Denis G. v The Ministry of Youth Empowerment, Sports and Recreation represented by its Permanent Secretary

2023 IND 4

Cause Number 464/16

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:

Gerard Denis

Plaintiff

v.

The Ministry of Youth Empowerment, Sports and Recreation represented by its Permanent Secretary

Defendant

Ruling

In this second amended Plaint, Plaintiff has averred the following-

1. Plaintiff has been in the continuous employment with Defendant since 26 August 2003 till 28 February 2015 and was at all material times employed as Adviser/Coach.

2. The Plaintiff was drawing a terminal monthly salary of Rs. 17,205.

3. By letter dated 29 January 2015, Defendant terminated Plaintiff's employment as from 28 February 2015 and this, unlawfully, without justification, summarily and in breach of the provisions of the Employment Rights Act.

4. Such termination was to all intents and purposes unlawful, unjustified and not made according to law.

5. A Notice, *mise en demeure,* was served upon Defendant on 27 June 2016 claiming the sum of Rs. 596,013, but the latter has failed to comply with the requirements thereof.

6. Plaintiff is claiming from Defendant the sum of Rs. 596,013 made up as follows namely severance allowance: Rs. 593,572 and unpaid bonus: Rs. 2,441.

7. Plaintiff is, therefore, praying for a judgment ordering Defendant to pay to him the said sum of Rs. 596,013 with interest and costs.

Defendant has raised a plea *in limine* to the effect that the present matter be set aside with costs inasmuch as-

(a) Plaintiff has failed to comply with Section 4(2)(a) of the Public Officers' Protection Act, and

(b) Plaintiff was not entitled to any severance allowance given that his appointment, which was effected under Section 89(3)(h) of the Constitution, was terminated under Section 113(3) of the Constitution.

The plea *in limine* was resisted and arguments were heard. In relation to the second limb, some evidence was heard just for the purposes of the arguments to which there was no objection.

As regards the first limb of the plea *in limine* namely that Plaintiff has failed to comply with Section 4(2)(a) of the Public Officers' Protection Act, the arguments are to the following effect.

The main thrust of the argument of learned Counsel for Defendant is that on the basis of the answer to particulars dated 21 June 2021, under paragraph 5 of the second amended *proecipe* as per the Answer 2 whereby the answer as to the communication of the notice, *mise en demeure,* served upon the Defendant on 27.6.2016 claiming the sum of Rs 596,013 and the usher's return, it is stated by Plaintiff that same is not available. She has relied on the provision of Section 4(2)(a) of the Public Officer's Protection Act in that no civil action shall be instituted unless one month's previous written notice of the action and of the subject matter of the

complaint has been given to the Defendant. It is further stated therein that no evidence shall be produced at the trial except of the cause of action as specified in the notice and paragraph (c) further provides that in default of proof at the trial that the notice under paragraph (a) has been duly given, the Defendant shall be entitled to judgment with costs. There is an admission in the present case that there is no notice, *mise en demeure,* claiming the sum of Rs 596,013 which is available. She has relied on the cases of **Gheesah I M v The Road Transport Commissioner, National Transport Authority & Anor** [2016 SCJ 77] where the case of **New Beau Bassin Co-operative Store and Juggroo** [1980 MR 320] was referred to and the case of **Gunesh R. v The National Transport Corporation & Ors** [2010 SCJ 35].

The main contention of learned Counsel for Plaintiff is that there was a *mise en demeure* served in line with the Public Officers' Protection Act and that *mise en demeure* talks about the cause of action. It talks precisely what is the cause of action that the Plaintiff has against the Defendant. That *mise-en demeure* is proof that it was served. The only thing is that the *mise en demeure* which has been produced as per Doc. A. refers to a claim of Rs 497,001. Following that *mise en demeure*, a plaint was lodged for Rs 497,001. In the course of the proceedings, an amendment was made whereby the claim figure was increased. His contention is that there was no necessity whatsoever to serve any *mise en demeure* with the new figure because the figure does not form part of the cause of action and the figure has nothing to do with the provision of section 4(2)(a) of the Public Officers' Protection Act.

I have given due consideration to the arguments of both learned Counsel in relation to both limbs of the plea *in limine* but I have confined myself to the first limb only as per the reasoning given below on the ground that will become apparent later.

First of all, I find it relevant to quote an extract from the Supreme Court case of **D S A Company Ltd v The Ministry of Public Infrastructure & Anor and Super Construction Co Ltd v State of Mauritius** [2013 SCJ 485]:

*"In **DSA**, the respondents are said to be two Ministries as represented by the respective Permanent Secretary, and in **Super Construction** the respondent State of Mauritius is said to be represented by the Attorney General. The legal logic resides in the fact that the State is sued in its corporate capacity, and in **DSA**, the two Ministries which are part and parcel of the State, can only act through the intervention and representation of "personnes physiques" i.e. officers and employees or persons engaged in the effective discharge of the State's public duty. There is*

*always a human interface acting on behalf of the State which is an incorporeal entity (…)." (**emphasis added**)*

Given that the *"human interface"* is present in this second amended plaint as the Defendant namely the said Ministry being part and parcel of the State was represented by its Permanent Secretary and therefore Section 4(2) of the Public Officers' Protection Act (POPA) is applicable and also given that Plaintiff has claimed that his contract of employment was unlawfully and unjustifiably terminated by the said Defendant while being in its continuous employment as Advisor/Coach.

The provision of Section 4 (2) of the Public Officers' Protection Act reads as follows -

*"**4. Limitations of actions***

(1) (…)

(2) (a) No civil action, suit or proceeding shall be instituted, unless one month's previous written notice of the action, suit, proceeding and of the subject matter of the complaint, has been given to the defendant.

(b) No evidence shall be produced at the trial except of the cause of action as specified in the notice.

*(c) In default of proof at the trial that the notice under paragraph (a) has been duly given, the defendant shall be entitled to judgment with costs." (**emphasis added**)*

At this juncture, I find it opportune to quote an extract from the Supreme Court case of **Louise Jean Noel v The State [2003 SCJ 221]**:

"Section 4(2)(a) of POPA requires that the notice should satisfy the following conditions:

(a) It should be written;

(b) It should disclose the action;

(c) It should disclose the subject-matter;

*(d) It should be given to the defendant." (**emphasis added**)*

The guiding principle has been highlighted in the Supreme Court case of **Narsinghen H. & Ors v The State of Mauritius [2020 SCJ 113]**:

"The compliance with the requirements of section 4(2)(a) of the POPA has been thoroughly canvassed in the recent case of ***China International Water and Electrical Corporation v The State of Mauritius & Anor*** *[2017 SCJ 3], where the Court held that*

'it is clear from the provisions of section 4(2)(a)(b) and (c) above, that the service of the notice must mandatorily be in the terms prescribed both as regards the nature of the action and its subject matter. These are not mere technical requirements but constitute a precondition for instituting civil proceedings against the State and its préposés.'

*The Court further emphasized that the notice had compulsorily to be served at least one month prior to the lodging of the case." (***emphasis added)**

The point that I have to decide as regards the first limb of the plea *in limine* is whether no action would lie against Defendant because Plaintiff has failed to give previous written notice to it in conformity with section 4(2)(a) of the POPA.

The previous *mise en demeure* served upon the Defendant on 27.6.2016 as per Doc. A borne out by the record was in relation to a total claim of Rs 497.001 and a claim for severance allowance in the sum of Rs 494,560. In the present second amended *proecipe*, the claim is in the sum of Rs. 596,013 and the claim for severance allowance having been increased to Rs. 593,572. When the question was put to Plaintiff as per the demand of particulars as to whether a *mise en demeure* covering the new claim was served on Defendant on 27.6.2016, his answer was that same was not available and more importantly the contention of learned Counsel for the Plaintiff is essentially that same was not necessary as the previous *mise en demeure* is sufficient. Therefore, it is beyond dispute that the Defendant has in effect not been given one month's previous notice *stricto sensu* in relation to the new claim of Rs. 596,013 comprising of an increase in the claim for severance allowance in relation to the second amended plaint.

It is apposite to quote an extract from the words of Lord Rodger in the Privy Council decision in **Mauvilac Industries Ltd. v Ragoobeer [2006 PRV 33]** –

"The Courts must respect the policy which lies behind the time-limits that the legislature has imposed."

At this stage, I find it appropriate to quote an extract from the Supreme Court case of **Bhoonah J. v Mauritius Revenue Authority [2017 SCJ 53]** wherein it was stressed that section 4(2)(a) of the POPA being quite specific, it enjoins the Plaintiff to notify the Defendant of the actual action, suit or proceeding that it will take against the Defendant which reads as follows:

*"Now, it has been decided in a number of cases that **section 4(2)(a) of the Act** clearly and specifically provides that the notice should be a previous notice, given at least one month prior to the lodging of the case, that it should be a notice of the action, suit, or proceeding and of the subject matter of the complaint. It has also been held that failure to comply with these requirements is not a mere technicality and that those conditions are to be complied with strictly, vide, inter alia, **Societe Cap Dal and Anor v Registrar General** [2002 SCJ 58]**; Louise Jean Noel v The State[supra]; Riaz Bhugaloo v The Commissioner of Police and Anor** [2004 SCJ 143]**; Gunesh v The National Transport Corporation & Ors (2010 MR 70)**.*

(…)

*The notice must set out the claim in similar terms to those in the plaint with summons, covering the same subject matters. It is clear from the case of **Gunesh v The National Transport Corporation & Ors** (supra), with which I respectfully agree, that although there the main issue was compliance with the delay to enter the case, it was clearly stated that the notice should mirror the plaint, the more so that the law clearly and unequivocally provides that the plaintiff will not be allowed to adduce evidence of what has not been averred in the notice, and that would include the items of damages claimed(vide also **Hemraz Gobin v The Registrar General**[2006 SCJ 128], in the same sense)."*

It is worthy to quote an extract from the Supreme Court case of **Nazeer F. & Anor v The State of Mauritius & Anor [2016 SCJ 45]**:

*"As was held in **Gunesh v The National Transport Corporation** [2010 MR 70] it is incumbent upon a plaintiff, by virtue of section 4(2)(a) of the Public Officers' Protection Act, to give one month's prior written notice of the action and the subject matter of the complaint. The importance of serving prior written notice is reflected in the peremptory consequences which would inevitably result where there has been a failure to do so as are set out in section 4(2)(b) and (c) of the Act **(Supra)**.*

The plaintiffs having failed to serve prior written notice of the present action as well as of its subject matter in respect of defendant no.2 in conformity with section 4(2)(a) of the Act, the plaint against defendant no.2 is accordingly dismissed with costs."

Indeed, I find it relevant to quote an excerpt from the Supreme Court case of **Gobin H. v The Registrar General [2006 SCJ 128]**:

"Now, section 4(2) clearly and specifically provides that the notice should be a previous notice, served one month prior to the lodging of the case, that it should be a notice of the action, suit or proceeding and of the subject matter of the complaint. In other words, that notice shall form the basis of an action by an eventual plaintiff who, subject to the further requirements of section 4(2)(b), which limits the production of evidence at the trial to the cause of action as specified in the notice, will not be allowed to depart from the contents of his notice. Therefore, a failure to comply with these requirements is not a mere technicality, but should strictly be complied with. ***Vide Societe Cap Dal and Anor v Registrar General*** *[2002 SCJ 58],* ***Louise Jean Noel v The State*** *[2003 SCJ 221],* ***Riaz Bhugaloo v The Commissioner of Police and Anor*** *[2004 SCJ 143]."*

It is apposite to quote an extract from the Supreme Court case of **New Beau Bassin Co-operative Store v Juggroo [1980 MR 320]** cited with approval in **Gheesah I .M v The Road Transport Commissioner, National Transport Authority & Anor. [2016 SCJ 77]**, referred to by learned Counsel for Defendant which is reproduced below:

"A 'cause of action' is constituted by the averment of facts which, if denied, require to be proved to enable a Plaintiff to obtain the remedy he seeks. The nature and extent of the remedy sought is a legal consequence of those facts and, as such, is a matter of law which the Court has to apply. Pleadings, therefore, are designed to aver, not the law, but the facts which constitute the 'cause of action'."

Therefore, the total claim forms part of the "*nature and extent of the remedy sought as a legal consequence of those facts"* which means that an increase in the quantum of severance allowance would necessarily "*constitute the 'cause of action'"* let alone that it is the major item claimed in the present second amended plaint and which is a question of law that the Court has to decide. I do not agree that it is a mere replica of the previous plaint with only an increase in the amount of severance allowance claimed so that the notice viz. the *mise en demeure* as per the reduced claim as per Doc. A would suffice for the purposes of section 4(2)(a) of the POPA. This is because the total amount claimed encompassing the increase in the claim for severance allowance forms part of the specificity or precision that is needed in order to formulate a complete cause of action. Although it is clear that there is no need as per **New Beau Bassin Co-operative Store** (supra) for the law to be specifically averred but there should be sufficient facts for the Defendant to know the case it has to meet by the evidence in Court which means *"every fact which is material to be proved to enable the plaintiff to succeed; in other words, every fact which, if traversed, the plaintiff must prove to obtain judgment"* (see- **Heera v Ramjan & Ors. [1976 MR 220]**, **A.Z.A.A. Cassim v The United Bus Service Co. Ltd [1986 MR 242]** and **Geerjanan P. v The Mauritius Commercial Bank Ltd [2006 SCJ 320]** in the same sense).

Now, the subject matters in the notice namely Doc. A and in the second amended plaint being markedly different in that the total claim has been increased and the claim for severance allowance has also been increased, the Defendant cannot be deprived of the statutory period afforded to it by the Legislator which is one month's notice given to it in order to take a stand prior to the case being lodged as it cannot give evidence outside the subject matter of the notice namely Doc. A which is for the sum total of Rs 497,001 only and not Rs. 596,013.

Therefore, it is abundantly clear that it cannot be construed that Defendant was given the mandatory one month's notice viz. *mise en demeure* pursuant to section 4(2)(a) of the POPA in relation to the second amended plaint which is the final plaint before this Court.

Thus, it is plain enough that one month's previous written notice of the action and of the subject matter of the complaint has not been given to the Defendant prior to the present civil action having been instituted against the said Defendant as per the second amended *proecipe* in that the provision of section 4(2)(a) of the POPA is necessarily qualified by the provision of section 4(2)(b) of the POPA (see - **Louise Jean Noel**(supra)).

Given that the plea *in limine* has been successful on the first limb, there is no need for the Court to adjudicate on the second one.

For the reasons given above, I find that the plea *in limine* is well taken as regards the first limb and which is upheld. The Plaint with Summons is accordingly dismissed with costs.

S.D. Bonomally (Mrs.) *(Acting Vice President)*
23.1.2023