IN THE COURT OF APPEAL OF SEYCHELLES

Arthur Servina — Appellant (Plaintiff)

VS

Indian Ocean Tuna Limited — Respondent (Defendant)

CR SCA No: 37/2010

BEFORE: MacGregor, President; Fernando; Twomey; JJA

Counsel: Mr. B. Hoareau, for the Appellant
Mr. D. Sabino, for the Respondent

Date of Hearing: 9th April 2012
Date of Judgment: 13th April 2012

JUDGMENT

Anthony F. T. Fernando JA.

1. This is an appeal against the judgment of the Supreme Court dismissing the Plaint brought by the Appellant (then Plaintiff) against the Respondent(then Defendant) claiming a sum of SR 270,400/= on the basis of a "faute" committed by the Respondent.

2. The Appellant had averred in his Plaint that the Respondent had unlawfully, without any claim of right and without any justification refused and/or failed to pay the outstanding salary for the months of February 2006 to July 2007 amounting to SR 208,800/- and the one months salary in lieu of notice of

termination of the contract of employment, amounting to SR 11,600/-; in accordance with the decision of the Seychelles International Business Authority, 'SIBA', dated the 31st of July 2007. He had also claimed by way of compensation, moral damages in a sum of SR 50,000/-.Thus the Plaint had been based on the basis of "the omission and/or conduct of the" Respondent in not complying with the decision of SIBA dated the 31st of July 2007 .

3. The Appellant had filed the following grounds of appeal:

   (i) The learned trial judge erred in law in holding that the cause of action which was before the Supreme Court was similar to the one which was before the Seychelles International Business Authority.
   (ii) The learned trial judge erred in law in holding that the Plaintiff could not have recourse to the Civil Code of Seychelles.
   (iii) The learned trial judge erred in law in holding that the Plaintiff could not institute an action in delict.
   (iv) The learned trial judge erred in law in coming to the decision that the proper proceeding was for the parties to institute, judicial review proceeding, to obtain a writ to compel the Minister to hear the appeal filed by the Respondent, in that the Respondent was the only party which had the obligation to institute such a writ.

4. The Appellant had been employed by Indian Ocean Tuna Limited, 'IOT', as a Catering Manager with effect from the 15th of May 2002. As per the letter of appointment either party could terminate the contract by giving 30 days notice or payment of one month salary in lieu of notice. According to the Appellant's evidence his employment was terminated in February 2006 on the ground that he had committed a serious disciplinary offence. The Appellant had then invoked the grievance procedure set out in the International Trade Zone (Employment) Regulations 1997 against the termination of his employment. On the 23rd of February 2006, the Appellant had been informed by the Authority (Seychelles Business Authority, 'SIBA') which determined the Appellant's grievance that: "Following our analysis, the Authority has come to a determination to uphold IOT's decision for terminating your employment to be justified."(D1).(emphasis by us). According to the Appellant he had appealed against the decision as he had not been heard. When questioned by the Counsel for the Respondent as to whether he appealed against the determination of 23rd February 2006 because he was

dissatisfied with the determination, his answer had been: "I was not dissatisfied with the conclusion, I was dissatisfied with the procedure I had not been heard."(emphasis by us). The 2nd determination by the Authority was appealed against by IOT as they had not been heard.

5. The subject matter of the case before the Supreme Court was based on the 3rd determination of the Authority dated the 31st of July 2007 which was to the effect:

   "that termination is not justified but, as it would not be practical or convenient to reinstate the worker in the post or offer the worker other suitable employment, allow the termination subject, in the case of subregulation (1)(a)(ii), to the payment in lieu of notice of one month's wages or, where an amount is specified in his contract of employment in the case of a non-Seychellois worker referred to in regulation 25(c), that amount;" (emphasis by us).

6. The words "**allow** the termination" in our view necessarily refers to a termination that has already taken place and relates back to the date when such termination was made.

7. The Respondent had appealed against the 3rd determination of the Authority dated the 31st of July 2007, but up to the conclusion of the Supreme Court case, neither party has had recourse to Judicial Review seeking a writ to compel the Minister to determine the appeal.

8. The Appellant after much reluctance had been compelled to admit, after D2 was shown to him that he had been paid the one months salary in lieu of notice. The determination of the Authority dated the 31st of July 2007 was also to the effect that the Appellant be paid the one months salary in lieu of notice. According to Respondent's witness Gaelle Kerloch, the Human Resources Manager of IOT, the Appellant was paid 1 month's salary in lieu of notice and the balance on the annual leave totaling to a sum of Sr 13,790 on the 14th of February 2006 that is even before the determination of the Authority dated the 31st of July 2007. According to Kerloch "IOT did not retain the misconduct as a reason of termination". The Appellant's letter of appointment provided that either party could terminate the contract by giving 30 days notice or payment of one month salary in lieu of notice. The Appellant had admitted under cross-examination that

he runs his own business and that he had opened the bakery "just after" he stopped working at IOT.

9. Gaelle Kerloch had stated under cross-examination that IOT appealed against the 3rd decision of the Authority because they did not agree on the fact that the termination is not justified. She had categorically denied the Appellant's Counsel's suggestion that IOT under the law was under an obligation to pay the Appellant all his salary until the date of lawful termination that is the 31st of July 2007. According to her the lawful date of termination is the date when IOT terminated the services of the Appellant and that is in February 2006.

10. It is to be noted that the Appellant's Plaint had been filed before the Supreme Court on the 20th of April 2009, almost 1 year and 9 months after the determination of the Authority, dated 31st July 2007. Further it was only on the 27th of June 2008, which is almost 11 months after the determination of the Authority that the Appellant's Counsel had written to the Respondent demanding payment within 14 days; of wages, compensation and other benefits up till the 31st of July 2007 and one month's salary in lieu of notice (P3). As stated at paragraph 8 above, the Appellant after much reluctance had been compelled to admit, after D2 was shown to him that he had been paid the one month's salary in lieu of notice and the balance on the annual leave totaling to a sum of Sr 13,790 on the 14th of February 2006.

11. We are compelled to accept the suggestion made to the Appellant while under cross-examination by the Respondent's Counsel that the action before the Supreme Court was initiated merely to see if the Appellant "can make some more money". In this regard the testimony of Respondent's witness, the Human Resources Manager of IOT, Gaelle Kerloch, has a bearing, namely "IOT did not retain the misconduct as a reason of termination". This is supported by P3 namely the letter of the Appellant's Counsel to the Respondent demanding payment within 14 days; wherein it is stated: "Please take note that in addition to the one month salary or such amount specified in my client's contract, my client is also entitled to compensation and wages and any other benefits as per Regulation 31 (b) (ii) of the Regulations."(emphasis by us). The same provision of the Regulations is referred to at paragraph 7 of the Plaint. Regulation 31 (b) (ii) of the International Trade Zone (Employment) Regulations, 1997 makes reference to a contract of

employment that is terminated by a employer **other than for** a serious disciplinary offence under regulation 23(4) of the Regulations.

12. The Supreme Court had dismissed the Plaintiff's action relying on a previous judgment of this Court, namely **Antoine Rosette V Union Lighterage Company SCA 16 of 1994** which held; in reference to a person who had prior to instituting action before the Supreme Court invoked the grievance procedure in the Employment Act 1990: "I do not think that the Act envisaged a situation in which the worker and employer would go through the grievance procedure to finality only for the worker to commence and drag the employer through fresh proceedings based on the same cause of action in another forum. In my view, the act provided a new remedy which is substitutional and not an additional remedy." The said decision was based on section 4(3) of the Employment Act which read:

"No Court shall have jurisdiction to hear or determine any matter or grant any remedy or relief in relation to a contract of employment to which this Act applies where provision is made in this Act for hearing or determination of the matter or granting of the remedy or relief."

There is no similar provision in the International Trade Zone (Employment) Regulations 1997 and we therefore find that the decision in **Antoine Rosette V Union Lighterage Company SCA 16 of 1994** is of no relevance to this case.

13. The Trial Court had dismissed the claim on moral damages relying on the decision of this court in **Antoine Rosette V Union Lighterage Company SCA 16 of 1994** and the Supreme Court decision in **Mike Valentin V Beau Vallon Properties Ltd CS 46 0f 1992** wherein it had been held that the Legislature would necessarily have taken the issue of moral damages into consideration when making provision under the Employment regulations. We are in agreement with the finding by the Trial Judge.

14. This appeal can be disposed off on a determination of ground (iii) of appeal referred to at paragraph 3 above, as the Appellant's action before the Supreme Court had been based on "faute" arising from the omission and/or conduct of the Respondent in not complying with the decision of SIBA dated the 31st of July 2007. The Appellant in his Skeleton Heads of argument had stated: "It is reiterated

that the Appellant did not institute proceedings before the Supreme Court for the termination of his employment but rather due to the non-payment of the compensation, benefits and wages arising from the decision of the Authority." In this regard it is necessary to examine the relevant provisions of **article 1382 of the Civil Code of Seychelles Act**:

" 1. Every act whatever of man that causes damage to another obliges him by whose fault it occurs to repair it.

2. Fault is an error of conduct which would not have been committed by a prudent person in the special circumstances in which the damage was caused. It may be the result of a positive act or an omission.

3. Fault may also consist of an act or an omission the dominant purpose of which is to cause harm to another, even if it appears to have been done in the exercise of a legitimate interest.

4. A person shall only be responsible for fault to the extent that he is capable of discernment; provided that he did not knowingly deprive himself of his power of discernment."

15. It was incumbent on the Appellant in order to succeed under delict, to have proved on a balance of probabilities that Respondent's act in not complying with the decision of the Seychelles International Business Authority, 'SIBA', dated the 31st of July 2007 amounted to a fault, namely an error of conduct which would not have been committed by a prudent person in the special circumstances in which the damage was caused, that the Respondent was capable of discernment of such fault and that the act of the Respondent in not complying with the decision of 'SIBA' caused damage to the Appellant.

16. We are of the view that in view of the wording of the decision of SIBA dated the 31st of July 2007, referred to at paragraph 5 above and the other circumstances set out in this judgment, it cannot be said that the Respondent is liable for an error of conduct which would not have been committed by a prudent person. We are of the view that the Respondent had every right to believe that they had paid the Appellant all his dues and more so because "IOT did not retain the misconduct as a reason of termination". This is a position that had been somewhat accepted by

the Appellant as stated at paragraph 11 above. As stated at D3 which was the Respondent's response to P3 referred to at paragraph 11 above: " Furthermore, you will note from the determination of SIBA dated 31st July 2007 that SIBA did not make any determination or ruling that required IOT to pay Mr. Servina any more than that he has already received."

17. In view of the Appellant's admission under cross-examination that he runs his own business and that he had opened the bakery "just after" he stopped working at IOT and that been in February 2006 itself, there is no evidence before the Court that he suffered any damages consequent to the Respondent not complying with the decision of 'SIBA', dated the 31st of July 2007 which is the 'faute' alleged. He had only claimed that the loss of his job in February 2006, caused him stress, which again is unrelated to the Respondent not complying with the decision of 'SIBA', dated the 31st of July 2007.

18. We therefore dismiss this appeal with costs to the Respondent.

A.F. T. Fernando
Justice of Appeal

I agree

F. MacGregor
President, Court of Appeal

I agree

M. Twomey
Justice of Appeal

Dated this 13th day of April 2012, Victoria, Seychelles