Pretorius v Helios Towers Limited

2022 IND 46

CN152/15

THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

Tony Sarel Pretorius

Plaintiff

v/s

Helios Towers Africa Limited

Defendant

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

As per the Plaint dated 26-03-15, the Plaintiff is claiming from the Defendant Company the sum of USD562 350.02 (or its equivalent in Mauritian Rupees), representing Severance Allowance, 03 Months' Notice, 12 Days Accrued And Untaken Holiday, and 08.25 Days Of Holiday Accruing Under 03 Months' Notice Period, with Interests at the Legal Rate since the date of dismissal.

The Defendant Company has denied the said Claim in its Amended Plea dated 23-11-2020, and has raised a Plea In Limine Litis in the following terms:

1. The Plaintiff cannot proceed with the present case in its form and tenor inasmuch as this Court does not have jurisdiction to entertain the present claims as Plaintiff is not a worker.

2. The Defendant therefore moves that the present case be set aside with costs.

The matter was fixed for Arguments on the Plea In Limine Litis, and each Party was assisted by Learned Counsel.

The Proceedings were held in English.

Case For The Defendant Company

Learned Counsel for the Defendant Company submitted to the effect that the governing Law was the **Employment Rights Act** (hereinafter referred to as **ERA**) at the relevant time, and conceded that **Part X** did fall within the exceptions listed in the **ERA**, and although the Plaintiff was earning more than Rs360 000/- per annum and hence did not fall within the definition of "worker" for the purposes of the **ERA**, the Industrial Court still had Jurisdiction in relation to Severance Allowance.

Learned Counsel for the Defendant Company further submitted that the Plaintiff's Claim for 03 Months' Notice could not be entertained by the Industrial Court, as the Notice provided by Law was 30 days, whereas the Plaintiff was claiming 03 Months' Notice, which was a contractual part of the agreement.

Learned Counsel for the Defendant Company went on to submit that the Untaken Holiday and the Holiday Accruing During The Notice Period claimed by the Plaintiff fell under **Part VI** of the **ERA**, which does not fall within the exceptions listed, and hence a non-Worker could not claim under the said **Part VI**, and hence the Court did not have Jurisdiction in relation to the said 02 Claims, Learned Counsel for the Defendant Company putting in the Authority of **Maxo Products Ltd v P.S. Ministry Of Labour And Industrial Relations** [1991 SCJ 225] and the case of **Subrata v The Habitat Development Co Ltd** [2017 IND 4] in support of his Submissions.

Learned Counsel for the Defendant Company further submitted that the Industrial Court has no jurisdiction to entertain the present claim in its "present form and tenor".

In Reply, Learned Counsel for the Defendant Company stated that he would stick to his Arguments, and emphasised the definition of "agreement" in the **ERA**.

Case For The Plaintiff

Learned Counsel for the Plaintiff submitted that the applicable Law was the ERA, given the termination occurred in September 2013, and referred to the case of **Van Hoeken v Africa Technical Services Ltd** [2019 IND 5] as a guidance, to ascertain "the jurisdiction and the general nature of the Employment Rights Act 2008 versus the special and specific legislation of the Industrial Court Act 1973".

Learned Counsel for the Plaintiff went on to submit "that the Industrial Court Act 1973 will take precedence over the general provisions of the Employment Rights Act 2008".

In relation to the Plaintiff's Claim for Severance Allowance, Learned Counsel for the Plaintiff relied on the Authority of **Joonas Marketing Ltd v Manjoo** [2009 SCJ 251] to support her Submissions that the Industrial Court has exclusive Jurisdiction, as **Part VIII** and **Part X** of the **ERA** are applicable to any worker, irrespective of his basic salary.

Learned Counsel for the Plaintiff highlighted that this had been conceded by Learned Counsel for the Defendant Company.

In relation to the Claim for 03 Months' Notice, Learned Counsel for the Plaintiff submitted that the Notice Period is provided for under **Part VIII** of the **ERA**, which applies to a worker irrespective of his basic salary.

Learned Counsel for the Plaintiff referred to **s. 37(4)** of the **ERA**, and placed emphasis on the wording of the said section in relation to "subject to any provision of an agreement", and submitted that the Legislation was catering for a situation where a contractual agreement provided for a more favourable Notice Period, which in the present matter, was 03 Months, which would take precedence as it had been lawfully agreed between the Parties.

As regards the Plaintiff's Claim for Untaken Holidays, Learned Counsel for the Plaintiff submitted that Remuneration has been defined in **s. 2** of the **ERA** as "all emoluments in cash or in kind earned by a worker under an agreement", and that in the present matter, the payment of Untaken Holidays is provided for in the Plaintiff's Contract of Employment, and therefore formed part of the Remuneration.

Learned Counsel for the Plaintiff, whilst observing it was considered that **s. 25** of the **ERA**, which provides for Remuneration due on Termination of Agreement, does not apply to an Employee whose basic salary is more than Rs30 000/- per month, submitted that by virtue of **s. 3** of the **Industrial Court Act**, the Industrial Court is given Jurisdiction to try any matter that arises out of the **ERA**.

Learned Counsel for the Plaintiff went on to submit that the Claim for Untaken Holidays arises from the alleged unjustified termination of the Plaintiff's employment.

Learned Counsel for the Plaintiff further submitted that the Plaintiff could not be expected to bring 02 different Claims, i.e. 01 for Severance Allowance and the Notice Period before the Industrial Court, and 01 for Untaken Holidays before another Court, relying on the Authority of **Soorkia v SGG Corporate Services (Mauritius) Ltd** [2019 SCJ 27] and **Joonas Marketing (supra)**.

Learned Counsel for the Plaintiff submitted further that it was best, for the proper administration of Justice, and in order also to avoid any possibility of *connexité* and *litispendance*, for all the Claims in the present matter, which arise from the same set of facts, to be dealt with before 01 Jurisdiction.

Learned Counsel for the Plaintiff also submitted that the Plea In Limine Litis was devoid of any merit, and should be set aside, and in the alternative, the Plaintiff's Claims for Accrued And Untaken Leave can be struck out, without the need for the Plaint to be struck out, as the Industrial Court would still have Jurisdiction to adjudicate upon the Claims for Severance Allowance and the Notice Period, relying on the Authority of **Jeetun v Sugar Investment Trust** [2010 SCJ 116].

Analysis

Applicable Law

Both Learned Counsel submitted that the applicable Law was the ERA, and the Court is of the considered view that given the Plaintiff's employment was terminated on 03-09-13, the **ERA** was the applicable Law at the relevant time.

Worker

The first issue to be determined is whether the Plaintiff was a Worker for the purposes of the **ERA**.

"Worker" is defined in **s. 2** of the **ERA** as follows:

> "worker", subject to s. 33 or 40 –
> […]
> (c) does not include –
> […]
> (ii) except in relation to sections 4, 20, 30, 31 and Parts VIII, VIIIA, IX, X and XI, a person whose basic wage or salary is at a rate in excess of 360,000 rupees per annum.

Ex facie the Proecipe, the Court is of the considered view that **ss. 33** and **40** of the **ERA**, which relate to the Entitlement of Workers in the Sugar Industry and the Workfare Programme respectively, do not apply to the Plaintiff in the present matter.

And "basic wage or salary" is defined in **s. 2** of the **ERA** as:

> "basic wage or salary", in relation to a worker, means-
>
> (a) where the terms and conditions of employment of the worker are governed by Remuneration Regulations, an arbitral award or an agreement, whether oral or written, express or implied, the basic wage or salary prescribed in the Remuneration Regulations, award or agreement, or where the employer pays a higher wage or salary, the higher wage or salary so paid, but does not include any allowance by any name called, and whether paid in cash or in kind;
>
> (b) in any other case, all the emoluments received by the worker, excluding bonus or overtime.

The Court has duly considered the Pleadings in the present matter, and the Plaintiff averred in the Plaint at paragraph 1. (e) i. that his basic salary was USD 25 000/-.

The Court takes Judicial Notice of the fact that the exchange rate of foreign currencies fluctuates daily, and as per the Bank Of Mauritius Website, the Exchange Rate of the Rupee (Period

Average from December 2012 to December 2013) was Rs31. 235/- to USD1/- in September 2013, bearing in mind the averment of the Plaintiff as to his date of dismissal.

And from a simple mathematical calculation, it is clear that the Plaintiff was earning as monthly basic salary well in excess of the prescribed amount of Rs360 000/- (USD25 000/- x Rs31. 235/- = Rs780 875/-).

The Plaintiff would therefore *a priori* not fall within the definition of "Worker" as per **s. 2** of the **ERA**.

Severance Allowance

The Court having found as above, as regards the Claim for Severance Allowance, the sections and Parts of the **ERA** which apply to a Worker, regardless of his / her basic wage or salary, are exhaustively set out in the definition of "Worker" in **s. 2** of the **ERA**, and include **Part X** of the **ERA**, which contains **s. 46** of the **ERA**.

The Legislator has not only set out the Parts of the **ERA** which apply to Workers, regardless of their basic wage or salary, but has also set out the sections of the **ERA** which likewise apply to Workers regardless of their basic wage or salary.

This clearly illustrates the intention of the Legislator and it is trite Law that the "legislator does not legislate in vain" (**Curpen v The State [2008 SCJ 305]**).

The Court is therefore of the considered view that **Part X** of the **ERA** is clearly an exception, and applies to a Worker, irrespective of her / his basic salary, and applies to the Plaintiff in the present matter, regardless of his basic salary.

The Court therefore is of the considered view that its Jurisdiction as regards the Plaintiff's Claim for Severance Allowance is not ousted purely and simply because the Plaintiff was earning in excess of the prescribed amount of Rs360 000/- per annum.

03 Months' Notice

In relation to the Plaintiff's Claim for 03 Months' Notice, Learned Counsel for the Defendant Company conceded that **Part VIII** of the **ERA** fell within the exceptions, and hence applied to a worker irrespective of his basic salary.

Applying the same reasoning as above, the Court is of the considered view that the Court has Jurisdiction to entertain Claims made under **Part VIII** of the **ERA**, regardless of the worker's basic salary, as it is listed as an exception in the definition of "Worker" as per **s. 2** of the **ERA.**

Now, the Court is of the considered view that the Submissions of the Defendant Company to the effect that the Plaintiff cannot claim more than what is provided by Law as period of Notice, untenable.

In light of the very wording of **s. 37(4)** of the **ERA**, it is clear that the minimum Notice provided by Law is 30 days, but this is subject to any provision of an agreement.

The Law therefore provides for the minimum Notice Period, but the Parties are at liberty to agree to more advantageous terms as per the agreement.

The following extract from **Précis Dalloz Droit du Travail 19e Edition by Lyon-Caen, Pelissier and Supiot** at paragraph 493, referred to in the Authority of **Jeetun (supra)** is found of particular relevance :

> « *493.* ***Licéité des clauses plus favorables au salarié.*** *La convention collective ou le contrat individuel de travail peut prévoir, au profit du salarié, une indemnité de licenciement dont les conditions d'attribution sont moins rigoureuses que celles fixées par la loi ou dont le montant est plus élevé que celui de l'indemnité légale.*
>
> *En particulier, la convention collective ou le contrat individuel peut abréger la condition d'ancienneté ouvrant droit à l'indemnité de licenciement ou prévoir que l'indemnité de licenciement sera due au salarié même dans les cas où celui-ci a commis une faute grave.*
>
> *La convention collective ou le contrat individuel de travail peut également fixer un taux plus élevé que le taux fixé par la loi pour déterminer le montant de l'indemnité de*

> *licenciement. Souvent les conventions collectives prévoient des taux de plus en plus élevés au fur et à mesure que l'ancienneté du salarié devient plus importante.*
>
> *Ces clauses conventionnelles ou contractuelles sont licites dans la mesure où elles sont plus avantageuses pour le salarié que les dispositions légales.* » (emphasis added)

Now, whether the terms of the Contract of Employment of the Plaintiff so provide is a question to be determined on the Merits.

12 Days Accrued And Untaken Holiday And 08.25 Days Of Holiday Accruing Under 03 Months' Notice Period

In relation to the Plaintiff's Claims for Untaken Holiday and the Holiday Accruing During The Notice Period, Learned Counsel for the Plaintiff submitted on the basis that the said Claim was pursuant to **s. 25** of the **ERA**.

As highlighted above, it is clear that the Plaintiff was earning in excess of the prescribed amount of Rs360 000/- per annum, and hence did not fall within the definition of "Worker" for the purposes of **s. 2** of the **ERA**.

That being said, as highlighted above, the Legislator has not only set out in the definition of "Worker" in **s. 2** of the **ERA** the Parts of the **ERA** which apply to Workers, regardless of their basic wage or salary, but has also set out the sections of the ERA which likewise apply to Workers regardless of the basic wage or salary.

No mention is however made of **Part V** and / or of **s. 25** of the **ERA** in the said list of exceptions.

This clearly illustrates the intention of the Legislator, and it is trite Law that the "legislator does not legislate in vain" (**Curpen (supra)**), and the Court is of the considered view that had the Legislator intended for **s. 25** of the **ERA** to apply to Workers, regardless of their basic wage or salary, **s. 25** of the **ERA** would have been included in the said exhaustive list.

In light of all the above, the Court is of the considered view that the Court's Jurisdiction is ousted, in relation to Claims pursuant to **s. 25** of the **ERA**, once the Employee's basic wage or salary

exceeds the prescribed amount of Rs360 000/- per annum, and that the Plaintiff cannot therefore base his Claim on **s. 25** of the **ERA**, his not falling within the definition of Worker, his himself having averred that he was earning a basic monthly salary USD 25 000/-, as highlighted above.

Conclusion

In light of all the evidence on Record, all the circumstances of the present matter, all the factors highlighted above, and for all the reasons given above, the Court upholds the Plea In Limine Litis raised by the Defendant Company but only in relation to the Plaintiff's Claims as regards the 12 Days Accrued And Untaken Holiday and the 08.25 Days Of Holiday Accruing Under 03 Months' Notice Period.

The Court does not uphold the Plea In Limine Litis Raised by the Defendant Company in relation to the Plaintiff's Claims as to Severance Allowance and 03 Months' Notice period.

In light of the Court's Ruling, and in the Interests of Justice, the Plaintiff is invited to take a Stand.

[Delivered by: D. Gayan, Ag. President]
[Intermediate Court (Financial Crimes Division)]
[Date: 19 August 2022]