SUPREME COURT OF SEYCHELLES

Reportable
[2020] SCSC 60
CS 31/2019

In the matter between:

1. **JUNIA ALBERT** **Plaintiff**
2. **PAULETTE ALBERT**
3. **TANIA ALBERT**
4. **VINCENT ALLISOP**
5. **NAOMI ALLISOP**

(rep. by Mr. Anthony Derjacques)

And

1. **HILL VIEW RESORTS (SEYCHELLES) LTD** **1st Defendant**
   (rep. by Ms. Edith Wong)
2. **MURBAN ENERGY LTD** **2nd Defendant**
   (rep. by Ms. Benoiton)

Neutral Citation: *Albert & ors v Hill View Resorts 7 or*(CS 31/2019) [2020] SCSC60

(27th January 2020)

Before: R. Govinden

Summary: Plea in limine litis upheld/case transferred to the Employment Tribunal.

Heard: 14th October 2019

Delivered: 27th January 2020

RULING

R. GOVINDEN J

[1] Introduction

[2] The Plaintiffs are 29 persons who have filed a plaint against the 1st Defendant alleging an unlawful breach of their employment contract that existed between them and the 1stDefendant. They alleged that their employment relationships with the 1st Defendant were unlawful terminated given that the procedure for redundancy as laid down under section 51 of the Employment Act (CAP 69), herein after also referred to as *"the Act"*, was not followed by the 1st Defendant. This assertion of liability is extended by the Plaintiffs to the 2nd Defendant who is the person who has allegedly acquired the ownership of the 1st Defendant following or during their termination of employment. As a result the Plaintiffs claim that both Defendants are jointly and severally liable to pay them the sum of SR 9, 541,497.60 cents and for an order from this court to the effect that their contract subsist in law and has not been lawfully terminated and that they are entitled , as such, to their lawful benefits and salaries.

[3] The 1st and 2nd Defendants both denies the claims of the Plaintiffs in separate Statements of Defence. They denied the Plaint both on the merits and in law. They have raised legal objections based on the alleged exclusive jurisdiction of the Employment Tribunal to hear this matter. They submitted that the Plaint concerns an "*employment and labour related matter"* and as such falls within the exclusive jurisdiction of the Employment Tribunal by virtue of Rule 3(1) of the Schedule 6 of the Act and that accordingly the Supreme Court has no jurisdiction to hear the case and that it should be dismissed with costs in favour of the Defendants.

[4] The 1st Defendant raised a 2nd plea in limine based on a *"compensation agreements"* allegedly entered between the Plaintiffs and the Defendants in which the Plaintiffs are said to have accepted in full and final settlement of all claims current and for the future, arising from the termination of their employment.

[5] The 2nd Defendant, on the other hand, raised a separate plea that the Plaint is frivolous and vexatious in that the Plaintiffs were employed by the 1st Defendant, a separate company, and that under the doctrine of separate legal entity the action is not maintainable against it in law and should be struck out.

[6] Submissions of counsels

In her supporting submission Learned Counsel for the 1st Defendant submitted that the case should have been brought before the Employment Tribunal under Rule 3 of the Schedule 6 of the Employment Act. Learned Counsel relies on the pronouncements of the court in the case of *Seychelles Petroleum Company vs Gervais Port Louis, Supreme Court, Civil Appeal, 47/ 2018.* A case in which the Court found that the case arose out of a Bonding Agreement, and that as a result that it should have been filed before the Employment Tribunal and not before the Magistrates Court as it consisted of a *"employment related matter"* in terms of schedule 6, Rule 3. Learned Counsel also made reference to the case of *Seychelles Petroleum Company Ltd vs Robert Morel and or, C/S 33 OF 2013.* In which case the Supreme Court relying on the ordinary meaning of the same phrase held that the term would apply to any individual in an employment relationship and that as such the Employment Tribunal had exclusive jurisdiction over the dispute, instead of the Supreme Court.

[7] Ms. Benoiton, for the 2nd Defendant, join the submission of the Learned Counsel for the 1st Defendant when it came to the 1st plea in limine. As regards to her second plea, she argued that as the 2nd Defendant is a separate legal entity from the 1st Defendant, who was the employer of the Plaintiffs and that under the doctrine of separation of powers and corporate liability enunciated under the *Solomon vs Solomon* principle by the House Of Lords in 1897, the 2nd Defendant cannot be made liable for the acts of the 1st defendant..

[8] In his submission in reply Mr. Derjaques, Learned Counsel for the Plaintiff, contended that it is implicitly admitted by the Defendants that the provisions of the Act has not been followed. He argued that the only legal defence put forward by the Defendants are in respect of the issue of exclusive jurisdiction of the Employment Tribunal. According to the Learned Counsel, the Defendants has flagrantly failed to abide to the provisions of section 51 (1) of the Employment Act and as a result there was no redundancy or negotiation procedures instituted between the parties before the employer issued the Termination Notice, which to him made the procedure unlawful.

[9] As far as the liability of the 2nd Defendant is concerned, Learned Counsel argued that the 2nd Defendant is culpable because, as the purchaser of the hotel, it failed to ensure that the 1stDefendant,as the sellor, abides by the law.

[10] In respect of the 2ndplea in limine raised by the Counsel for the 1st Defendant is concerned, Learned Counsel for the Plaintiffs submitted that the *"compensation agreements"* in full and final satisfaction allegedly signed between the Plaintiffs and the Defendants were contrary to public policy and was null and void and cannot be enforced by the parties.

[11] Issues for determination

I have thoroughly considered all the submissions of the parties and their legal arguments raised in this case and having done so I find that the following are issues left for the determination of this court.

(1) Whether this case concerns a change of ownership under section 50 or a redundancy procedure under section 51 of the Act

(2) Whether the Employment Tribunal has exclusive jurisdiction to hear the dispute in this case.

(3) Whether the agreement entered between the Plaintiffs and the defendants are in full and final settlement of the terminal benefits and as such, can oust the jurisdiction of this court.

(4) Whether the 2nd defendant can be made liable for any claims made given that it has a separate corporate personality from the 1st Defendant.

[12] Determination.

[13] (1) Whether this case concerns a change of ownership procedure under section 50 or a redundancy procedure under section 51 of the Act.

Before making a determination on this issue I have found it apt to refer to the applicable provisions of the Employment Act in this case.

[14] Section 50

[15] (1),"Where an employer transfers a business undertaking in which works are employed to another person, and the other person accepts the obligations of the employer with effect from the date of transfer, irrespective of whether the ownership of the assets of undertaking are transferred or not, the first mentioned employer shall be deemed to have terminated to contract of employment of the workers immediately between the date of transfer subject to subsections 2."

(2) The termination of employment of such workers shall be deemed to be for a cause in no way attributable to the workers and the workers shall be paid compensation calculated in accordance with section 47 (2) (b) , regardless of whether they are employed or not employed by the person to whom the undertaking is transferred.

(3) An employer who knows , or may reasonably be deemed to know that a transfer of the business is due to occur, shall within one month notify the Chief Executive in writing of that fact and take steps to comply with the provisions of subsection (2).

47(2)

Where consequent upon the reconciliation procedure initiated under subsection (1) the Competent Officer determines that-

(b) a contract of employment may be determined and the cause no way attributable to the worker, the employee shall pay the worker compensation calculated at-

(i) the rate of the five sixth of one day wage for each completed month of service in the case of contract of continuous employment;

(ii) double the rate in sub-paragraph (i) in the case of the fixed term contracts;

(iii) such higher rate as may be prescribed.

[16] Section 51,

(1) Subject to this section , where as a result of an employee-

(a) ceasing to operate, in whole or part, a business, otherwise than as provided under section 50;

(b) temporarily suspending in whole or in part , the operation of a business for any reason specified in section 48 (1);

(c) restructuring the operation of a business for the purpose of…improvement in the business by which greater efficiency and economy can be effected, or

(d) introducing new technology in a business,

[17] a worker employed in the business has become redundant and it is necessary to terminate the contract of employment of the worker, the employer shall before terminating the contract of employment initiate and comply with the negotiation procedure.

(2) Where consequent upon the negotiation procedure initiate under subsection (1), the Competent Officer determines-

(a) that the contract of the employment of the worker may be terminated, the worker shall be entitled to compensation calculated in accordance under section 47 (2) (b).

(b) that the contract of employment of the worker shall not be terminated, the contract shall continue to have effect.

[18] I have scrutinised the averments in the pleadings and the submissions made before this court in the light of these provisions and I find that the facts of this case shows that this was a case of change of ownership under section 50 and not one of redundancy under

section51 as argued by the Plaintiff's Counsel. The procedure of the Act under section 50, therefore, should have been the procedure that should have been followed by the Defendants with regards to the Plaintiffs. This is exactly with the 1st Defendant did.

[19] The standard letter of termination send to the Plaintiffs by the 1st Defendants, of which their content are not being contested in this case, clearly established this fact.. All of them contain the following paragraphs,*" I refer to the meeting held on the 13th of August 2018, where our Group Managing Director , Mr Eddy See, officially informed you that there will be a change of ownership as the hotel is being sold to Murban Energy Limited and to the subsequent letter issued to you on the 10th of October, 2018.*

[20] *In view of this change your contract of employment with Hill View Resort (Seychelles) Limited will be terminated on the 5th November 2018, in compliance with section 50(1) of the Employment Act of Seychelles (the Act).*

[21] *You will be compensated in line with section 47 (2) (b) of the Act and any outstanding annual leave that you might have as at 5th November 2018 will be accounted for in the aforementioned final settlement .."(emphasis is mine).*

[22] From the content of these letters it is clear that the Plaintiffs are informed of the change of ownership and that in accordance with section 50(1) of the Act their employment are deemed terminated by the 1st Defendant as of the 5th of November 2018, that is two days following the receipt of the letters by their recipients as from the 5th of November 2018. The Plaintiffs were to be paid compensation calculated in accordance with section 47(2) (b) of the Act together with other terminal benefits regardless of whether they would be in the employment of the new owner of the enterprise.

[23] The employer further statutory undertaking under section 50 (3) of the Act also appeared to have been fulfilled as evidence shows that the 1st Defendant had informed the Government of the fact that a transfer of business undertaking was due to occur within one month upon it knowing of the intended transfer.

[24] Accordingly, there was in my view no need to enter into negotiation procedure under section 51(1) of the Act. Nonetheless, the 1st Defendant having chosen the right

procedure under the Act, the Plaintiffs now need to satisfy the court that they have chosen the proper forum to hear and adjudicate on this dispute.

[25] Whether the Employment Tribunal has exclusive jurisdiction to hear the dispute in this case.

[26] The Employment Tribunal is established under section 73(a) (1) schedule (6) of the Act. This schedule prescribes for the composition, jurisdiction and powers of the Tribunal. The provisions of paragraph 3(1) of said schedule provides that, *"The tribunal shall have exclusive jurisdiction to hear and determine employment and labour related matters"*. Paragraph 3(2) allows the Tribunal to hear matters that have not been successfully mediated under 3(1). Whilst 3(3) oust the jurisdiction of the Tribunal in matters relating claim to damages and personal injuries arising in an employment relationship.

[27] Schedule (6) of the Employment Act was made by way of a Statutory Instrument. That instrument is SI 4 of 2011. It being a subsidiary legislation its provisions cannot override the provisions of the Act under which it is made and by virtue of which it is made. Any provisions of the Act that are found to be inconsistent with that of the Regulations will prevail over the latter. Therefore, I am of the view that the exclusive jurisdiction provision of the instrument, regarding the Tribunal, must be intra vires the Act. If the latter has prescribed another forum to adjudicate over the dispute at hand, that other forum will have to prevail.

[28] Section 50 of the Act does not prescribe for the procedure of what would happened if there is discordance with its application of Section 47 (2) (b) which deals with rights of action for breaches of other provisions makes no reference to this aspect. There is no indication of the legal procedure to be followed or the body to hear any disputes regarding the quantum of compensation, for example. Or what would happened if there is a dispute between the outgoing and the incoming employer regarding issues having to do with the procedure. The Grievance Procedure under section 61 which entitles a worker to initiate a grievance procedure that eventually comes before the Tribunal does not include change of ownership as one of the grievance that empowers a worker to bring an action

before the Tribunal. It instead gives jurisdiction to disputes arising pursuant to section 57 (2) (a) or (b) ;

[29] By necessary implications the *"employment and labour related matters"* could have been interpreted so as to extend to section 50 of the Act if some other provisions of the Act regarding change of ownership, albeit of a miscellaneous or procedural character, had given some jurisdiction to the Tribunal. I have scrutinised the provisions of part XI *" offences, penalties and prosecution"* of the Act in order to find any reference to a legal suit or prosecution under section 50, before the Tribunal and no reference s were found to this effect, the closest that the law comes is that of the procedure under section 76(3) , which creates an offence against an employer who fails to initiate a negotiation procedure before making a worker redundant.

[30] There is thus no specific reference to a judicial body to adjudicate on the dispute in the Act. There is silence on the *"forum convenience"*. The legislature in this silence has enacted SI 4 of 2011 which extends the jurisdiction of the Tribunal to all employment and labour related matters, which to my mind will encompass matters arising out of disputes under section 50 of the Act. There is as such no inconsistency or ultra vires application between the Regulation and the Act. In the silence of the law the Minister responsible for the Act could have perfectly promulgated the SI that grants jurisdiction to the Employment Tribunal in matters of change of ownership under section 50(1) of the Act.

[31] Further, I find some weight in the argument that there are no procedural provisions regarding the procedure to be adopted in cases of disputes in these matters. I am of the view that justice cannot be denied in the inevitable disputes that would may eventually arise under section 50. When this happens adjudication cannot be denied on the basis of absence of an adjudicative forum, as this would consist of a breach of article 19(7) of the Constitution that grants a right to fair hearing before an independent and impartial tribunal in all civil matters. As far as the form of action is concerned, in the absence of a specific form what the Tribunal ought to do is to hear this case by way of a common law action by way of a Plaint such as filed in this case.

[32] Whether the compensation agreement, signed in full and final satisfaction, between the parties can oust the jurisdiction of this court.

[33] The Plaintiffs signed a *"compensation letter"*. The letter and its content is not being contested by the parties in this case. Paragraph 2 of the said document is to the following effect *"In consideration of the said payment I hereby agree to indemnify Banyan tree (on behalf of the 1st Defendant) its associated or affiliated companies, its servants and or agents from and against all further claims by me or whomsoever made in respect of the event"*. The payment is said to be accepted by the plaintiffs *"in good will "*and in *"full and final settlement of all claims of whatsoever nature, howsoever arising that the plaintiffs may have now or in the future"* against the 1st Defendant.

[34] It is clear to me that the purport and object of this letter shows an intent on the part of their makers to oust the jurisdiction of the courts from hearing any disputes arising out of the terms and conditions of the said agreements. Given that this is the case the question that arises is whether the parties to the agreement can lawfully agree through contracts to oust the jurisdiction of the courts. It is my considered opinion that they cannot do so and to the extent that they agreed to do so the agreement is contrary to public policy and void. The right to have a dispute heard by a court in civil matters under article 19(7) of the Constitution means that no one can contractually lawfully agree not to sue and even if one agrees to do so voluntarily one can rescind them at will. I find therefore that the *"compensation agreement"* is void as to be contrary to public policy. As it cannot be used by the defendants as a defence against meeting its statutory obligations, if any.

[35] Whether the 2nd Defendant can be made liable for any claims made by the plaintiffs given that it has a separate corporate personality from the 1st defendant.

[36] The liability of the 2nd Defendant as the new owner of the business is a specific one created by statute. It operates by virtue of section 50 of the Employment Act, read as a whole. The liability provisions in this section would prevail above the *Solomon v/s Solomon* Rule of corporate liability as this is a special provisions, which has specific

application in the context of employment law.. This is so given that the Companies Act, in which the rule is found is the general law and the Employment Act is the specific law.

[37] I am of the view that Section 50 of the Act seeks to impose the legal duty of payment of terminal benefits not upon the new owner and employer but upon the previous one. Section 50(1) deals with the transfer of obligations from the 1st employer to the 2nd employer. According to this provision this transfer of obligations takes place when the 1st employer transfer the business undertaking to the 2nd one and the latter accepts the undertaking. On the date of the transfer and acceptance, the 2nd employer becomes the person with the statutory obligations, irrespective of whether the business assets has been transferred or not.

[38] In this case this court can safely assume that the transfer of the obligations had taken place between the 1st and 2nd Defendants. This is so given the content of the letter of the 2nd of November from the 1st defendant to the plaintiffs. However, to my mind this is where the liability of the 2nd Defendant stops. The 2nd Defendant in law only assumes the obligations that the law under section 50(1) places on the 2nd Defendant. The law limits this transfer of obligations under section 50(2).

[39] Section 50(2) of the Act provides that when the transfer of the employer's obligations takes place there is a presumption that arises that the employment of the worker is terminated through no fault of his and the worker has to be compensated regardless of whether they are employed or not by the person to whom the undertaking is transferred. In other words the new employer has the option of retaining the workers in employment, and if he choose not to do so (as in this case), they are deemed to have had their employment terminated without fault by the 1st employer and the latter must compensate the worker. There is thus no collective responsibility to pay terminal benefits in cases of laying off on transfer of ownership. Hence, I will agree with counsel that the 2nd defendant has been wrongly suited in this case as the statutory liability is attached to the 1st Defendant only. Moreover, the separate corporate liability is inapplicable given the specific provisions of the Act.

[40] <u>Final determination.</u>

In my final determination, therefore, I uphold the 1st plea in limine litis raised by both Defendants in this matter and hold that the Employment Tribunal has exclusive jurisdiction in this matter. I further uphold the 2nd plea in limine litis raised by the 2nd Defendant in this case and strike off the 2nd defendant from this suit.

In the interest of justice I forward this file to the Registrar of the Supreme Court and direct her to place this suit before the Employment Tribunal and I further direct the Employment Tribunal to call for the Defence of the 1st Defendant and hear this case on its merits.

Signed, dated and delivered at Ile du Port on 27th January 2020.

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R. Govinden J