

Coolen O. v Airmate Ltd, in administration & Anor.

2022 IND 41

Cause Number 907/17

**IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)**

In the matter of:-

Oulaganarden Coolen

Plaintiff

v.

- 1. Airmate Ltd, in administration.**
- 2. Air Mauritius Limited, in administration.**

Defendants

Ruling

The averments of this amended plaint are essentially that Plaintiff has been in the continuous employment as Attendant at Defendant No.1 since 17 September 2012.

Defendant No.1 is a company limited by shares, incorporated on 5 January 2006 and is wholly owned by Defendant No.2.

Defendant No.2 is a public company and the sole shareholder of Defendant No.1.

Plaintiff performs the same work as Attendants employed by Defendant No.2 in the category of LM3 as governed by a collective agreement of Defendant No.2 ("his

counterparts"). However, his salary, benefits and leave are less favourable than his counterparts as detailed in the plaint.

Defendant No.2 benefits from work carried out by him as an employee of Defendant No.1.

Paragraph 6 of the plaint is reproduced as follows: "*Plaintiff further avers that Defendant No.2 has purposefully incorporated Defendant No.1 as a façade to circumvent the law and fair industrial law policies, more especially that of remunerating workers performing the same work with equal pay*".

Plaintiff ought to be paid the same salary and fringe benefits and he ought to be granted the same number of days' leave as his counterparts.

Defendant Nos.1 and 2 are defrauding him of his rights of an equal pay under the law so that their acts and doings are unfair, unreasonable and illegal.

On 22 April 2020, Messrs A. Sattar Hajee Abdoula and Arvindsingh K. Gokhool were appointed as Joint Administrators of Defendants.

Paragraph 11 of the plaint is reproduced below:

"Plaintiff therefore moves for a Judgment:

A. *Lifting the veil of incorporation of Defendant No.1;*

B. *Condemning and ordering the Defendants, jointly and in solido:*

(i) *To apply the same salary, benefits and leave to him as that applicable to his counterparts employed at Defendant No.2;*

(ii) *To refund to the Plaintiff the difference in earnings received by him for the period of December 2014 to November 2017 plus interest at legal rate. WITH COSTS."*

Both Defendants have raised a plea *in limine* as follows:

1. *The prayer at Paragraph 11. A of the Amended Plaintiff is meaningless and should be set aside. With Costs.*

2. *In the alternative, in so far as the prayer in Paragraph 11. A of the Amended Plaintiff may have sense, that prayer requires a preliminary*

exercise and investigation which, only, if successful can lead to a trial of the Plaintiff's claim.

3. *The Industrial Court does not have the jurisdiction to conduct such preliminary exercise and investigation.*
4. *The prayer at Paragraph 11. A of the Amended Plaintiff should therefore be set aside on this ground also. With Costs.*

The plea *in limine* was resisted and arguments were heard.

The main thrust of the argument of both learned Counsel for Defendants is that pursuant to Section 3 of the Industrial Court Act, the Industrial Court has exclusive Civil and Criminal jurisdiction to try any matter arising out of the enactments set out in the First Schedule. That First Schedule does not include the Company Law's Act or the Insolvency Act which are enactments relevant for the Commercial Division of the Supreme Court. They have relied primarily on the case of **Prest v Petrodel Resources Limited and Ors [2013] UKSC 34** and an extract from Dr. D. Fok Kan's Book namely Introduction au Droit du Travail, 2nd edition at Page 37 to the effect that the Industrial Court does not necessarily have jurisdiction to hear all cases involving labour disputes, to submit that the Court has no jurisdiction to grant that remedy contained at paragraph 11.A viz. the lifting of the veil of incorporation which is a matter purely of Company Law and such paragraph should be set aside by the Court.

The main thrust of the argument of learned Counsel for the Plaintiff is that the Industrial Court has jurisdiction as it is a case under Section 20 of the Employment Rights Act 2008 in force then and which is contained in the First Schedule of the Industrial Court Act. He submitted that the Court is only concerned with the true exceptions to the rule in **Salomon v Salomon & Co. Ltd. [1897] AC 22** as regards the piercing of the corporate veil and that this plea *in limine* is premature as some evidence needs to be adduced by relying on the Supreme Court case of **Rama v Vacoas Transport Co. Ltd [1958 MR 184]** which reads as follows:

"(...) Objections cannot properly be heard in limine unless the objector accepts – for the purposes of argument only – all the facts alleged by the plaintiff but argues that, even accepting them, his opponent cannot succeed. Where the objection is based on disputed facts the court must hear the evidence before it can rule on the point of law; the objection cannot be taken in limine."

He went on to submit that by relying on the case of **Rama**(supra) that even all the facts have been accepted in the amended plaint, the Plaintiff cannot succeed, but in the present situation, if all the facts are admitted the Plaintiff has succeeded.

Both learned Counsel for Defendants have replied that if ,for example, a divorce petition has been entered before the Industrial Court for which it has no jurisdiction, it cannot be said that the Court will have to start trying the case of the divorce petition before deciding on the plea *in limine* and that the Employment Rights Act 2008 does not provide for a remedy given to an employee to pierce a corporate veil or to lift a corporate veil.

I have given due consideration to the arguments of all learned Counsel. Section 3 of the Industrial Court Act 1973 reads as follows:

“3. Establishment of Industrial Court”

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.”

Now, by virtue of Section 3 of the Industrial Court Act 1973, the Industrial Court has exclusive civil and criminal jurisdiction to try matters arising out of the enactments listed in the First Schedule to the Act. True it is that the First Schedule does not include the Insolvency Act nor the Companies Act.

Section 20 of the then Employment Rights Act 2008 reads as follows:

“20. Equal remuneration for work of equal value”

(1) Every employer shall ensure that the remuneration of any worker shall not be less favorable than that of another worker performing work of equal value.”

This leads me to consider the important question as to whether in relation to the prayer averred at paragraph 11.A of the amended plaint namely for the Court to give a judgment to have the veil of incorporation of Defendant No.1 lifted, is meaningless or will entail a preliminary investigation of the company's affairs.

First and foremost, Defendant No.1 being a legal entity, an artificial person (see- **Salomon v Salomon & Co. Ltd. [1897] AC 22**), can only have its business and affairs managed by, or under the direction or supervision of, the Board of directors by virtue of Section 129(1) of the Companies Act 2001. The only shareholder viz. Defendant No.2 has nothing to do with the management of Defendant No.1 because it is the Board that has all the powers necessary for managing, and for directing and supervising the management of, the business and affairs of the company pursuant to Section 129(2) of the said Companies Act.

Now, nowhere in the amended plaint has it been averred that Defendant No.2 paid to Defendant No.1 a management fee to pay the salaries or remuneration of the employees of Defendant No.1 so that it could be inferred that Plaintiff was, therefore, employed by both Defendants and worse it can hardly be inferred that Defendant No.1 was even a related company of Defendant No.2 as the latter was the sole shareholder of Defendant No.1 leaving the said Defendant No.1 without any shareholding at all in its own company.

At this stage, it is significant to note that they are the joint administrators who have the control of Defendant No.1 company's business, property and affairs as per Section 222(1)(a) of the Insolvency Act 2009. The joint administrators become the agents of the Defendant No.1's company pursuant to Section 223(3) of that Act. Once under administration, no action can be brought against that company without the written consent of the joint administrators or with leave of the Court as per Section 244 of that Act.

Furthermore, the prayer averred at paragraph 11.A of the amended plaint has to be considered together with the averment at paragraph 6 of the said plaint meaning that Defendant No.1 was used a façade or device to circumvent the law and fair industrial law policies, more especially that of remunerating workers performing the same work with equal pay by concealing the true facts and that the Court should look behind the corporate façade or pierce the corporate veil of Defendant No.1.

At this stage, I find it relevant to quote an extract from the Supreme Court case of **Mohung A v Murday D [2016 SCJ 330]** which reads as follows:

*"In Mauritius the concept of 'corporate veil' was given due consideration in the case of **Maudar and Ors v Moirt and Ors [2011 SCJ 387]** and reaffirmed in the cases of **Baharim v Transinvest (Mauritius) Ltd [2013 SCJ 418]** and **Mauritius***

Post and Cooperative Bank Ltd v Triolet Multipurpose and Agro- Mechanical Co- operative Society Ltd and Ors [2014 SCJ 290].

The concept of ‘corporate veil’, as pointed out in the case of **Maudar**, was succinctly explained in the New Zealand case of **Attorney General v Equiticorp Industries Group Ltd (in stat man)**(1996) 7 NZCLC 261, 064, 261, 074 as follows –

“The phrase ‘to lift the corporate veil’ is a description of the process by which in certain situations the Courts can look behind the corporate façade and identify the real nature of a transaction and the reality of the relationships created. It is not a principle. It describes the process, but provides no guidance as to when it can be used.”

In the more recent case of **Prest v Petrodel Resources Limited and Ors [2013] UKSC 34**, the Supreme Court of England and Wales reviewed the jurisprudence relating to this principle. **Lord Sumption**, in relation to the lifting of the corporate veil, stated at paragraph 16 of his speech the following –

“I should first draw attention to the limited sense in which this issue arises at all. ‘Piercing the corporate veil’ is an expression rather indiscriminately used to describe a number of different things. Properly speaking, it means disregarding the separate personality of a company. There is a range of situations in which the law attributes the acts and property of a company to those who control it, without disregarding the separate personality of the company. The controller may be personally liable, generally in addition to the company, for something that he has done as agent or a joint actor..... But when we speak of piercing the corporate veil we are not (or should not be) speaking of any of these situations, but only of those cases which are true exceptions to the rule in Salomon v A Salomon and Co Ltd [1897] AC 22, i.e. where a person who owns or controls a company is said in certain circumstances to be identified with it in law by virtue of that ownership and control.”

Therefore, based on **Mohung** (supra), the Court will have to venture by way of a preliminary investigation on the application or not of the true exceptions to the rule in Salomon v Salomon & Co. Ltd. [1897] AC 22 so that the separate personality of Defendant No.1 company is to be disregarded with the aim of finding whether the joint administrators of Defendant No.1 namely Messrs A. Sattar Hajee Abdoula and Arvindsingh K. Gokhool can be held personally liable or not as they have the control

of that company's business, property and affairs as they have become agents of that company(see- Sections 222(1)(a) and 223(3) of the Insolvency Act).

This is because the relevant question is although Defendant No.1 is a separate legal entity, whether it was managed as a separate entity.

Thus, I take the view that in order for the present Court to consider whether to have the veil of incorporation of Defendant No.1 lifted or not is far from being meaningless and will entail a preliminary investigation of the company's affairs involving the application of different provisions of the Companies Act 2001 and the Insolvency Act 2009 which are within the domain of the Commercial Division of the Supreme Court and for which the Industrial Court has no jurisdiction pursuant to Section 3 of the Industrial Court Act 1973 and that the issue of hearing evidence first on the authority of **Rama v Vacoas Transport Co. Ltd [1958 MR 184]** is misconceived in the present context.

For the reasons given above, I hold that the plea *in limine* has been successfully invoked in the sense that the prayer at paragraph 11.A of the amended plaint is outside the jurisdiction of the Industrial Court and the said prayer is accordingly set aside.

The matter is, thus, fixed *proforma* to 18.8.2022 for all learned Counsel to suggest common dates for trial.

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

11.8.2022

