

**Alcindor v The Plantation Club Resort & Casino
(2000) SLR 155**

Anthony Juliette for the plaintiff
Bernard Georges for the defendant

Ruling on Plea in Limine Litis delivered on 11 October 2000 by:

JUDDOO J: The plaintiff claims from the defendant, his former employer, loss and damages in the sum of R26,930 with interest and costs for prejudice suffered on account that an offence of breach of trust against him leading to the termination of his employment has not been proved. The claim is resisted by the defendant company which has raised a plea in limine litis to the effect that this court "has no jurisdiction to hear this matter, the plaintiff having opted to obtain relief under the Employment Act."

It is not denied that the plaintiff terminated the employment of the defendant on 30 May 1997 on the "ground of breach of trust." Subsequently, on 19 August 1997, the competent officer in the Ministry of Employment and Social Affairs ruled that the offence of breach of trust against the plaintiff had not been proved and ordered the defendant company to pay the plaintiff R3544.95 under the provisions of the Employment Act 1995. The said sum has been paid as ordered. The plaintiff in the instant proceedings claims for prejudice suffered on account that the offence of breach of trust against him had not been proved and claims damages for loss of salary for 3 months and moral damages.

Under Article 1370(2) of the Civil Code:

(2) When a person has a cause of action which may be founded either in contract or in delict, he may elect which cause of action to pursue. However if a law limits the liability to either of the two causes of action the plaintiff shall be bound to pursue the cause of action to which the law relates. A plaintiff shall not be allowed to pursue both causes of action consequently.

Moreover, under section 4(3) of the Employment Act 1995 (prior to the amendment brought by Act No.8 of 1999):

where provision is made under this Act for the hearing and determination of any matter in relation to a contract of employment to which this Act applies, any remedy or relief granted under this Act in respect of that matter shall, subject to the jurisdiction of the Supreme Court, be binding on the parties to the hearing or determination.

It has been held by the Court of Appeal in *Genevieve Lionnet v Central Bank of Seychelles* (unreported) Civil Appeal No. 33 of 1998 that the above section 4(3) "cannot possibly be construed as ousting the jurisdiction of the Supreme Court" and that in circumstances where the plaintiff has not resorted to the grievance procedure under the Employment Act 1995, the jurisdiction of the Supreme Court in a claim for damages for unjustified termination, is not ousted.

However the Court of Appeal did not disturb its earlier determination in *Antoine Rosette v Union Literate Company* (unreported) Civil appeal No. 16 of 1994, judgment delivered on 18 May 1995 (although based on the earlier Employment Act of 1990), that where a grievance had been lodged with the Ministry of Employment and Social Affairs and an employee was awarded statutory benefits for unjustified termination of employment under the latter Act, the latter "cannot commence and drag the employer through fresh proceedings based on the same cause of action in another forum." This reasoning is equally applicable to the Employment Act 1995 and constitutes a bar to the instant proceedings.

It is to be noted in the present case that the cause of action relied upon by the plaintiff is not a separate act from the unjustifiable termination and forming the basis of a different cause of action from that determined under the Employment Act. As commented by Ayoola JA in the *Rosette* case:

However if in the course of terminating a contract, the employer committed a delict, such

as, for instance, a libel or assault, that act which amounted to a delict would be a separate cause of action apart from unjustifiable termination.

Instances of such acts separate from the termination of employment have been found in several decisions of this Court including:

- (i) *B. Rosalie v Bodco Ltd* (unreported) Civil side No. 193 of 1997: where the court held that the failure of the employer to comply with an order made by the competent officer and the Minister to reinstate the plaintiff constituted a "faute" under article 1382 of the Civil Code;
- (ii) *B. Elizabeth v SPTC* (unreported) Civil side No. 157 of 1997: where the court found that the failure to amend a certificate of employment by the employer was an error of conduct which constituted a 'faute' under article 1382; and
- (iii) *E. Philo v Pension Bel Air* (unreported) Civil side No. 78 of 1998: where the court found (vide: Ruling on Plea in limine litis) that the omission by the employer to pay statutory benefits awarded to the plaintiff under the Employment Act could amount to a 'faute' under the Civil Code.

In the present case the plaintiff has been awarded statutory benefits for the unjustified dismissal and is barred from claiming before this court from the same cause of action.

I uphold the plea in limine litis and dismiss the plaint. I make no order as to costs.

Record: Civil Side No 345 of 1997