Lamusse Y. v TEX International Limited

2020 IND 3

Cause Number 309/11

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil side)

In the matter of:

Yves-Robert Lamusse

Plaintiff

v.

TEX International Limited

Defendant

Ruling

The salient averments of the present plaint are as follows:-

Plaintiff is a Mauritian citizen of 60 years of age. The Defendant (or "TIL") is a Mauritian company (holder of a category 1 global business licence) which trades clothing garments manufactured in India for export to Europe.

Mr. Bernard Maigrot was at all material times the Managing Director of TIL and Tex Services

Limited ("TSL"), a Mauritian company which trades clothing garments manufactured in Madagascar and Mauritius for export to Europe (TIL and TSL referred to together as the "TEX Group").

Around late 2006, Plaintiff was approached by Mr. Maigrot in his capacity as TIL's Managing Director to discuss the Plaintiff's potential employment by TIL and which lasted until May 2007.

During the discussions, Mr. Maigrot explained among other things that the TEX Group's business was in financial difficulty. TSL's Mauritian and Madagascan business was becoming less and less competitive and was losing clients to Asian competitors, and TIL's Indian business (the "Indian Business") needed to be revived and by reason of a prohibition order preventing him from travelling abroad, he was looking to hire a General Manager for TIL of Plaintiff's calibre and expertise to implement and run this ambitious project.

> Plaintiff claims that TIL's meaning Defendant's unilateral variation of the Contract after the prohibition order preventing Mr. Maigrot to travel abroad was lifted, was *"substantielle"*, unjustified and unlawful. Such variation of the contract entitled the Plaintiff to treat the Contract as terminated and to hold himself constructively dismissed from his employment with TIL. Plaintiff consequently submitted his notice of resignation with immediate effect around December 2009 or early January 2010 to express his rejection of the unilateral variation of his terms of employment.

Defendant, for its part, has denied liability in its plea.

Plaintiff was deposing in Court when objection was taken as to the line of examination in chief adopted by his learned Counsel in order to rebut poor performance by reliance being placed on what two Indian Businessmen had to say when the cause of action of Plaintiff is Constructive Dismissal and arguments were heard.

The main thrust of the arguments of learned Counsel for the Defendant is that the Plaintiff is travelling outside his pleading by eliciting evidence on the issue of poor performance for the benefits prayed from the Court when the cause of action of Plaintiff is that of Constructive Dismissal.

Learned Counsel for the Plaintiff's contention boils down to the fact that claims for bonuses and other benefits do not form part of the cause of action of Plaintiff for constructive dismissal but for the other cause of action for breach of contract as per the averments of the plaint and that the plea of the Defendant is in relation to both causes of action viz. breach of contract and constructive dismissal.

I have duly considered the arguments of both learned Counsel. It is significant to note that *ex facie* the averments of the plaint that Defendant's Managing Director, Mr. Maigrot, has shown his interest to potentially hire Plaintiff (being given that they had known each other very well on a personal and professional level for a long time) for the said employment and which he had eventually done in relation to the business of Defendant already handled by him as he could not travel abroad because of his prohibition order to leave the country as he did not want the business of Defendant to suffer but instead to be revived. It is clear that the term *"hire"* is meant to be a temporary measure meaning that the very essence of the contract of employment of Plaintiff is a temporary one and conditional upon the waiving of the prohibition order against Mr. Maigrot to leave the country so that all the prospects, benefits forecast to be accrued, financial projections and other set -backs of Defendant are irrelevant for the purposes of recruitment of Plaintiff as it was of a precarious nature. Now that the prohibition order has been lifted and that Mr. Maigrot can travel abroad, it is abundantly clear that the contract of employment of Plaintiff is deemed to have come to an end and that Plaintiff has rightly resigned. Obviously, the acts and doings of the Defendant as averred in the plaint should first of all be shown to be actionable in law before they may become a legal cause of action so that clever drafting, the ritual of repeating words or the creation of an illusion cannot insert a cause of action in a plaint. Furthermore, a discernible nexus between the wrong alleged and the remedy sought should be clearly specified.

Now as per the line of examination in chief of learned Counsel for the Plaintiff as intimated by her was that she was trying to rebut poor performance as couched in the plea given that unpaid bonuses had nothing to do with constructive dismissal. According to her, one cause of action was for breach of contract namely unpaid bonuses, benefits and remuneration while another cause of action was for constructive dismissal and that the Plaintiff resigned because he was not given the responsibilities promised to him because the contract was unilaterally modified by Mr. Maigrot. It is worthy of note that both causes of action claimed by her for the first time at the stage of arguments was after the prohibition order to leave the country and travel abroad against Mr. Maigrot has been waived. Her contention is that the Defendant has used the same defence that Plaintiff did not meet the target to defend both the unpaid bonuses and his constructive dismissal.

Therefore, the conclusion drawn from the plaint as a result of the material/essential facts averred do not reveal that Defendant has unilaterally modified the contract of employment of Plaintiff leading to his resignation and as such it cannot be inferred that he was constructively

dismissed leading to an actionable cause of action or even two after the prohibition order against Mr. Maigrot was lifted.

At this particular juncture, I find it appropriate to quote an extract from the case of **New Beau Bassin Co-operative Store v Juggroo** [1980 MR 320] which reads as follows:

"A cause of action is constituted by the averment of facts which, if denied, require to be proved to enable a plaintiff to obtain a 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" (underlining is mine).

It is apt to refer to the case of **Gungadin J. v The State of Mauritius Anor.**[2015 SCJ 193] where it was tersely stated that to decide as to whether a plaint discloses a cause of action, the essential averments contained in the plaint with summons will have to be examined closely. After having complied with that exercise, the matter was set aside without recourse being had to particulars in order to render valid or to cure that otherwise invalid cause of action. This is because, it is not the function of particulars to take the place of essential averments in the plaint in order to fill the gaps to make good an inherently bad plaint (as per Scott L.J. in **Pinson v Lloyds & National Foreign Bank Ltd.[1941] 2 KB 72 at 75**) **;** see also – **Charlie Carter Pty Ltd v. The Shop, Distributive and Allied Employees Association of Western Australia (1987) 13 FCR 413 at 419** and **H 1976 Nominees Pty Ltd v. Galli (1979) 30 ALR 181 at [13] – [23]** which pertain to a Common Wealth jurisdiction namely Australia derived from the English rules of procedure like ours.) - otherwise any bogus or nonsensical plaint will be endlessly cured by way of particulars which is against the overriding principle of procedural fairness ensuring proportional expenses and thus undermining faith in our civil justice system as fundamentally defective plaints would *de facto* be non-existent. This is because the purpose of particulars is to define the generality or vagueness of material facts already pleaded with a sufficient degree of specificity to convey to the other party the case that it has to meet by the evidence *ex facie* the plaint on the basis of the facts pleaded which if proved, are sufficient to establish the cause of action relied on (see - **Danjoux v Partnership Bangaroo - Danjoux and Cie** [2001 MR 64] **; Spedding v. Fitzpatrick (1888) 38 Ch.D. 410; 59 l.t.492, C.A. ; Cassim (supra)** and **Premchand I. & Ors. v. Jagoo A.R. & Ors.**[2013 SCJ 184]).

Thus, particulars form part of the pleadings as a matter of concept only and no more.

Now, the provision of the law regulating the contents of a plaint is provided by **Rule 3(1) (b) of the Rules of the Supreme Court 2000** as follows:

"3. Contents of plaint with summons

(1) A plaint with summons shall –

(a) (…)

(b) State the substance of the cause of action;

(…)"

Given that our District, Industrial and Intermediate Court Rules 1992 are silent on that issue, we follow Supreme Court Rules for guidance as no repugnancy whatsoever is being caused to our rules of court (see - **Jhundoo v. Jhurry**[1981 SCJ 98]).

An excerpt from the case of **Mauritius Commercial Bank Limited v The Mauritius Union Assurance Company Limited** [2010 SCJ 97] affords a useful illustration of the term "substance of the cause of action" meaning all material facts necessary for the purpose of formulating a complete cause of action as reproduced below:

" Having found that the requirement of our relevant **Supreme Court Rule** that the plaint *" **shall state the substance of the cause of action**"* has been satisfied, (*…)The defendant is entitled to know what it is that the plaintiff alleges against him……..*" in ***Odgers on the Principles of Pleadings and Practice****, under the heading "The function of Pleadings" or "Indeed a plaintiff need not plead law, yet it is his duty to* ***state with precision all the material facts "necessary for the purpose of formulating a complete cause of action"***, referred to in **A.Z.A.A. Cassim v The United Bus Service Co. Ltd** [1986 MR 242]."

Moreover, **Rule 13 of the Rules of the Supreme Court 2000** provides that:-

*"**Every pleading shall clearly and distinctly state all matters of fact that are necessary to sustain the plaint**, plea or counterclaim as the case may be."*

Indeed, the cursus of our case law shows a rigorous application of Rule 3(1) (b) because procedural fairness imposes on the Plaintiff an undeniable duty to inform the Defendant in a concise and precise manner what it is that the Plaintiff is alleging against it. It boils down to

mean that *"a cause of action"* comprises of *"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]) *"so that a plaint which will not aver all material facts would, therefore, not disclose a cause of action"* (see - **Geerjanan P. v The Mauritius Commercial Bank Ltd** [2006 SCJ 320], **Compagnie Mauricienne de Textile Limitée v. Scott Shipping International Ltd.**[2015 SCJ 8], **Metex Trading Co.Ltd. v The State of Mauritius & Ors.**[2014 SCJ 219], **Constantin Roland v Jhuboo Scilla Par Vaty** [2014 SCJ 221] and **Tostee J.Y. v Property Partnerships Holdings (Mauritius) Ltd** [2015 SCJ 41]).

As explained by the learned author **Odgers** on High Court Pleading and Practice 23 ed. at page 124:

*"The function of pleadings then is to ascertain with precision the matters on which the parties differ and the points on which they agree; and thus to arrive at certain clear issues on which both parties desire a judicial decision. In order to attain this object, it is necessary that the pleadings interchanged between the parties should be conducted according to certain fixed rules (…)" (**emphasis added**).*

Indeed, the case of **Tostee (supra)** has highlighted the importance of pleaded facts which reads as follows:

*"The case of **Ramjan v Kaudeer**[1981 MR 411][1981 SCJ 387] may also be referred to whereby the court had relied upon cases of **Chetty v. Vengadasalon**[1901 MR 22], **Deena v. Malaiyandee 1940 Pt.II MR 156** and **Ramdharry v. Dhumun**[1942 MR 108] as being*

examples of judgments which have been quashed on appeal on the ground that the decisions were based on issues which did not appear in the pleadings.

The case of ***Ramjan v Kaudeer*** *(supra) further referred to certain passages of Bullen and Leake, and Jacobs Precedents of Pleadings 12th Ed. which were quoted in the judgment of* ***Jagatsingh and Walter v. Boodhoo (supra)*** *and explained that once a party has stated the facts on which he relies, these facts are binding and the Court cannot ground its judgment on other facts which may come to light in the course of the trial" (****emphasis added****).*

The word "material" means those facts, which are necessary for the purpose of formulating a complete cause of action, and if any one 'material' fact is omitted, the statement of claim is bad (see - **Odgers Principles of Pleading and Practice, 22 ed. at p.98; Bruce v Odhams Press Ltd [1936 1 KB, at p. 697**]. **Odgers (supra) at p.100** goes on to state that:

"Each party must state his whole case. He must plead all facts on which he intends to rely, otherwise he cannot strictly give any evidence of them at the trial. The plaintiff is not entitled to relief except in regard to that which is alleged in the pleadings and proved at the trial (per Warrington J. in ***Re Wrightson [1908] 1 Ch. at p. 799****)".*

The observations of Lord Esher M.R. in **Read v. Brown (1888) 22 Q.B.D. 128** at page 131 cited with approval in the case of **Premchand I. & Ors.v Jagoo A.R. & Ors.**[2013 SCJ 184] further illustrates the meaning of *"material facts"* as reproduced below:

"It has been defined in Cooke v. Gill (Law Rep.8 C.P.107) to be this: every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

This is in line with the reasoning in the case of **Compagnie Mauricienne de Textile Limitée (supra)**.

Now, the crux of the present case rests on the acts and doings of Defendant which have not been averred with specificity in the plaint on the basis of which liability can be ascribed to the said Defendant if proved. To prove liability, Plaintiff is assuming that the acts done by the Defendant are wrongful and obviously if proved would not entitle him to his right to judgment of the present Court as the Plaintiff cannot adduce evidence to perfect that lack of precision in the material facts, nor rely on a traverse of the plea of Defendant nor on particulars to fill those gaps.

Therefore, the threshold needed to be reached in order to formulate a complete cause of action cannot be based on a mere subjective assumption. As pointed out by the learned author **Odgers** on High Court Pleading and Practice 23 ed. at page 145 at para. (iv) : *" In the first place, material facts must be stated clearly and definitely. (…) Pleadings are useless unless they state facts with precision."*

The present plaint has relied on conclusions of law or of mixed law and facts which is the wrong footing altogether. It is clear as per **Odgers** at page 131 of the same book that *"conclusions of law, or of mixed law and fact, are no longer to be pleaded. It is for the court to declare the law arising upon the facts proved before it (…)"*. The Plaintiff *"must state the facts which in his opinion gives him that right, or impose on the defendant that duty; and the judge will decide, when those facts are proved, what are the legal rights and duties of the parties respectively. So, too, a Defendant must state clearly the facts which in his opinion afford him a defence to the plaintiff's action. He must not say merely, "I do not owe the money"; he must allege facts which show he does not owe it (…)"*. Therefore, it is abundantly clear that conclusions of law may be pleaded only if the material facts supporting them are pleaded. This

means that one cannot allege merely that a right, duty, or liability exists; the facts that create such right, duty or liability must also be averred.

Therefore, the decision as to whether a valid cause of action has been formulated as per the material averments in a plaint irrespective of the prolix ones is within the sole province of the Court. It is not the duty of the Plaintiff as he did in the present plaint to impose upon the Court his own conclusion of the averments of his plaint himself by appreciating and adjudicating as to their sufficiency in law under different heads to the cause of action prayed for namely constructive dismissal and more importantly to take the liberty to further impress upon the Court for the first time at the stage of arguments that there is also another cause of action for breach of contract let alone that there has been no prayer for breach of contract. This practice should not be encouraged as it is misconceived.

It is therefore clear that the facts which constitute the cause of action 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]). It is obviously not that every fact in the plea needs to be traversed for the Plaintiff to obtain judgment. Thus, a cause of action has nothing to do with the defence which may be set up by the Defendant. It refers entirely to the grounds set forth in the plaint as the cause of action so that the contention of learned Counsel for the Plaintiff is misconceived. In other words, ***l'action est un voie de droit; le titulaire de l'action doit transformer cette faculté en acte; cet acte est précisément la demande en justice*** **which means that** ***la demande est la puissance passée en acte.***

As per **Rép.pr.civ.Dalloz Tome 1**, page 4,notes 1,4 : *"**L'action en justice**"* has been defined as:

1. *" **le fondement de la recevabilité des prétentions**.(…) Avoir une action, ou avoir le droit d'agir, c'est donc, pour tout plaideur, demandeur ou défendeur, avoir une prétention recevable.(…)*

4. *En droit positif, cela doit être souligné d'emblée, **la recevabilité des prétentions est subordonnée à plusieurs conditions**.(..) En réalité, il convient de distinguer plusieurs sortes de conditions. Selon S.GUINCHARD et F.FERRAND, "on peut, dans cette perspective, **distinguer les conditions relatives à la personne qui agit, celles qui concernent l'objet de la demande, enfin celles qui précisent dans quel délai il faut agir**." (Procédure civile. Droit interne et droit communautaire, 28e é.,2006, Précis Dalloz, no. 120). **Une formule** de G.CORNU et J.FOYER(Procédure civile, 3e éd., 1996, coll. Thémis, PUF, p.322) **résume** de manière frappante **la triple exigence qui préside à l'ouverture de l'action en justice : "N'importe qui n'a pas le droit de demander n'importe quoi, n'importe quand à un juge"** (V. égal R. PERROT, Institutions judiciaries, 12e éd., 2006, Précis Domat, Montchrestien, no. 536).*" **(emphasis added)**

Rép.pr.civ.Dalloz Tome I page 18 & 37 notes 93, 215:

"*93. (…) L'action est une voie de droit, un simple pouvoir virtuel que son titulaire peut préférer ne pas exercer, soit par souci de conciliation, soit pour ne pas courir les risques d'un procès. Mais si le titulaire de l'action veut effectivement exercer cette voie de droit et saisir les tribunaux compétents, il doit alors transformer cette faculté en acte: et cet acte est précisément la demande en justice[…] en un mot la demande en justice est la puissance passée en acte"(R.PERROT, Cours de droit judiciare privé,op.cit.,p.40; S.GUINCHARD et F.FERRAND, op.cit.,no.94). L'action précède donc la demande. C'est la raison pour laquelle elle peut être l'objet d'actes juridiques alors même qu'aucune demande n'a été formée (G.CORNU et J.FOYER,op.cit.,p.313; G.WIEDERKEHR, article préc.[Mélanges Simler],spéc.p.905 et s.).*

*215. L'idée que **l'ouverture de l'action est subordonnée à l'existence d'un "intérêt légitime à agir" est traditionnelle**. Un adage de l'Ancien droit l'exprime avec force et concision: **"pas d'intérêt, pas d'action"** (V.H.ROLAND et L.BOYER, Adages du droit français, 4e éd., 1999, Litec).9.(…)"* **(emphasis added)**

In the plaint

Therefore, it is abundantly clear that it is not sufficient merely to state that certain events occurred that entitle the Plaintiff to relief, but all the material facts/elements for a valid cause of action must be averred in the plaint.

For the reasons given above, I will not allow any examination in chief along that line by learned Counsel for the Plaintiff with a view to eliciting evidence to rebut the poor performance

of Plaintiff as canvassed in the plea of Defendant to fill the gaps in the material facts averred in the plaint in order to formulate an actionable cause of action of constructive dismissal and even one more for breach of contract. This practice should not be encouraged as it is misconceived as no proper discernible actionable cause of action can be concluded from the material facts averred in the plaint. Hence, in the furtherance of the proper administration of justice, I non-suit the Plaintiff's action.

S.D. Bonomally (Mrs.) *(Ag. Vice President)*
27.2.2020