Cause Number 683/17

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

Monique Patricia Augustin

Plaintiff

v.

ISM Ltd

Defendant

Ruling

In this Plaint, Plaintiff has averred that she was in the continuous employment of Defendant since 10 March 1984 till 24 January 2017. She was last occupying the post of Factory Worker and was remunerated at monthly intervals at the rate of Rs 14,160.

On 24 January 2017, while she was at her place of work, performing her duties, she was requested to go and see the Administrative & Finance Manager and the Industrial Manager. There and then, she was informed, without any prior notice or notification that Management had decided to terminate her employment due to a financial crisis as alleged.

Plaintiff has averred that she was paid Rs 299,208.05, and was, on the spot, requested to sign a *"Quittance,"* without being given the opportunity to be explained

the contents thereof and to leave the Defendant's premises immediately after having signed the said *"Quittance"*. She was forced by the Defendant's Management to sign the document.

It was only after having sought legal advice that she came to learn that she had been paid much less than what she should have been as further alleged.

Plaintiff has, therefore, averred that Defendant has unfairly and unjustly terminated her employment, as a result of which she has claimed the following:

Severance Allowance for unjustified termination of employment	
Rs 14160 x 3 x 540/12	Rs 1,911,600.00
Less	Rs 299.298.05
Total	**Rs 1,612,301.00**

Paragraph 10 of the plaint is reproduced below:

"The Plaintiff therefore prays from this Honourable Court for a judgment condemning the Defendant to pay to her the said sum of Rs 1,612,301.00. With Costs."

Learned Counsel appearing for Plaintiff has moved to amend the plaint at paragraph.10 as follows:

"The Plaintiff therefore prays from this Honourable Court for a judgment:

(i) declaring that the said "Quittance" dated the 24th January 2017 is null and void ab initio; and

(ii) condemning the Defendant to pay to her the said sum of Rs 1,612,301.00. With Costs"

Learned Counsel for Defendant has objected to the proposed amendment of the plaint on the sole ground that it was made at a late hour as per the Court Sitting of 3 March 2021 and arguments were accordingly heard on the same day.

The main thrust of the argument of learned Counsel for Defendant is that when allowing an amendment at so late in the hour by relying on the Supreme Court case of **Unmar v Lagesse** [1994 MR 183] especially if one is appearing for the Plaintiff and there is an averment that the whole procedure goes *"caduque"*, one has to apply

for particulars again. That would mean that there would be application for particulars, answers to particulars and then amendment to the plea. The whole scenario is changed and the Plaintiff will have to start afresh after 3 years. That is why an amendment should not be granted rightly as it is clear by the Court of Appeal judgment that has been repetitive in asking the lower courts not to use the discretion so easily in that kind of matter.

The main contention of learned Counsel for Plaintiff is that on the issue of delay he was relying on an old case of **Banymandhub v Chung Woo** **[1964 MR 224]** which also touches upon the general principles of amendment so that delay as such is not a ground to refuse a motion for amendment especially when the trial has not started yet.

I have given due consideration to the arguments of both learned Counsel as regards the proposed amendment in relation to the sole ground raised namely the late hour meaning after about 3 years for doing so. There have been other issues addressed in a haphazard, speculative and incomplete manner outside the scope of the objection raised namely the issue of jurisdiction overlapping onto another issue of revocation of an *aveu judiciaire* which I will not rule upon in all fairness as they were not pressed as grounds of objection proper at the Court Sitting of 3 March 2021 and the more so as learned Counsel for the Plaintiff expressed the view at some stage that he was not prepared for that.

True it is that the proposed amendment has been made at a late stage meaning about three years after the plaint was lodged. Indeed, as highlighted in the Supreme Court case of **Harel and anor v Société Jean Claude Harel and Cie and ors and Société du Patrimoine**[**1993 SCJ 464**], the amendment if granted will have for effect as if the amended plaint itself was the original one dating back to about 3 years ago and an extract of which reads as follows:

"Any amendment allowed by the Court dates back in general to the time of the original issue of the claim and the action continues as though the amendment has been ab initio – Warner v Sampson [1949] 1 QB 297."

It is also true that as per the proposed amendment, Plaintiff's claim for Severance Allowance will remain the same meaning by having the amount paid for the *"Quittance"* deducted. But the only addition is that, she is praying the Court to

declare that the said *"Quittance"* is null and void *ab initio*. Obviously, an amendment is necessary as a *"Quittance"* cannot be equated with a part payment.

Now the provision of the law regarding amendment of pleadings is governed by **Rule 48 of the District, Industrial and Intermediate Court Rules 1992** as follows:

*"**48.** The District Magistrate may, at all times, amend all defects and errors, both of substance and of form, in any proceedings in civil matters, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; all such amendments may be made with or without costs, as to the Magistrate may seem fit, and also such amendments as may be necessary for the purpose of determining, in the existing suit, the real question in controversy between the parties shall be so made."(**emphasis added**)*

Moreover, **Rule 1** of the said Rules provides:

*"**1.** These rules –*

(a) may be cited as the District, Industrial and Intermediate Court Rules;

*(b) shall regulate the practice and proceedings of District Courts in the exercise of their civil jurisdiction and, where appropriate, the practice of Industrial and Intermediate Courts in similar matters." (**emphasis added**)*

The following extract from the Supreme Court case of **Maxo Products v Swan Insurance Co. Ltd. [1996 MR 41]** is relevant and is reproduced below: -

"It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made "for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings."

It is apposite to note that in matters of amendment, the present lower court has a wider discretion than the Supreme Court as highlighted in the case of **Sénèque v Armand [1883 MR 141]** pursuant to the now **Rule 48 of the District, Industrial and Intermediate Court Rules 1992** an extract of which reads as follows:

"We think that there is a great difference between the rule of the Supreme Court and that of the District Court, and that the words "in substance" which are to be found

in the latter give a much greater power of amendment to the District Magistrate than the Rules of the Supreme Court as actually existing give to the Judges of that Court."

Thus, under the authority of **Sénèque (supra)**, the present Court has not only the power to amend pleadings for the purpose of bringing out clearly the points at issue, but also has a discretionary power to amend *"in substance"* which means that amendments may be granted by the present Court although these amendments will vary a great deal the original conclusions of the plaint.

At this stage, I find it appropriate to quote an extract from the Supreme Court case of **Unmar v Lagesse [1994 MR 183]** referred to by learned Counsel for the Defendant himself as follows:

"The general principles relating to amendment of pleadings have been fully considered in a number of cases. The dominant principle appears to me to be that the Court has a discretion to grant or to refuse an amendment, and that this discretion should be exercised upon an assessment of where justice lies: See the dicta of Lord Griffiths in Kettleman v Hansel Properties Ltd. (1987) A.C. 189 at page 220, quoted in Soobhany v Soobhany [1989 MR 191]. Many and diverse factors will bear upon the exercise of this discretion. The Court will bear in mind, in particular that the interests of justice normally require that the real controversy which finally exists between the parties should be resolved. This consideration will weigh very heavily in the balance but on the other hand the Court may take into account a number of other factors which it is impossible to enumerate, but which certainly includes the nature of the amendment and the behavior of the party seeking the amendment. In the Kettleman case (supra) Lord Griffiths said (at p.220) that "to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence." And in the same case, Lord Brandon of Oakbrook, summarising the principles regarding amendment of pleadings, said, at p. 212, that "however blameworthy (short of bad faith) may have been a party's failure to plead the subject matter of a proposed amendment earlier, and however late the application for leave to make the amendment may have been ", the application should, in general, be allowed provided that there is no injustice to the other party, there being no such injustice when he can be compensated by appropriate orders as to costs. It is noteworthy that in Jagatsingh v Boodhoo and Walter v Boodhoo [1981 MR 357] where Counsel for the defence had adopted unjustifiable tactics involving

concealment of certain facts until as late as possible, the Appellate Court, after reviewing the law relating to pleadings, still found that, despite the reprehensible attitude of the respondent , it would have been "wrong to shut the door of Justice to him" by refusing the amendment."

The above principles are in line with the authority cited by learned Counsel for the Plaintiff viz. the Supreme Court case of **Banymandhub v Chung Woo** [1964 MR 224] an extract of which is given below:

"Whilst I am prepared to agree that the amendment could have been prayed for much earlier and that the respondent does in effect suffer some prejudice by having a trial of the issue raised by the applicant in the statement of claim postponed, yet I am clearly of opinion that this disadvantage is outweighed by the necessity that the issue now raised which is so germane and so connected with the cause of action be tried at the same time in order that all questions in controversy between the parties be decided upon once for all. It would, in my view, be a denial of justice to refuse the motion. English case law and our own case law are at one on the principle that leave to amend must be readily granted to the party on payment of costs, occasioned, unless the opponent would be placed in a worse position than he would be if the amended pleadings had been delivered in the first instance, or if some injury were caused to him which could not be compensated by costs, or if there were ground for believing that the application was not made in good faith, which is not the case here."

Therefore, as also repeated *ad nauseam* in a string of decided cases namely **Earl Seymour S. v Hassamal S.M.** [2014 SCJ 291], **Tive Hive & Ors. v Kam Tim** [1953 MR 80], **Bronsema v Mascareigne Shipping & Trading Co.Ltd.**[1985 MR 79], **Soobhany & Ors. v Soobhany & Ors** [1989 MR 191], **Rambujoo & Co.Ltd. v Hicons Co.Ltd.[2003 SCJ65], Badain v ICAC** [2004 SCJ 33], **ABC Motors and Ors. v Ngan Hoy Khen Ngan Chee Wang & Ors.**[2008 SCJ 25a] and **Best Luck (Mauritius) Ltd. v Murden N. & Anor.**[2013 SCJ 335] that in the exercise of its discretion, the Court will take into account: –

(a) the nature of the proposed amendment;
(b) the stage at which the motion to amend is made;
(c) the purpose for which it is made; and
(d) whether it is likely to cause any prejudice to the other party so that it may not be compensated by an order for costs.

As regards item (a), I find that the justice of the case lies in favour of the nature of the proposed amendment to be granted in order to safeguard the right of the Plaintiff seeking it given that it is necessary for the Court to determine the real question in controversy between the parties.

As far as item (b) is concerned, the stage at which the amendment is made is not really material although Courts are more inclined to grant an amendment made before the start of a trial and the hearing of evidence (see – **Bawamia H.M. v Tranquille M.R.G.C. & Ors.**[2013 SCJ 237] and **Hurnam D. v The Commissioner of Police**[2014 SCJ 87]). This is because the duty of this Court is not to act for the sake of discipline because of a late application for amendment, but to assess the stage at which the application is made namely whether the rights of the other party existing at the time of the amendment will be jeopardized by prejudice being caused to it and whether such prejudice can be adequately compensated by an award of costs. I find that the prejudice being caused to Defendant by the granting of the amendment at a late stage can be adequately cured by an award of costs.

In relation to item (c), as for the purpose for such an amendment, I find that it is being made in good faith as it is so connected with the cause of action to be tried and that all matters in controversy between the parties will be decided upon once and for all in this plaint.

As regards the last item (d), I find that any prejudice to be caused to the Defendant by going through the process of having pleadings closed again for the present case to be in shape for trial anew by the granting of the amendment is outweighed by the necessity for the Court to decide the real question in controversy between the parties and by the fact that the Defendant can be adequately compensated by an award of costs.

For the reasons given above, I allow the amendment of the Plaint. The Plaintiff will bear the costs of the day.

The matter is accordingly fixed *proforma* to 19 January 2022 for an amended plaint to be filed and learned Counsel for the Defendant to take a stand.

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

11.1.22