Rahman S.A. v Blanche Birger Co Ltd

2020 IND 11

Cause Number 1/2015

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil side)

In the matter of:

Salim Abdur Rahman

Plaintiff

v.

Blanche Birger Co Ltd

Defendant

Judgment

Plaintiff has averred that he was enlisted by Defendant in its Informatics Division with effect from 1 June 2001 with a basic monthly salary of Rs. 23,000 and other benefits. By way of letters with the passage of time, he was informed by Defendant of his revised and better conditions of service and in that respect, he was appointed to sit as a member on the Board of Information Communication Technology Authority which did not please the CEO of Defendant and who exerted pressure on him to leave his post with Defendant.

The Defendant Company then kept pestering Plaintiff asking him to submit his letter of resignation and imposed an unrealistic target of a yearly turn over to the tune of Rs. 20 M. which target was impossible, given the shifting away of the trained staff which initially formed part of Plaintiff's team as alleged.

Plaintiff subsequently received from Defendant a mail on 03.10.04 whereby the CEO of Defendant expressed his disappointment while underlining that he had been extremely patient, polite and understanding with the Plaintiff before adding that he would assume that Plaintiff was no longer committed to Defendant. Being unable to bear the ongoing pressure from the CEO of Defendant, he submitted his resignation by way of a letter dated 13.10.14 wherein he made it clear that Defendant through his CEO had created an unbearable situation that he had been forced to resign as further alleged.

Given the treatment meted out by Defendant through its CEO, Plaintiff avers that he had been constructively dismissed by Defendant without any justification and that at the time of his constructive dismissal Plaintiff was in receipt of a yearly pay packet of Rs. 1,472.835. Hence, he is claiming the sum of Rs. 5,165.140 comprising of severance allowance, indemnity in lieu of notice and bonus.

Defendant, for its part, has denied liability. It has essentially averred that Plaintiff's condition was upgraded on the basis that he would adhere to the forecasted budget submitted by it and that he would have met the target set. However, it turned out that the Plaintiff was not performing to expected levels and failed to achieve the budgetary targets and that subsequently impacted negatively on the annual net profit of Defendant and as a result it could not afford to continue to pay the said monthly commission. Furthermore, Defendant was not made aware that Plaintiff was appointed to sit on the Board of the Information Communication Technology Authority and that was creating conflict of interest with Defendant so that its CEO asked Plaintiff to opt between that Authority or Defendant and he decided to resign from Defendant Company.

At this stage, without the need to go into the merits of the case, I find that there is no valid cause of action disclosed *ex facie* the material/essential averments in the plaint as there was no contract of employment or contract of service between the Defendant and the Plaintiff as it has been averred that he was <u>enlisted</u> by Defendant in its Informatics Division. At no time has it been averred that he was employed by Defendant by virtue of an agreement signed or reached on a specified date, of a specified month and of a specified year. Likewise, it has not been averred that he was in the continuous employment of Defendant be it on a full time or part time basis in order to attract a monthly salary in the sum of Rs.23,000. Now, the Oxford Dictionary meaning of the word *"enlist"* means *"secure as a means of help or support"* which necessarily means that Plaintiff was secured by Defendant as a means of help and support only and no more meaning until he could be tolerated by Defendant.

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)**.

Therefore, the threshold needed to be reached in order to formulate a complete cause of action cannot be based on a mere subjective assumption nor on a mere reliance on the evidence to be adduced to perfect that lack of precision in the material facts, nor on particulars and nor on the plea of the Defendant to fill those gaps. 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."*

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)**

Therefore, it is abundantly clear that all the material facts/elements for a valid cause of action must be averred in the plaint.

For the reasons given above, it is clear that *ex facie* the material facts of the plaint, it cannot be concluded that the Plaintiff was employed at all on a continuous basis by virtue of a contract of employment in the year 2001 so that liability could be inferred. Given that no valid cause of action has been formulated against the Defendant, the plaint is dismissed.

S.D. Bonomally (Mrs.) *(Ag. Vice President)*
9.6.2020