27

IN THE SEYCHELLES COURT OF APPEAL

ANTOINE ROSETTE

v

UNION LIGHTERAGE COMPANY

Appeal No. CA/16 of 1994

(Before: A. M. SILUNGWE, E. O. AYOOLA, M.A. ADAM JJ.A)

Mr. J. Hodoul for the Appellant

Mr. K. Shah for the Respondent

Judgment delivered by AYOOLA, J.A.

This is an appeal from the judgment of the Supreme Court (Bwana J.) whereby the respondent's objection to the jurisdiction of the court to entertain the appellant's claim for a judgment ordering the defendant to pay to the plaintiff the sum of R64,210 with interest and cost" was upheld.

At all material times the appellant, who was plaintiff, was a Boarding Clerk employed by the respondent, a company incorporated in Mahe, Seychelles. By a letter dated 22nd October 1992 the respondent terminated the appellant's contract of employment. The appellant lodged a grievance with the Ministry of Employment and Social Affairs and on 7th January 1993 was awarded what was described in the plaint as "statutory benefits for unjustified termination of employment." Alleging that the manner and circumstances of the termination were particularly distressing to him and

...2/

that he had thereby suffered loss and damages, the appellant commenced this action against the respondent, who was then defendant, claiming the total sum of R64,210.00; as to R14,210, being loss of 5 monthly salary, and as to R50,000, being moral damages. The respondent by its defence raised two points "in limine lites" namely:

> " 1. The Supreme Court of Seychelles has no original jurisdiction in the case by virtue of S.4(3) of the Employment Act 1990 as interpreted and applied Valentin versus Beau Vallon Properties Limited (C.S. No. 46 of 1992) ruling dated 29th July 1993;
>
> 2. The Employment Act 1990 has limited the liability in this cause of action and the plaintiff is, therefore, bound to accept the amount determined by the Ministry of Employment in full and final settlement of his claim by reason of Article 1370(2) of the Civil Code of Seychelles."

After hearing counsel on the two points which were taken as preliminary issues, Bwana, J. upheld the contention raised by Mr. Shah, counsel, on behalf of the respondent; that the jurisdiction of the court has been ousted by section 4(3) of the Employment Act, 1990 ("the Act"). He declined to deal with the second point for reasons, as he stated, that his court had no jurisdiction and the appellant had obtained redress from the Minister.

The main contention of Mr. Hodoul, counsel, on behalf of the appellant on this appeal is that the judge was in error in holding that section 4(3) of the Act ousted his jurisdiction when, it was contended, the Act neither made provision for the hearing and determination of such matter as the present one nor provided for the granting of that

...3/

particular remedy. The contention, as I understand it, is that since moral damages could not be awarded under the Act, it was open to the appellant to ask for moral damages by instituting an action. Mr. Shah, counsel on behalf of the respondent argued that the Act was intended to provide a comprehensive piece of legislation covering all employment matters in Seychelles including the payment of monetary award for loss of employment.

The question that is decisive of this appeal is whether the remedy or relief in relation to contract of employment provided by the Employment Act is substitutional or an additional remedy. Can the right to compensation provided for under the Act for unjustified termination co-exist with the right to damages under the Civil Code of Seychelles?

The Employment Act 1990, a unique statute, described in its preamble as an "Act to revise and consolidate the law relating to employment," makes comprehensive provision in regard to contracts of employment. It provides for possible durations of such contracts (section 16(1); the form of such contracts (section 18(1), regulation of wages and conditions of employment termination of such contracts (Part ix), restriction on termination of contracts (section 47(i). It provides its own dispute resolution mechanism in the form of a grievance procedure in section 61.
Apart from a worker whose contract has been terminated pursuant to the sections stated in section 61(i) (a) and (b); either party to a contract of employment may initiate the grievance procedure wherever a dispute, other than one for which the grievance procedure is expressly provided under other provisions of the Act, arises between employer and

.....4/

worker. Sections 61(2)(a)(ii) and (iii) deal with the relief that a worker whose contract of employment is unjustifiably terminated could obtain. Where the termination is unjustified the worker may be re-instated or offered other suitable employment. Where neither is practicable, the termination would be allowed subject in the case of termination for serious disciplinary offence to the payment in lieu of notice of one month's wages. Provisions for compensation for non-Seychellois worker is made but that is not relevant to this case. It seems clear to me that insofar as unjustified termination of a contract of employment is concerned, the provisions of section 61(1)(2)(a) have provided remedies intended to be exhaustive for such breach of contract.

However, Mr. Hodoul relying on a judgment of the Supreme Court in the case of Wilson Laboudallon v U.L.C. rep by Edmond Hoareau (Civil Side No. 42/88: 21st February 1989, (unreported)) submitted that notwithstanding award and payment of compensation pursuant to section 61(2)(a) of the Act, the appellant is entitled to claim moral damages which was not a head of compensation under the Act. Indeed in the Laboudallon case the worker's employment had been terminated contrary to the Employment Act 1985. The Industrial Relations Advisory Board (IRAB) ruled that the termination was unjustified and ordered the employer to pay compensation which the employer duly paid. In an action by the worker for damages for unlawful dismissal, the employer set up as a defence the ruling of the I.R.A.B. and the payment of compensation pursuant to that ruling. Notwithstanding that defence Abban, J. as he then was, said:

> "In my opinion, the plaintiff has been paid what he would have received had his employment been terminated lawfully. So the financial loss which

....5/

> flowed from the unlawful dismissal has been made good by the defendant. Moral damage was the only head which was not considered in the heads of compensation which I have enumerated above. There was no doubt that the plaintiff suffered some mental agony and distress when he was unlawfully kicked out from employment. He must have had anxiety for his future, not mentioning the humiliation he must have experienced. I therefore hold that the plaintiff has suffered moral damage as a result of the defendant's unlawful dismissal, and the defendant must be called upon to repair that damage by paying some compensation."

The above passage from the judgment of Abban J does appear to support the contention that notwithstanding the payment of compensation pursuant to the Act, the worker could still institute an action to claim by way of damages further compensation not provided for in the Act.

For my part, I am constrained to entertain grave doubts whether the above would be the correct view. The tenor of the Act is to make the worker seek his remedy and relief within the Act which, I may observe, also gave his employment ample protection more than would ordinarily have been the case. 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. However, in this case, it is not necessary to decide whether Laboudallon case was rightly decided or not. That case was decided under the 1985 Act which did not contain the ouster clause now contained in the 1990 Act. The issue now raised in the present case whether the jurisdiction of the court is ousted did not arise in the Laboudallon Case. It does seem reasonable to conjecture that

....6/

the ouster clause was introduced into the 1990 Act to avoid the consequence of such cases as Laboudallon Case.

Section 4(3) of the Act provides as follows:-

> "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 the hearing or determination of the matter or granting of the remedy or relief."

It is manifest that the present action is in relation to a contract of employment to which the Act applies. The only question is whether the matter is for the hearing or determination of a matter or granting of remedy or relief which the Act had provided for. The material fact on which the appellant relied for his action is that the manner and circumstances of the termination of his contract of employment were particularly distressing. It is evident that the cause of action and substratum of his action is the unjustified termination. If the termination was justified no cause of action could be founded solely on the "manner and circumstances" of the termination. The Act apart, in my opinion, the manner and circumstances of a breach of contract, if it is relevant at all, may only go to aggravation of damages in the sense that it may occasion an aggravation in the award of moral damages in appropriate circumstances. If the manner and circumstances of the termination of a contract of employment are relevant only to damages, it cannot be said that a claim for moral damages can be pursued notwithstanding that the Act made provisions for compensation payable to a worker whose contract of employment has been unjustifiably terminated.

....7/

The remedy and relief which attend an unjustified termination of a contract of employment have been fully set out by the legislature in the Act. If the legislature had intended that additional compensation is to be awarded having regard to the manner and circumstances of the termination, it would have so provided. As I read the Act, I cannot see how the intention can be imputed to the legislature that the worker could split his remedy or relief consequent on an injustified termination. The whole tenor of the Act is fully to define the rights and liabilities of parties to a contract of employment upon termination of such contract in the provisions of the Act without recourse to the provisions of the Civil Code of Seychelles, the common law or any other law. It could not be the intention of the legislature that upon an allegation of unjustified termination of a contract of employment the worker could initiate a grievance procedure under the Act or elect to pursue his remedy for damages or other reliefs in the court or seek his remedy both under the Act and under the general law. In my view, the Act provided a new remedy which is a substitutional and not an additional remedy. It seems both reasonable and just that the Act having made adequate provisions for compensation and for dealing with cases of unjustified termination of contracts of employment, would take away the jurisdiction of the court to determine those same questions arising from an unjustified termination or indeed touching on whether or not there had been an unjustified termination.

There are of course matters relating to contracts of employment for which the Act has not made provision particularly in regard to granting of remedy or relief. In respect of these matters, the jurisdiction of the court to grant remedy or relief has not been ousted but this case does not fall within such.

It has been faintly suggested in the course of this appeal that the claim in this case was in delict. Wisely and, in my view, rightly, this course of argument has not been strongly pursued. Although there may be an apparent blurring of the boundaries of tort and contract in some cases such as where the same set of acts or omission may be a tort or a breach of contract, or where remedy by way of compensation for non-pecuniary losses is available in contract as it is in tort, such blurring is merely superficial. A certain demarcation between delict and contract is that whereas in the latter the conduct of the wrongdoer is a wrongful conduct independently of the consensus of the tortfeasor and his victim, in the former it is the parties who have themselves pre-determined by their agreement what would be wrong conduct or omission. A wrongful termination of contract of employment is a breach of contract. It may be done in a manner as to attract aggravated damages but it does not by that fact become a delict. However, if in the course of terminating a contract the employer committed a delict, such, for instance, as libel or assault, that act which amounted to the delict would be a separate cause of action apart from the unjustifiable termination. Such is not the position in this case in which what was claimed may in appropriate circumstances only be a head of damage in a claim for unjustified termination.

Since this case at the Supreme Court was disposed of on the ground of jurisdiction, I do not think it is worthwhile to comment on the remarks made by the judge in regard to Art 1370(2) of the Code of Civil Procedure of Seychelles. Also, since no constitutional issue has been raised on this appeal, it is not necessary, notwithstanding the learned Judge's anxiety in that regard, to comment on the constitutionality or otherwise of the ouster provision of the Act.

....9/

In my judgment, the learned Judge was right in holding that he had no jurisdiction to entertain the action. In the result, I would dismiss the appeal with costs to the respondent to be assessed.

(E. O. AYOOLA)
Justice of Appeal

Delivered in open court
by V. Allecan C. J.

V. Allecan
C. J
18/5/95

IN THE SEYCHELLES COURT OF APPEAL

CIVIL APPEAL NO. 16 of 1994

ANTOINE ROSETTE — APPELLANT

v

UNION LIGHTERAGE CO LTD — RESPONDENT

Before: Silungwe, Ayoola and Adam, JJA.

Mr. Hodoul for the Appellant
Mr. Shah for the Respondent

JUDGMENT OF ADAM, J.A.

This is an appeal against the Ruling given by Bwana J. on a plea in limine litis raised by Respondent. Mr Shah for the Respondent submitted to the learned Judge that section 4(3) of the Employment Act, 1990 ousted the jurisdiction of the Supreme Court; that the same Act has limited liability so that the Appellant must accept the amount determined by the Ministry of Employment; and that the Appellant could not claim moral damages. For this he relied on the Supreme Court judgment in Mike Valentin v Beau Vallon Properties Ltd; Civil Side No. 46 of 1992. Mr Bonte for the Appellant submitted to the learned Judge that the grievance procedure avails the Appellant with the benefits under the Act but any loss or damages which arises that is not covered by the Act does not oust the jurisdiction of the Supreme Court. He argued that Valentin v Beau Vallon Properties, supra, could be distinguished.

Bwana J. agreed with the decision in Valentin v Bean Vallon Properties, supra, that the jurisdiction of the Supreme Court had been ousted; that as for Article 1370(2) of the Seychelles Civil Code there

was no need to deal with it now; that the Appellant could not file, in the absence of pleadings to the contrary, in accordance with section 71 of the Seychelles Code of Civil Procedure another Plaint involving the same parties; that initially the Appellant obtained redress from the Ministry of Employment and if there are further fresh claims arising from the same subject matter involving the same parties it was logical and proper and in compliance with Article 1370(2) that the Appellant goes back to the Ministry of Employment.

In his Memorandum of Appeal the Appellant's grounds are that the learned Judge was wrong to hold, that his jurisdiction was ousted; that further relief sought by the Appellant could be awarded by the Ministry of Employment; that under Article 1370(2) the Appellant was barred from obtaining further relief from the Supreme Court in addition to those under the Act; and that he was wrong to find that the Plaint disclosed no cause of action.

Before us Mr Hodoul on behalf of the Appellant submitted that there was no ouster of the Supreme Court's jurisdiction where that particular legislation did not deal with the matter. The Appellant's contention was that the Employment Act, 1990 did not cover what constituted his claim under the Plaint. Mr Hodoul referred to sections 47(2)(b)(i); 62(2)(c) and 63 of that Act. He argued that in the Plaint the Appellant sought consequential damages as a result of unjustified termination of his employment and delictual moral damages, which were not dealt with by that Act and Article 1370(2). The Act covered contractual moral damages. He asserted that under that Act the Ministry of Employment could not grant additional further relief under fresh claims that arose. He submitted that under the Employment Act,

1985 – which did not have the equivalent of section 4(3) of the 1990 Act – moral damages were awarded in Wilson Laboudallon v Union Lighterage Co Ltd., Civil Side No. 42 of 1988.

Mr Shah on behalf of the Respondent countered that the Appellant received what his entitlement was under that Act. He submitted that the learned Judge did not deal with Article 1370(2) and that even if he had done so the Appellant's claim would have been barred by Article 1370(2).

The Employment Act, 1990 is an "Act to revise and consolidate the law relating to employment". Section 4(3) of that Act states as follows:

> (3) 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 the hearing or determination of the matter or granting of the remedy or relief".

Section 47(1) provides that an employer shall not terminate, or give notice of termination of, a worker's contract of employment unless negotiation procedures are complied with. Section 47(2) makes provision consequent upon the negotiation procedure and where the competent officer determines that a contract of employment be terminated where the worker is not at fault the employer shall pay compensation to him in accordance with that section. Section 52(2) provides for serious disciplinary offences. Section 57(4) provides that notwithstanding section 47 an employer may terminate a contract of employment without notice where the worker has committed a serious disciplinary offence. Section 57(5) provides that an employer shall not, otherwise than under section 57, terminate the contract of employment

of a worker. Section 61(1) makes provision for the grievance procedure. Section 62 makes provision for compensation upon termination of employment from a determination of the competent officer and states that his ruling is final.

In his Plaint the Appellant averred that he lodged a grievance with the Ministry of Employment and was awarded statutory benefits for unjustified termination of employment. He also averred that the manner and circumstances of his termination was particularly distressing to him and so he has suffered loss and damages. He claimed for loss of salary and moral damages.

In the Respondent's Defence under In limine litis the Respondent averred that the Supreme Court had no jurisdiction in the matter by virtue of section 4(3) and that the Act has limited the liability of the Respondent, therefore, the Appellant was bound to accept the amount awarded by the Ministry of Employment in full and final settlement of his claim by reason of Article 1320(2).

Mr Hodoul's argument is that the Act covered contractual "moral damages" whereas the Appellant seeks in his Plaint delictual "moral damages". Section 4(3) of the Act refers to the hearing or determining of any matter or the granting of any remedy or relief in relation to a contract of employment. Section 47(2) makes provision consequent upon the negotiation procedure and the compensation to be paid as calculated in terms of section 47(2)(b) or (c). Section 62 also makes provision for compensation upon termination and provides that compensation is payable to the worker, in addition to his wages and

any benefits earned, in accordance with section 47(2)(b) or (c). The Act defines "wages" but does not define compensation.

In Valentin v Beau Vallon Properties Ltd, supra, Perera J. relying on Wilkinson v Banking Corporation (1948) 1 KB721 and Barraclough v Brown (1897) AC 615 said:

> "As regards the claim for moral damages, every worker whose termination of employment is found to be unjustified would undoubtedly suffer pain of mind, loss of reputation, etc. It could not be stated that the legislature was oblivious of this aspect when making provision for compensation".

In Laboudallon v Union Lighterage Co, supra, where the plaintiff's termination of employment was unjustified and the employer was ordered and did pay compensation, Abban CJ on a claim for moral damages awarded the plaintiff SR 4000. In that case the Employment Act 1985 was operative and it would appear that the learned Chief Justice was of the view that the compensation paid to the plaintiff did not cover the moral damages claimed by him.

Be that as it may, in light of the specific provisions in relation to compensation in the Employment Act, 1990, Perera J was correct in his observation pertaining to this and the state of the knowledge of legislature concerning this. However, when considering the word "may" in section 61(1) he said that this should be construed as being mandatory. But that section 61(1) deals with the employer's termination of a probationary worker and, of a worker for serious disciplinary offences, as well as the termination by a worker of his employment. In light of this, to interpret "may" as being mandatory and so making it obligatory for him, does not, in my view, accord with the tenor of the legislation.

It has not been disputed that the Appellant's remedy or relief in relation to his contract of employment was governed by the Employment Act, 1990 and that it provided for such remedy or relief. The argument that the Act covers "contractual" moral damages and not "delictual" moral damages cannot in the circumstances of this case stand up to close scrutiny despite Mr Hodoul's valiant effort since we are asked, in interpreting the provisions of the Employment Act, 1990, to read into it that "delictual" moral damages are excluded.

In the result I am satisfied that there is no substance in this appeal which is dismissed with costs.

Dated at Victoria this 18th day of May 1995

M. A. Adam

Mahomed Ali Adam
JUSTICE OF APPEAL

Delivered in open Court
by M. Allean C.J.

M Allean
C.J
18/5/95.

IN THE SEYCHELLES COURT OF APPEAL

ANTOINE ROSETTE APPELLANT

v

UNION LIGHTERAGE COMPANY RESPONDENT

Civil Appeal No. 16 Of 1994

Before Silungwe, Ayoola & Adam JJA.

Mr J. Hodoul for the appellant
Mr K. Shah for the respondent

JUDGEMENT OF SILUNGWE, J.A.

This is an appeal against the ruling of Bwana, J.S., in which he upheld the respondent's plea in limine litis on the ground that the Supreme Court had no jurisdiction to hear this case by virtue of section 4(3) of the Employment Act 1990 (hereafter referred to as the Employment Act).

The appellant, who had been employed as a clerk by the respondent, was dismissed on October 22, 1992. He then invoked the "Grievance Procedure" pursuant to section 61 of the Employment Act. This was apparently done on January 7, 1993. To use the appellant's own words, the Minister of Employment and Social Affairs (hereafter called the Minister) "awarded (him) statutory benefits for unjustified termination of employment."

On April 27, 1993, however, the appellant filed this action before the Supreme Court, averring that the manner and circumstances of the termination of his employment had been particularly distressing to him and that, in the premises, he had

suffered loss and damages particularised as follows:

(i)	Loss of 5 months' salary	R14,210
(ii)	Moral damages	R50,000
	Total	R64,210

He further sought interest on the principal sum, plus costs. But, as previously stated, the Supreme Court ruled, on the strength of Valentin v Beau Vallon Properties Ltd., a Supreme Court case, Civil side No. 46 of 1992, that it had no jurisdiction to hear the case.

On appeal, Mr. Hodoul argued that the learned trial judge had been wrong to hold that the jurisdiction of the Supreme Court of Seychelles is ousted by section 4(3) of the Employment Act. His reason for this line of argument was that the appellant had sought a remedy which was not provided for under the Employment Act. He submitted that the Minister had found that the appellant's dismissal was unlawful and that, as a result of the said dismissal, his client had been unable to find employment for 5 months, i.e., February, March, April, May and June; and that he had suffered moral damages.

Section 4(3) of the Employment Act provides:

"4(3) 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 the hearing or determination of the matter or granting of the remedy or relief."

All contracts of employment in the country fall under the Employment Act with the exception of those contracts that are, by order, exempted by the Minister under section 4(2) of the Employment Act. It is not in dispute that the appellant's contract of employment was caught by the provisions of section 4(3). The bone of contention was that the relief that the appellant had sought was not provided for under the Employment Act and that, for that reason, the Supreme Court had jurisdiction to entertain his action. Wilson Laboudallon V. U.I.C. Civil Side No. 42 of 1988 in which the Supreme Court had awarded moral damages for unlawful dismissal after the case had been dealt with by the Industrial Relations Advisory Board, cannot in any way be supportive of the present appeal because that case had been decided before the coming into force of the 1990 Employment Act.

On the issue under consideration, I take the view that, as the appellant's contract of employment had fallen within the purview of the Employment Act, the Supreme Court's jurisdiction was ousted. The fact that the relief available and obtained under the Act was of a limited nature, and might not have possibly catered for the appellant's claim in this case, is neither here nor there.

It was further argued that the learned trial judge had been wrong to hold that the additional relief sought by the appellant could be awarded under the Employment Act which he had already granted to the appellant. This point was well taken but, in the final analysis, the learned trial judge's misdirection on this

point was obviously of no consequence.

There was a submission on Article 1370(2) of the Civil Code to the effect that the learned trial judge had been wrong to hold that, under that Article, the appellant was debarred from obtaining further relief from the Supreme Court, in addition to the relief already obtained under the Employment Act. This submission was misconceived as the learned trial judge had not considered the Article; he had merely alluded to it.

On account of what has already been said, I am satisfied that the only course open in this case lies in the dismissal of the appeal.

Dated at this day of 1995

A.M. Silungwe
Justice of Appeal

Judgment delivered in open court in the presence of Counsel

A.R. Nyirenda
JUDGE
12/6/95