in order to attract the applicability of the time bar of 3 years under the provisions of Article 2279 of the Civil Code let alone that it is a verbal contract and there are no pay slips as per the answers to particulars provided.

As far as the outstanding annual leaves are concerned, both parties agree that such claims are not time barred as they do not concern claims prior to the year 2017.

Now as regards gratuity on retirement, it not disputed that Plaintiff was employed after having attained the age of 60. So, pursuant to Section 49(1) of the Employment Rights Act 2008, he should have been in continuous employment with Defendant for at least 12 months prior to having attained the retirement age which is 60 in order to qualify for the gratuity on retirement.

In the present case, the Plaintiff is deemed to have retired from his previous employment prior to him being bound by his contract of employment with Defendant at the age of 63 as he had to earn a living before reaching 63 years of age unless he was supported by someone else so far which is highly unlikely. Furthermore, he has averred in his plaint that he has retired after having been in continuous employment with Defendant for only about 4 years on the ground of age. I agree with learned Counsel for Defendant that the Plaintiff cannot retire many times after having attained retirement age namely the age of 60 by, for instance, deliberately starting new jobs with different employers after that retirement age of 60 and claim gratuity on several retirements, because such an interpretation of Section 49 of the Employment Rights Act 2008 would lead to a clear absurdity. However, the Court is in the dark as regards the terms and policy of the verbal contract in force at the time the agreement was reached between the parties as to whether Plaintiff would have been entitled to some sort of benefit or gratuity should he resign as I am making abstraction of the word "retire", after having given one month's notice to Defendant, on the ground of age after having been in continuous employment with Defendant for more than 12 months bearing in mind that the notion of Portable Retirement Gratuity Fund under the Workers' Rights Act 2019 – Act No.20 of 2019 was not operative at the material time in that eligible employees will no longer be penalized by the period of employment with previous employers. Such facts could only be enlightened at the merits' stage.

Now, learned Counsel for Defendant has included a counterclaim in its amended plea containing the plea *in limine* so that even in the event that the plaint discloses no cause of action, the counterclaim according to him will subsist provided that there is a connection between the plaint and the counterclaim. However, the case of **Broquere** (supra) as referred to by him is in relation to a Plaint with Summons lodged before the Supreme Court and not before the Industrial Court.

At this stage, I find it appropriate to reproduce Section 136 of the Courts Act where it has been clearly spelt out that lower courts could only entertain counterclaims when such counterclaims have been transferred from the Supreme

Court following actions commenced in the first place in the Supreme Court and which reads as follows:

> ***"136. Transfer of proceedings***
>
> *(1) In any action commenced in the Supreme Court, the Court may at any time, on application made in that behalf by any party by way of motion, make an order that the claim and counterclaim, if any, or, if the only matter remaining to be tried is the counterclaim, the counterclaim, be transferred to any Court which has jurisdiction to hear and determine the subject matter of the claim or counterclaim, as the case may be, and the amount thereof.*
>
> *(2) Where an order is made under subsection (1), the costs of the proceedings before the Supreme Court, including the costs of the application for the transfer, shall be in the discretion of the Supreme Court.*
>
> *(3) The Court to which any claim or counterclaim has been transferred by an order made under subsection (1) shall adjudicate upon the claim or counterclaim as if the action had been commenced there and the provisions regulating the procedure of that Court in civil matters shall apply, mutatis mutandis, to any claim or counterclaim so transferred."*

Therefore, it is plain enough that pursuant to Section 136(1) of the Courts Act, a pleading before a lower Court viz. the Industrial Court cannot include a counterclaim.

It is only after a case which has been commenced before the Supreme Court containing a claim and a counterclaim which have then been transferred to a lower Court following an order from the Supreme Court that the said lower Court having jurisdiction to hear and adjudicate upon the subject matter of the claim and counterclaim so transferred, can proceed to hear them.

Thus, the present Court will not adjudicate on the counterclaim in the amended plea pertaining to the present plaint let alone the issue of jurisdiction, purely and simply because the plaint and the counterclaim have not been transferred from the Supreme Court by way of an order after this action has been commenced in the Supreme Court in order for me to adjudicate upon. Hence, the Industrial Court

cannot entertain a counterclaim in relation to a plaint lodged before this Court as it will offend Section 136(1) of the Courts Act.

For all the reasons given above, I find that it is too premature to thrash out the issue as to whether there is no cause of action as per the plaint or that the action is frivolous or vexatious or even an abuse of the process of the Court in the absence of evidence being ushered. The plea *in limine,* therefore, has not been acceded to.

The matter is being fixed Proforma to 13 January 2023 for the amended plea to be further amended in order to have the counterclaim removed prior to both learned Counsel to suggest common dates for Trial.

S.D. Bonomally (Mrs.) *(Vice President)*

9.1.2023