Sabas D.C. v Top Turf (Mauritius) Limited

2022 IND 18

Cause Number 186/19

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

Didier Charles Sabas

Plaintiff

v.

Top Turf (Mauritius) Limited

Defendant

Ruling

This plaint in a gist is to the effect that Plaintiff was the General Manager of the Defendant pursuant to a Service Agreement effective from 1 August 2016 and which was *"à durée indeterminée".*

As per the provisions of the Service Agreement, such employment followed the execution by Plaintiff and Defendant of a sale of Business Agreement dated 24 August 2016 whereby Plaintiff and his lawful wife, Mrs. Christine Sabas, sold the businesses of Hyginette Marketing Ltée and Services 2000 Ltée to Defendant.

It was expressly agreed that all the employees thereof, including Plaintiff and his wife as, Managing Director, would be transferred to the Defendant company with their continuity of employment safeguarded and carried forward.

As such, Plaintiff reckons 24 years and 7 months of service having been in employment since 7 February 1994. He was drawing a monthly salary of Rs. 163,360 as well as other allowances amounting to a total monthly remuneration of Rs.192,811.

During his employment with the Defendant, Plaintiff was at all material times, answerable to Defendant's *préposé* and Managing Director, Mr. Gabriel Richter Pretorius.

On or about 5 June 2018, Defendant, through its Managing Director, informed Plaintiff that certain changes were about to happen within Defendant company, and it was Defendant's aim to increase profits within 6 months starting as from June 2018. Thus, he was asked by Defendant through the Managing Director, whether he would consider leaving the company before his retirement age and if so, upon what conditions he would be ready to do so.

Plaintiff has by way of an email dated 6 June 2018 informed Defendant that he was ready to leave the company but only on those conditions which were as follows:

(a) That he would be authorized to take his vacation leave in September 2018 instead of December 2018.

(b) That he would be able to finish his holidays in August.

(c) That the amount of MUR 2,576,654 as lump sum for his years of service and end of year bonuses be paid in full.

After an exchange of emails, on or about 12 June 2018 he received, by email, an official letter from Defendant's Managing Director stating that he must leave the company on 31.08.18 without any confirmation as to whether his conditions have been approved as the matter had to be discussed with the relevant officials of Defendant Company in South Africa.

On 25 June 2018, he was convened by Defendant's Managing Director for a meeting in the latter's office. During the meeting, it was imparted to him that Defendant was still working on the figures regarding the lump sum and monetary payments that Plaintiff requested and the company was in touch with Swan Insurance Ltd ("Swan") for retirement benefits amounts.

Plaintiff continued his employment with Defendant normally until 20 July 2018 when Defendant's Managing Director came to meet him at his office with a "SWAN early retirement option form". He signed the relevant forms on the same day as requested by Defendant's Managing Director, and following the latter's reassurance that Defendant will accept all his conditions of his early departure.

Following correspondences from Plaintiff that it appeared to him that Defendant was actually unilaterally putting an end to his contract, he received an email from Defendant's Managing Director on 30 August 2018, requesting a meeting in Curepipe. He did not attend. On or about 31 August 2018, Mr.Yogesh Balloo, an officer of SWAN, was advised to block any such pension payments as his early retirement was contingent upon certain conditions precedent being met and that same was not the case yet. Plaintiff further asked for and obtained the cancellation of the "SWAN early retirement option form" that he had previously signed. In the meantime, on the same day, a sum of Rs. 335,926 had been credited to his bank account by Defendant, without any explanations. It was clear to Plaintiff that Defendant was trying discreetly to oust him from the company without paying him the lump sum and other monies to reflect his years of service.

The whole situation took a serious toll on his health and he had to consult a medical practitioner on 3 September 2018 and informed the human resource officer of Defendant and forwarded the medical certificate issued by Dr. Vial for 14 days' rest.

On 4 September 2018, Defendant informed him that his contract with Defendant had come to an end at the end of August 2018 and that it would forward a calculation of the final payment shortly.

On 6 September 2018, he caused a registered letter to be sent to Defendant in order to set out his grievances and to seek explanations as to how his employment had terminated at the end of August 2018, giving Defendant a delay of 5 working days and informing Defendant that should it fail to reply, then he will be bound to consider that his contract had been summarily and unilaterally terminated by Defendant. The latter never replied to the letter of 6 September 2018.

Plaintiff sent to Defendant a letter dated 18 September 2018 to inform it that he is, in good faith, handing over all company property that was still in his possession as Defendant had summarily dismissed him without justification.

Defendant and its Managing Director, Mr. Pretorius, have at all material times induced Plaintiff into believing that his monetary conditions of early departure were being considered positively when in truth and in fact it is clear from the acts and doings of Defendant that it never intended to agree to any of the conditions proposed by Plaintiff.

The acts and doings of Defendant have been done in bad faith with a deliberate view to terminate his contract without lawful justification and without any compensation to reflect his 24 years' and 7 months' service.

He was still employed as General Manager of Defendant when the latter decided to unilaterally and illegally put an end to his employment. Thus, he has sought remedy in terms of remuneration due and severance allowance in relation to his said years of service to the tune of Rs.14,219,811.

Following answers to particulars and to further and better particulars having been provided, Defendant has put in a notice of preliminary objection as to jurisdiction which is reproduced below:

"1. The Defendant avers as follows:-

(a) The Plaintiff and Mrs. Christine SABAS, at all material times, the shareholders and directors of the companies Hyginette Marketing Ltée and Services 2000 Ltée did sell the businesses of the said 2 companies to the Defendant in virtue of a ***Sale of Business Agreement*** *dated 24 August 2016.*

(b) According to Clause 14 ***of the said Sale of Business Agreement****, it is stated that all employees of the 2 companies will be transferred to the Defendant company with the continuity of service and in fact it is not stipulated that the continuity of service of the shareholders and directors of the 2 companies will be considered as continuous employment.*

(c) In fact, the Plaintiff and Mrs. Christine SABAS have been paid in the capacity as directors and shareholders of the 2 companies namely: Hyginette Marketing Ltée and Services 2000 Ltée and at no time Plaintiff and Mrs. Christine SABAS were to be considered as employees and Defendant has never accepted to consider the Plaintiff as an employee.

(d) The Plaintiff and Mrs. Christine SABAS were in fact after the sale of the businesses Hyginette Marketing Ltée and Services 2000 Ltée employed by

the Defendant in view of their knowledge, expertise and involvement in the affairs of the said 2 companies namely Hyginette Marketing Ltée and Services 2000 Ltée, in the Defendant's company in virtue of a ***Service Agreement*** *dated 24 August 2016 and 29 August 2016 and such employment was stipulated to be effective as from 1 August 2016.*

(e) *The Plaintiff is therefore not recognised as an employer of Defendant as from 7 February 1994.*

(f) *There is a serious dispute as to whether Plaintiff is an employee of the Defendant and whether Plaintiff was employed as from 7 February 1994 or as from 1 August 2016 and such dispute should be resolved by Arbitration as hereunder mentioned.*

(g) *Clause 23 of the* ***Sale of Business Agreement*** *provides that:*

"23.1. Any dispute controversy or claim arising out of or in relation to this agreement, including any question regarding its existence, validity or termination, shall be referred to and shall be finally resolved by arbitration under the rules of the LCIAMIAC Arbitration Centre which rules are deemed to be incorporated by reference into this agreement."

(h) *Defendant avers that there is also a serious dispute as regards the alleged manner the Service Agreement has been terminated and therefore such dispute should be resolved by Arbitration as provided by Clause 13.1 of the* ***Service Agreement****.*

(i) *Clause 13 of the* ***Service Agreement*** *between Plaintiff and the Defendant provides as follows:*

"13.1. Save as specifically provided to the contrary in this Agreement, any disputes arising from or in connection with this Agreement or the termination thereof shall, at the request of any Party to the dispute, be finally resolved in accordance with the LCIA-MIAC Arbitration Rules for the time being in force, which rules are deemed to be incorporated by reference in this clause. The tribunal shall consist of one arbitrator to be appointed by the chairman for the time being of the LCIA – MIAC. The place of arbitration shall be Mauritius and the arbitration shall be conducted wholly in English. The arbitral award shall be subject to appeal."

2. Defendant therefore pleads that in view of the above, this Court has no jurisdiction to hear and determine the present action and the matter should be resolved by Arbitration."

Plaintiff has replied to the notice of preliminary objection raised by Defendant as follows:

"1. This is a case entered by way of Plaint before the Industrial Court and, as such, it is procedurally wrong to raise any preliminary objections merely by way of a document styled "Notice of Preliminary Objection".

2. The preliminary Objection ought to have been raised by way of a Plea in Limine whether or not the Defendant reserves its right to enter a Plea on the merits at a later stage. The Defendant, at this stage, is not entitled to split its defence.

3. The Notice of Preliminary objection is in fact a disguised Plea on the basis of the averments contained therein.

4. Any objections to the jurisdiction of the Court must be raised "préalablement à toute autre exception et défense" failing which they will be held "irrecevable".

5. In the present case, the Defendant has failed to raise any preliminary objections at the outset of the case. The Defendant has instead participated in the "mise en état" of the case by asking for particulars thereby submitting itself to the jurisdiction of this Honourable Court, thereby rendering any objection as regards to the jurisdiction null and void."

The matter was accordingly fixed for arguments.

The main thrust of the arguments of learned Counsel for Plaintiff is that this case has been entered by way of Plaint with Summons before the Industrial Court on 28.3.2019 where Plaintiff is claiming Severance Allowance as per paragraph 54 of the plaint because of unjustified termination of his contract of employment. Following the lodging of the plaint, there was a demand of particulars made, then another demand of further and better particulars made so that when the matter was fixed for plea, that Defendant filed the document which was styled as *"Notice of preliminary objection as to jurisdiction"*. He referred to Section 7(1) of the Industrial Court Act 1973:

"Subject to the other provisions of this Act and to any specific procedural provisions in any enactment set out in the First Schedule, all proceedings before the Court shall be instituted and conducted in the same manner as proceedings in a civil or criminal matter, as the case may be, before a District Magistrate."

He also referred to Section 17(1)(a) of The District and Intermediate Courts (Civil Jurisdiction) Act: *"Where the defendant appears and does not admit the demand, his plea or defence shall be recorded."*

Defendant by filing this 3- page document is intending to raise the *"l'exception d'incompétence"* and he relied on the case of **Avigo Capital Managers PVT Ltd v Avigo Venture Investments Limited [2019 SCJ 158]** namely:

"Points which are more appropriately raised in limine are those which, by reliance on the pleadings only and without having recourse to the production of evidence, or by production of a significantly limited amount of evidence in relation to the point raised in limine, could dispose of the case and avoid protracted hearing of the whole evidence in the case."

He relied on **Avigo** (supra) as the way Defendant should have proceeded is that at the very outset, it should have raised the point by way of plea *in limine* and thereafter it should have called the representative of the Defendant to produce the contract wherein there is a *"clause compromissoire"* and then they would have argued it. In the document filed as styled, it is in fact a disguised plea that goes into the merits of the case. In the same document that purports to question the jurisdiction of the Industrial Court, that is, in the same document that is supposedly raising *"l'exception d'incompétence"*, *ex facie* paragraphs 1(a) to (f) of that document, the Defendant is raising other issues which cannot be canvassed as preliminary objections. These are issues which are not even remotely connected to *"l'exception d'incompétence"*. At para. 1(a) Defendant is apprising the Court that the Plaintiff was a shareholder and director of two companies which he sold to Defendant. In para. (b), the Defendant is stating that as per a certain agreement, continuity of service of all employees was to be ensued. In para. (c), it goes on the Defendant has never accepted to consider the Plaintiff as an employee. In para. (d), it goes on to say that he was actually employed. In para. (e), it is saying that Plaintiff is not recognized as an employee as from 7.2.1994. Finally, at para. (f) there is a dispute as to when the employment actually started. Thus, Defendant has raised different lines of defence in one document which is styled as *"notice of preliminary objection as to jurisdiction"*

while it is firmly established that any objection as to jurisdiction of the Court must be raised *"préalablement à toute autre exception et defense"* failing which they will be held *"irrecevable"*. He relied on the case of **Malaysian Airline System Berhad v Airworld Limited & Ors.** [2010 SCJ 352]. He also relied on the case of **Rama v Vacoas Transport Co. Ltd** and stated that objections cannot be heard *in limine* unless Defendant accepts for the purposes of the arguments only all the facts alleged by Plaintiff but agrees that even if Defendant were to accept those facts, Plaintiff would not have succeeded. The objection that is raised in the present matter is based on disputed facts. The Court will have to hear evidence before it can rule on the point of law. Had the plea *in limine* raised only *"l'exception d'incompétence"*, it would have been fine. But taken together with the other lines of defence, that is, whether Plaintiff was actually employed, since when he was employed, whether he was a shareholder or an employee that were raised in this document, are all different lines of defence such that the Court is in presence of disputed facts. Therefore, these disputed facts have to be heard first before it can decide on this plea *in limine*. In that document, Defendant is stating that Plaintiff was not in employment, it goes on to say that he was employed since 2016 and not 1994 and it is disputed as to when the employment started. This is a claim for severance allowance and Plaintiff contends that he is the employee. By the disputed facts that have been raised by Defendant, it has already submitted itself to the jurisdiction of the Industrial Court. He relied on the case of **Hurnam v The Attorney** [2014 SCJ 423]. He also referred to the case of **Magisson Lionel v Immobilier Conseil Marketing Ltee**[2012 SCJ 313] concerning the prohibition of splitting of defence where it was held by Justice Lam Shang Leen as follows:

"I need to say that it is permissible in certain cases for the defence not to put in a plea on the merits but simply to put in an objection in law as provided for in the Code of Civil Procedure especially when it does not want to submit itself to the jurisdiction of the Court. Challenge to jurisdiction is taken ex -facie the plaint with summons or application. Examples of such types of cases are legion especially where the party pleads that there is an arbitration clause, the present case is not in that category."

Learned Counsel for Plaintiff further contended that Defendant cannot plead *'l'exception d'incompétence'* because it has already submitted itself to the jurisdiction of the Court because Defendant has participated in what is called the *"mise en état"* of the case by firstly asking for particulars, not once but twice and it has joined issue

with the Plaintiff by filing this document whereby it is pleading on the merits. Therefore, it has submitted itself to the jurisdiction of the Court. He relied on the case of **Seament International SAL v The State Trading Corporation** [1998 SCJ 96] where it was held: *"**Premiere règle: presentation des exceptions in limine litis**:*

"26. Consacrant les principes déjà posés par les articles 169, 186 et 424 anciens du code de procédure civile, le nouvel article 192, alinéa 1, dispose que les exceptions cessent d'être recevables lorsqu'elles sont présentées << après qu'il a été conclu au fond >>. Elles doivent donc être invoquées avant l'échange des conclusions qui aboutit à la mise en état, dite initiale, de l'affaire…"

In the present case, Defendant has submitted to the jurisdiction of this Court for the *mise en état*. He relied on the case of **Ramgoolam N. Dr GCSK FRCP v. The State of Mauritius & Anor.** [2020 SCJ 91] to state that this document is actually a plea on the merits and thus Defendant will be submitting itself to the jurisdiction of the court and that it should have been styled plea *in limine* and not notice of preliminary objection.

Learned Counsel for the Defendant's main contention is that on the authority of **Clanbrassil Co Ltd & Anor. v Copex Management Services Ltd & Ors.** [2012 SCJ 192]: *"(…) even if they have been styled in limine, they are challenges to the jurisdiction and there is in my view no imperative need for the plea on the merits also to be given before the "exceptions d'incompétence" can be heard and determined."*

The Defendant has set out for the Court to understand its plea of jurisdiction, why it is raising this plea that the Plaintiff has no other avenue if he wants to pursue his claim, it has to be according to the contract. For the Court to understand this preliminary point, what Defendant did was solely to reproduce Clauses 14 and 23 of the agreement for instance at Clause 23.1 of the Sale of Business Agreement: *"Any dispute, controversy or claim arising out of or in relation to this agreement, including any question regarding its existence, validity or termination, shall be referred to and shall be finally resolved by arbitration under the rules of the LCIAMIAC Arbitration Centre which rules are deemed to be incorporated by reference into this agreement."* He is asking the Court very humbly that this matter should be referred to arbitration and the matter be purely and simply set aside here. It will be open for the Plaintiff to pursue his claim under the arbitration clause. Before the plea is filed, the point of jurisdiction has been raised although there has been an exchange of pleadings.

I have given due consideration to the arguments of both learned Counsel. First and foremost, it is significant to note that Plaintiff in his reply to the notice of preliminary objection to jurisdiction raised by Defendant, has not denied the presence, tenor and applicability of the arbitration clauses. This is because *ex facie* the averments of the plaint, the employment of Plaintiff pursuant to a Service Agreement followed the execution by Plaintiff and Defendant of a sale of Business Agreement so that both contracts are relevant and contain the relevant arbitration clauses as highlighted above. The contention of the Defendant is that the sale of the two businesses caused the service agreement to come into effect and any termination as such would be dealt by the arbitral tribunal as per the intention of the parties as per the relevant clauses namely Clause 23 of the Sale of Business Agreement and Clause 13 of the Service Agreement.

Defendant has in the document filed specified the disputed issues, for instance, as regards the years of service of Plaintiff with Defendant by referring to Clause 14 of the Contract of the Sale of business agreement, when he was employed, whether he was a shareholder, in relation to the termination of his contract are all disputed issues to be resolved by arbitration and not by the Industrial Court. Defendant was trying to specify and illustrate that the jurisdiction of the Industrial Court is ousted and that all the disputes as a result of the *ex facie* averments of the plaint will have to be resolved by arbitration.

Now Plaintiff has termed such specifications or illustrations by Defendant as contained in the notice of preliminary objection as a disclosure of Defendant's lines of defence so that he has filed a disguised plea on the merits following the *mise en état* by asking for particulars twice so that the Defendant has joined issue with the Plaintiff and as such has submitted to the jurisdiction of this Court which means the renunciation of his right to have the matter resolved by arbitration.

At this stage, I find it significant to quote an extract from the Supreme Court case of **Ramgoolam N. Dr GCSK FRCP v. The State of Mauritius & Anor. [2020 SCJ 91]** at page 8 highlighting the following:

"(…) that a challenge to the jurisdiction of the Court can be raised either as a preliminary objection or as a plea in limine. The terminology use to raise the objection, in other words whether it is styled "Preliminary Objection" or "Plea in limine litis" is of little importance so long as it is an objection in law as to jurisdiction or limitation of action which is required to be raised at the very outset of the case. The

requirement that the defendant should also plead on the merits of the case is not necessary in each and every case."

Moreover, in **Ramgoolam** (supra) at page 7, it was further highlighted as follows:

"Furthermore, in ***Magisson Lionel v. Immobilier Conseil Marketing Ltée****[2012 SCJ 213] the Court stated that "…it is permissible in certain cases for the defence not to put in a plea on the merits but simply to put in an objection in law as provided for in the Code of Civil Procédure especially when it does not want to submit itself to the jurisdiction of the Court. Challenge to jurisdiction is taken ex-facie the plaint with summons or application."*

Therefore, it is abundantly clear that it does not make any difference whether the term plea *in limine* is being used or *preliminary objection* when, for instance, as in the present case the jurisdiction of the Court is being challenged and it is also clear that such challenge to jurisdiction is taken *ex facie* the plaint without the calling of evidence.

For the Defendant to renounce its right to have the matter resolved by arbitration is when he has filed his notice of preliminary objection after having filed its plea which is not the case in the present situation. Indeed, it has been stressed in the Supreme Court case of **Clanbrassil Co Ltd & Anor v Copex Management Services Ltd & Ors [2012 SCJ 192]**:

"It is well settled that objections to the jurisdiction of the Court ("l'exception d'incompétence") must be raised "préalablement à toute autre exception et défense" failing which they will be held "irrecevable"(vide Airworld Limited v Malaysian Airline System Berhad [2012 SCJ 29], wherein reference is made to the oft quoted cases of ***Compagnie Desmem Ltée v United Docks Ltd [2008 SCJ 354]*** *and* ***Seament International SAL v The State Trading Corporation [1998 MR 21]****). In those cases objections raised or attempted to be raised by defendants to the jurisdiction of the Court after they had already given their plea on the merits were rejected on the reasoning that by giving their plea they had already submitted to the jurisdiction of the Court and were precluded from subsequently challenging the same. They were deemed to have renounced to their right to refer their dispute to arbitration by thus submitting to the jurisdiction of the Court.*

The following from French authorities establish the principles applied in the above quoted cases:-

Note 6 Encyclopédie Dalloz Procédure Vo. Exceptions et fins de non-recevoir:

6. Les exceptions sont de moyens que le défendeur sans contredire de façon direct ni discuter immédiatement les droits du demandeur ni y a acquiescer invoque pour critique l'instance elle-même qu'il considère comme mal engagée. Les critiques portent soit sur la compétence de la jurisdiction saisie, soit sur la forme, soit sur le montant dans lequel la demande est formée. Leur caractère commun est d'aboutir a une paralysie temporaire de la demande formée irrégulièrement ……"

*"**Premiere règle: presentation des exceptions in limine litis**:*

*26. ……..Le nouvel **article 192**, alinéa 1, dispose que les exceptions cessent d'etre recevables lorsqu'elles sont presentées << après qu'il a été conclu an fond>>. (Emphasis added).*

Elles doivent donc être invoquées avant l'échange des conclusions qui aboutit à la mise en état dite initiale, de l'affaire……"

(Seament International/ SAL v The State Trading Corporation** [1998 MR 21]**).

***Encyclopédie Dalloz Procédure Vo. Arbitrage en Droit Interne note 119** reads:-*

*"119. ……..L'article 74 du nouveau **Code de Procédure Civile** dispose en effet que toutes les exceptions doivent sous peine d'irrecevabilité, être soulevées simultanement et avant toute défense au fond ou fin de non-recevoir. En conséquence, l'incompétence des tribunaux doit être soulevée <<in limine litis>>" (Emphasis added).*

It is clear beyond dispute from the above that challenge to the jurisdiction of the Court will as a rule not be allowed to be raised if it is not done at the first opportunity and if, for example, it is sought to be raised after the plea has been given on the merits."

Hence, it is clear enough that for the Defendant to have joined issue with the Plaintiff and thereby to have submitted to the jurisdiction of the Court, it is only when the plea has been filed so that it cannot be said that the Defendant has renounced to its right to have the case referred to arbitration because it is *l'échange des conclusions qui aboutit à la mise en état dite initiale, de l'affaire* and the *conclusions* mean the averments of the plea. Indeed, the Supreme Court case of **Malaysian Airline System Berhad v Airworld Limited & Ors** [2010 SCJ 352] has clearly illustrated the point at page 5 as follows:

"This is, it appears to me, the conclusion reached by the Court in ***Seament International SAL v. The State Trading Corporation*** *[1998 MR 21], which was not referred to either by the plaintiff company or the defendants. In the case of* ***Seament****, the defendant after the conclusion of all pleadings sought to amend its plea and to add a plea "in limine litis" to the effect that the parties should resolve their difference pursuant to an arbitration clause. The motion for amendment was disallowed on the ground that the defendant "failed to avail itself of the defence of 'exception' before submitting to the mise en état" of the case. In the present matter, I agree with the submissions made on behalf of the plaintiff company, that the defendants have invoked the arbitration clause at a very late stage. They should have invoked the arbitration clause at the time they filed their respective plea. They have failed to do so and must be deemed to have accepted the jurisdiction of the present Court and have renounced to the "clause compromissoire.""*

Moreover, the authority relied by Defendant namely the case of **Seament International SAL v The State Trading Corporation** [1998 SCJ 96] where it was held: *"**Premiere règle: presentation des exceptions in limine litis**:*

"26. Consacrant les principes déjà posés par les articles 169, 186 et 424 anciens du code de procédure civile, le nouvel article 192, alinéa 1, dispose que les exceptions cessent d'être recevables lorsqu'elles sont présentées << après qu'il a été conclu au fond >>. Elles doivent donc être invoquées avant l'échange des conclusions qui aboutit à la mise en état, dite initiale, de l'affaire (C.pr.civ. art. 78, redact. L. 15 juill. 1944, D.A. 1944.81); les conclusions sur le fond, prises par le defendeur, ont pour effet de les couvrir.[emphasis supplied]".

Therefore, it means that the plea *in limine litis* or *preliminary objection* which in the present case is objection as to jurisdiction has to be invoked *avant l'échange des conclusions qui aboutit à la mise en état, dite initiale, de l'affaire* which means

before the plea is given by Defendant. Having said so, it can safely be construed that the preliminary objection to jurisdiction has been raised before the plea has been given by Defendant. Thus, the contention that the Defendant has renounced to his right to arbitration because its preliminary objection filed contains specifications by way of illustration to show that disputed facts cropping up as a result of the *ex facie* averments of the plaint is in fact a plea on the merits that has been filed is untenable as no evidence is called for before this jurisdiction. All the issues canvassed by Defendant in its notice of preliminary objection have been taken care of in the arbitration clauses for the resolution of any dispute arising out of the Service Agreement and this cannot be tantamount to disclosing other lines of defence and as such Defendant has not submitted to the jurisdiction of the Industrial Court nor is it tantamount to the Defendant splitting its defence.

Moreover, it is not contested by way of reply to the notice of preliminary objection by Plaintiff that by virtue of the **Sale of Business Agreement and the Service Agreement**, as per the relevant clauses quoted in the said notice that any dispute arising out of the contract in relation to the termination of the Service agreement or any dispute as to the Plaintiff's status as employee in the Sale of Business Agreement ought to be submitted to arbitration and that the place for the arbitration would be Mauritius.

Now learned Counsel for the Plaintiff has also referred to an excerpt from 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."

In the present plaint, the disputed facts fall squarely within the purview of the said arbitration clauses in both contracts entered into by both Plaintiff and Defendant and which precisely have been canvassed by Defendant in its notice of preliminary objection for the resolution of the dispute namely the alleged termination of Plaintiff's contract of employment arising out of the Service Agreement. Thus, for the purposes of the arguments only, even if the facts alleged by Plaintiff are accepted by Defendant, the Plaintiff cannot succeed as they boil down to the termination of his

contract of employment which has to be dealt with by the arbitral tribunal (see- **Rama**(supra)).

Hence, it would be misconceived to construe that Defendant has submitted to the jurisdiction of the Industrial Court thereby renouncing to his right to arbitration because its plea has not been filed yet. The cases of **Avigo** (supra), **Hurnam** (supra) and the provisions of Section 7(1) of the Industrial Court Act 1973 and Section 17(1)(a) of The District and Intermediate Courts (Civil Jurisdiction) Act relied upon by Plaintiff do not cater for the situation where the resolution of the dispute between the parties fall squarely within the purview of the arbitration clauses and where both Plaintiff and Defendant are parties to the arbitration clauses found in their contracts. Thus, the challenge to the jurisdiction of this Court to hear the present case is being done *ex- facie* the averments of the plaint only under the authority relied upon by Plaintiff himself namely **Magisson**(supra).

True it is that it is not for the arbitral tribunal to decide on the amount of severance allowance but it will be competent to decide on whether there has been *inter alia* any *manoeuvre dolosive*, omission, concealment, misrepresentation and breach resulting in prejudice to the Plaintiff.

For all the reasons given above, I uphold the preliminary objection raised by Defendant in the sense that the matter has to be heard before the arbitral tribunal given that the Industrial court has no jurisdiction. The plaint is accordingly set aside. With costs.

S.D. Bonomally (Mrs.) *(Vice President)*
30.3.22