

Torabally v Air Mauritius Ltd

2022 IND 30

CN519/18

THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

Sheik Oumed Ali Torabally

Capacity

v/s

Air Mauritius Ltd

Capacity

RULING (NO. 1) (PLEA IN LIMINE LITIS)

The Plaintiff is claiming the sum of Rs192 226 872/- together with Interests at the rate of 12% as from the date of his dismissal until the date of final payment, with Costs, as per the Proecipe dated 04-09-18.

The Defendant Company has denied the said Claim in its Plea dated 23-10-19.

Each Party was assisted by Learned Senior Counsel.

The Proceedings were held in English.

The Defendant Company raised a Plea In Limine Litis as follows:

- 1) Limb 1: The Plaintiff is based upon a breach of contract by the Defendant, not for unfair dismissal, so that the Industrial Court has no jurisdiction to entertain it; and
- 2) Limb 2: Another case between the same Parties based on similar facts is pending before the Supreme Court of Mauritius (SCR No. 1/313/19). For reasons of “litispendance” and “connexité” the Industrial Court cannot hear this dispute.

And the Defendant Company moved for the Plaintiff to be set aside with Costs.

The matter was set for Arguments on the Plea In Limine Litis.

Case For The Defendant Company

Learned Senior Counsel for the Defendant Company submitted in relation to Limb 1 of the Plea In Limine Litis to the effect that given the Plaintiff had used the words “unlawful termination” in the Proeclipe, in particular in relation to paragraphs 6 and 8 of the Proeclipe, as opposed to unfair dismissal, in light of the principles set out in the Authority of **Oxenham v France Maritime Agency Ltee (FMA)** [\[2016 SCJ 10\]](#), the Plaintiff’s Claim was one in Breach of Contract, which was outside the Jurisdiction of the Industrial Court.

In relation to Limb 2 of the Plea In Limine Litis, Learned Senior Counsel put in a copy of the Plaintiff With Summons before the Supreme Court, and offered Submissions in relation to *connexité* only, relying on the Authority of **Lesage v The Mauritius Commercial Bank Ltd** [\[2008 SCJ 252\]](#), to the effect that there may be *des décisions inconciliables* to the extent that both the Supreme Court and the Industrial Court would have to determine the issue of whether the Plaintiff in the present matter (Defendant in the case before the Supreme Court) breached his duties at EVP Flight Operations, having regard to paragraph 2(e) of the Plea in the present matter, and paragraph 6 of the Plaintiff With Summons before the Supreme Court.

Learned Senior Counsel went on to submit that as per the principles set out in the Authority of **Jamalkhan v Ramduny** [\[1986 SCJ 32\]](#), when there is *connexité*, there is no transfer of the matter to another Court, but rather the case would have to be withdrawn or set aside, with another case lodged before the appropriate forum.

In Reply, Learned Senior Counsel for the Defendant Company submitted that the Defendant Company was relying on *connexité*, and that there was no strict rule that the Motion as to *connexité* was to be made before the Court seized last.

Case For The Plaintiff

In relation to Limb 1 of the Plea In Limine Litis, Learned Senior Counsel for the Plaintiff submitted to the effect that the mere fact that the words “unlawful termination” have been used does not necessarily make the action one for Breach of Contract, the determining factor being the remedy sought, which in the present matter was Severance Allowance for Breach of Contract, and not Damages.

Learned Senior Counsel relied on the Authorities of **Perrine v Duke Haberdashers Co Ltd** [[1986 SCJ 206](#)] and **Marie-Jeanne v Rose Belle Sugar Estate Board** [[2002 SCJ 31](#)].

In relation to Limb 2 of the Plea In Limine Litis, Learned Senior Counsel for the Plaintiff offered Submissions as to *litispendance* and *connexité*, and submitted essentially that when two Courts have been seized, the date at which the Proceedings were initiated is essential in determining before which Court the Motion for *connexité* is to be made, relying on the Authority of **Maureemootoo v Sutterie & Another** [[2012 SCJ 224](#)] in support of his Submissions, and on the case of **Mamet v Gamma Equipment Limited** [[2011 IND 20](#)].

Analysis

The Court has duly considered the Submissions of both Learned Senior Counsel, the Plaintiff With Summons put in by Learned Senior Counsel for the Defendant Company, as well as the Authorities and case referred to by each Learned Senior Counsel.

The Parties were in agreement that the applicable Law was the **Employment Rights Act** (hereinafter referred to as **ERA**), which was in force at the relevant time.

Breach Of Contract

The Court is of the considered view that the Authority of **Oxenham (supra)** does not assist the case for the Defendant Company, inter alia as it confirmed the well settled principle that a Plaintiff must elect whether to enter an action before the Industrial Court for Severance Allowance for

unjustified dismissal, or for Breach of Contract, in which case the Labour Laws would not apply, and concerned specifically the question of a specific Clause in the contract as to Arbitration.

The same principle that a Party cannot claim both before the Industrial Court and the Civil Court based on the same set of facts has been reiterated in the Authority of **Perrine (supra) and Marie-Jeanne (supra)**.

The Court is of the considered view that the emphasis placed on the wording used in the Proecipe is limitative and unduly strict, and that the use of the words “unlawful termination” does not necessarily place the action of the Plaintiff under Breach of Contract (see for instance **Ramdoe v De Chazal Du Mee & Co. Ltd [2022 SCJ 189]**).

The Plaintiff had a choice as to whether to enter an action for Breach of Contract or an action for Severance Allowance, and in the present matter, the Plaintiff has elected to enter an action before the Industrial Court, which is in line with the principles enunciated in the Authorities of **Perrine (supra) and Marie-Jeanne (supra)**.

Connexité

In relation to Limb 2 of the Plea In Limine Litis, the Court will only consider the issue of *connexité* in view of Learned Senior Counsel appearing for the Defendant Company’s Submissions that the Defendant Company was relying on *connexité* and not *litispendance*.

The Court finds the following extract from the Authority of **Fanny & Ors v Mauritius Co-Operative Savings And Credit League [2015 SCJ 331]** pertinent:

The notion of *connexité* is defined in **Dalloz, Répertoire de Procédure Civile, Tome II, Note 1 Vo Connexité** as under:

“le lien étroit entre deux demandes non identiques mais telles qu'il est de bonne justice de les instruire et juger en même temps afin d'éviter des solutions qui pourraient être inconciliables. »

One can further read that the notion implies also that –

“... les instances présentent entre elles une corrélation telle que la solution de l'une doive nécessairement influer sur la solution de l'autre, de telle sorte que si elles étaient jugées séparément, il risquerait d'en résulter une contrariété de décisions.
...” **Dalloz (supra) Note 2.**

At first glance, ex facie the Plaintiff With Summons before the Supreme Court and the Plea before the Industrial Court, there would appear to be a *lien de connexité* between the said two Proceedings.

Whilst it is clear that both actions are based on the same set of facts, the Court is of the considered view that the issue to be determined before the Industrial Court is whether the Plaintiff's employment was unlawfully terminated by the Defendant Company, whereas before the Supreme Court, the issue is whether the Plaintiff breached his duties as EVP Flight Operations which resulted in the Defendant Company (Plaintiff in the case before the Supreme Court) sustaining financial prejudice and reputational damage.

In light of the above, the Court is of the considered view that the issues to be determined are different, and the Court is comforted in reaching the said conclusion in light of paragraph 2(d) of the Plea in the present matter.

It is also apparent ex facie the Pleadings that the causes of action and remedies sought before the Supreme Court are different to those before the Industrial Court.

In light of all the above, it is clear that, albeit based on the same set of facts, the issues and facts to be determined by the Supreme Court are different from the ones to be determined by the Industrial Court, and there is therefore no *corrélation telle que la solution de l'une doive nécessairement influer sur la solution de l'autre, de telle sorte que si elles étaient jugées séparément, il risquerait d'en résulter une contrariété de décisions.* ...” **Dalloz (supra) Note 2.**

Conclusion

In light of all the evidence on Record and all the factors highlighted above, the Court is of the considered view that there is nothing on Record compelling the Plaintiff to proceed with an action for Breach of Contract, and preventing the Plaintiff from proceeding before the Industrial Court, and that no *lien de connexité* between the Proceedings before the Supreme Court and the present

Proceedings has been established, and hence the Motion of the Defendant Company in terms of the 02 Limbs of the Plea In Limine Litis is set aside.

[Delivered by: D. Gayan, Ag. President]

[Industrial Court]

[Date: 29 June 2022]