

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CA 27/2017

Appeal from Magistrates Court Decision /20

[2018] SCSC 910

DOMINIQUE GUICHARD

Appellant

versus

SANDRINE MATOMBE

Respondent

Heard: 22nd May 2018 and 6th June 2018

Counsel: Mr. Frank Elizabeth Attorney at Law for appellant

Mr. Clifford Andre Attorney at Law for respondent

Delivered: 11 October 2018

JUDGMENT

Burhan J[1] This is an appeal from the judgement of the Employment Tribunal and concerns the issue whether a purported agreement to terminate a contract of employment is legally valid.

[2] The background facts of the case are that the appellant, Mr. Dominique Guichard, is a business man having as one of his businesses, a real estate enterprise known as Agence Immobiliere Des Seychelles. The respondent, Mrs. Sandrine Matombe worked from 1st

May 2013 until 4th January 2017 in this business as a Secretary. She received a gross salary of SR 15,000/= per month. As a Mauritian national and non-resident, the respondent worked subject to a Gainful Occupation Permit (GOP). In mid-November 2016, the respondent realised that she was pregnant with her second child. She continued to work for the appellant.

[3] On the 4th January 2017, when she returned to work after the Christmas holidays, she had met the appellant in his office and informed him of her pregnancy which news was not happily received. The outcome of the conversation was that her services were to be terminated immediately as a result of her pregnancy effecting her work. Thereafter, she signed a contract to terminate her services with immediate effect. A few weeks later, the appellant transferred SR 23,653/= into her bank account. This sum included her salary in lieu of notice, and 18 days annual leave.

[4] Mrs. Matombe lodged a grievance application with the Employment Tribunal. She claimed that she had been unfairly dismissed and sought pecuniary relief. She asked for one-month compensation in lieu of notice, 33 days compensation for length of service, 30 days annual leave and 8 months' salary as compensation.

[5] The appellant opposed the application and pecuniary relief claimed, stating that she had voluntarily entered into an agreement to end her contract of employment. He claimed that the amount paid to her after the termination was in pursuance of this agreement. He provided a copy of this contract, which was titled 'Rupture Amiable De Contract' (hereinafter referred to as RADC). The agreement (RADC) was signed by both him and the Mrs. Matombe on 4th January 2017.

[6] At the Tribunal hearing only two persons testified, namely, Mrs. Matombe the respondent and the appellant, Mr. Guichard. Mrs. Matombe's contended that she was unfairly dismissed when she had revealed that she was pregnant. According to her testimony, the appellant and his wife were unhappy about the news of her pregnancy which she conveyed to them in November. They told her, her pregnancy would interfere with workplace productivity, and that they would have to pay her while she was away on maternity leave. They further mentioned they had learnt a hard lesson in the past with a

pregnant employee and were not prepared to end up with the same financial burden. Although she agreed that she signed the purported agreement (RADC) terminating her employment, she testified that she did not read the document before signing it. She further explained that on 4th January 2017, she had met with the appellant in his office. He admonished her for falling pregnant and raised his dissatisfaction with her deteriorating level of work. After that he notified her that he was terminating her services with immediate effect. She tried to persuade him to take her personal financial situation into account. He gave her a letter to sign, she signed it, and escorted her outside. She claimed that she was in shock, and only read the document when she got home. She admitted she had received the SR 23, 653/= from the appellant, but in her view, this amount was not enough, and she was entitled, by law to a higher sum.

[7] In his defence, the appellant denied that he dismissed Mrs. Matombe, and rejected the claim that he had done so because of her pregnancy. He maintained that it was because her work had deteriorated. He also denied that they had discussions with Mrs. Matombe about a former employee who had fallen pregnant in the past. He testified that he prepared the agreement (RADC) with her, that she read it and signed it; she was not in any kind of shock. He further stated they had agreed, amicably, to terminate her contract of employment, and that the subsequent payment of SR 23,653/= was in terms of that agreement.

[8] It is to be mentioned that Mrs. Matombe's evidence was hardly tested by cross examination and no material contradictions or omissions were observed in her evidence under oath.

[9] It is apparent that in its judgment the Tribunal had accepted the evidence of Mrs. Matombe. The Tribunal held that she was a credible witness and came to the finding that her termination agreement was due to the fact the respondent had become pregnant.

[10] The Tribunal further held that the agreement (RADC) was in contravention of the Employment Act, 1995 since section 57 and section 52 of the Employment Act 1995 limited the circumstances under which a contract may lawfully be terminated. Since the effect of the agreement (RADC) would be to deprive an employee of mandatory statutory

rights and benefits, the Tribunal concluded that the agreement was against public policy and thus, had no legal effect.

[11] The Tribunal in its final judgement ordered the appellant to pay Mrs. Matombe a compensatory award for loss of earnings in terms of unpaid salaries from 1st January 2017 to the date of confinement; Payment in lieu of 14 weeks' maternity leave and compensation for length of service from 1st May 2013 up to date of confinement. Further as the respondent had been paid one month's notice and annual leave totalling a sum of SR 23,653/= the Tribunal declined to grant her other prayers.

[12] In the appeal the main ground relied on by the Appellant is that the termination agreement (RADDC) was voluntarily entered into by the respondent. Referring to Articles 1134 and 1135 of the Civil Code, the Appellant contends that these provisions codify the lawfulness of agreements entered into between two parties and the consequences that flow from such agreements. He also submitted that the Tribunal's reliance on section 57 of the Employment Act was misplaced because he did not terminate her employment contract on his own accord but there was instead a voluntary agreement between both parties to end it. He also rebuffed the Tribunal's conclusion that the agreement was a ploy to avoid the payment of statutory benefits, and also rejected the Tribunal's finding that the agreement was against public policy. In so far as the compensatory awards were concerned, he submitted that these were unsubstantiated.

[13] The respondent opposed the appeal, stating that the Tribunal's determination was legally sound and should not be interfered with. In her view, she had been discriminated against because of her pregnancy. It is her contention that the Tribunal correctly held that the purported agreement contravened section 57 of the Employment Act and that the appellant could not therefore rely on Articles 1134 and 1135 of the Civil Code. She submitted that she was forced to sign the contract because of her pregnancy. She maintained that the Tribunal's finding that the agreement was a tactic to avoid paying her statutory benefits was sound and substantiated by her evidence, which evidence was accepted by the Tribunal.

[14] The first issue for this Court to decide was whether the termination agreement (RADC) entered into between the parties is legally valid. In terms of Article 1108 of the Civil Code of Seychelles validity of an agreement is dependent on four essential conditions. These conditions are set out in Art; 1108 of the Civil Code of Seychelles, and they are: (a) consent of the party who binds himself; (b) capacity to enter into the contract; (c) a definite object, and lastly (d) that it should not be against the law or against public policy. (See also Dr. M Twomey (née Butler-Payette ‘Legal Metissage in a Micro Jurisdiction: The mixing of common law and civil law in Seychelles’ (2017) at 87.)

[15] Where the conditions necessary for the validity of a contract are not met, the contract is null and void. In *Chetty v Chetty SCA 15/2009, LC 339 para 18*, it was held that should one of these elements be missing, then there would be no contract.

[16] Employment contracts are generally regulated in terms of the Employment Act, 1995. This Act regulates conditions of employment generally, including the termination of employment. In terms of the Act, termination of a contract of employment can happen in several ways. It can happen either at the instance of employer or by an employee resigning. It could also happen through lay-offs. The way termination can happen and the circumstances under which it occurs are dealt with the Part VIII of the Act. Whichever manner of termination is applicable, the Act sets out clear procedures which precede the termination, and deals with the consequences of termination, such as for example, notice, compensation or grievances. This Court observes that mutual termination by way of contract is non-existent within the provisions of the Employment Act.

[17] It would be pertinent at this stage to refer to section 43(b) of the Employment Act that reads as follows.

The statutory wages prescribed under section 40(1)(a) and the condition of employment prescribed under section 40 (1)(b) are deemed to be part of every contract of employment in which they relate, whether the contract was entered into before or after the commencement of this Act save that-

(a)-----

(b) where the contract provides for conditions of employment more favourable than those prescribed, those conditions more favourable shall apply unless otherwise prohibited under this Act.

It is apparent therefore, that section 43(b) allows parties to contract out of the regulations only if parties agree to conditions that are more favourable than what is stated in the regulations.

[18] Therefore, while a mutual agreement to terminate employment may not itself be against the Employment Act, it would however be against the Act to do so on terms that are less favourable than what is provided in the Act. The relationship between employers and workers is inherently an unequal one, thus, the machinery of the Employment Act seeks to protect workers by regulating, as far as possible, all the terms of employment within a single framework. On the other hand, permitting employers and workers to contract out of the general framework, but only in instances where these terms are more favourable, seeks to address the need for contractual freedom, but in a legally compliant and fair manner. Therefore parties to a contract would act contrary to the Employment Act, where the terms agreed upon are less favourable. This is fortified by section 46A of the Act, which prohibits the discrimination against employees by the employer on several grounds, including gender.

[19] It is the considered view of this Court that the evidence, clearly indicates that the termination agreement (RADDC) was introduced to ensure that the services of the respondent would be terminated because Mrs. Matombe was pregnant which would make the termination agreement (RADDC) unfair, as its object was unlawful and therefore has no legal effect, *Hardy v Valabhji (1964) SLR 98* and *Maeschig v Colling SCA 11/2004, LC 274*. When the object of an agreement is prohibited by law or infringes the principles of public policy, the object is unlawful and the agreement has no legal effect. (See *La Gigolette v Durup [1978] SLR 101*). Accordingly, it is the view of this Court that the agreement (RADDC) falls foul of the Employment Act and is therefore against the law, void and has no legal effect.

[20] Since the agreement (RADC) is void and has no legal effect, Mrs. Matombe's contract was never lawfully terminated. The implication, therefore, would be that she is still validly an employee of the appellant. But, she had sought compensation at the Tribunal, and not reinstatement.

[21] I would next pass on to consider the award made by the Tribunal. The Tribunal is empowered by Schedule 6 of the Act to award remedies under the Act including compensation or costs. It also has the discretion to make any order it deems fit. In considering the Tribunal award, I am guided by the general principle that an award should be just, fair and equitable as against both the respondent, and the appellant as held in *Caledonian (Ceylon) Tea and Rubber Estate v Hillman 1979 NLR 421*. A long time has passed since Mrs. Matombe last worked at the appellant's establishment, and he may by now have hired a replacement. I also consider the fact she admits receipt of SR 23,653/= from the appellant at the time her services were terminated. At the same time, however, employers must know that when they terminate contracts, they run the risk of a challenge which may result in an order to reinstate. In this case, Mrs Matombe simply prayed for and was granted pecuniary relief – she did not seek to be reinstated.

[22] Thus considering the facts peculiar to this case, the following award is made in favour of the respondent. The appellant is herewith ordered:

(a) To pay the respondent, Mrs. Matombe a compensatory award for loss of earnings in respect of unpaid salaries from 1 January 2017 to the date of confinement;

(b) To pay the respondent payment in lieu of 14 weeks maternity leave; and

(c) To pay the respondent compensation for length of service from her date of employment 1st May 2013 up to the end of her 14 weeks maternity leave.

(d) To pay legal interest on the entire amount due, calculated from the date of filing the grievance application i.e. the 28th of February 2017, till the date payment is made.

[23] For the aforementioned reasons the appeal stands dismissed with costs.

Signed, dated and delivered at Ile du Port on 11 October 2018

M Burhan
Judge of the Supreme Court