CIVIL COURT – FIRST HALL

THE HON. MADAME JUSTICE MIRIAM HAYMAN

Application Number: 133/2021 MH

Today, 8th of March 2023

Florin Coseraru (British Passport Number 503218979)

vs

Bank of Valletta P.L.C. (C-2833)

The Court:

Having seen **plaintiff's application of the 16th February 2021** by virtue of which he is requesting the Court in terms of article 7 of the Protection of the Whistleblower Act (Cap. 527 of the Laws of Malta) to –

i. Declare according to article 7 of the Act that he was a victim of a detrimental action taken against him in retaliation for protected disclosure and/or that he was a victim of "*detriment at the place of work";*

ii. Order the defendant Bank to remedy that action in accordance with article 7 (1) (a) and/or article 7 (3) of the Act;

iii. Make an interim order and/or grant an interim injunction as deemed appropriate in terms of article 7 (2) of the Act; until a final decision is taken about plaintiff's claims;

iv. Liquidate and order the payment of damages, including but not limetedly moral damages in terms of article 7 (3) and article 8 of the Act;

v. Order defendant bank to pay all the expenses in line with article 7 (6) of the Act.

Having seen the documents and the list of witnesses annexed to the sworn reply.

Having seen **the reply of defendant Bank of the 29th April 2021**[1] by virtue of which it raised a preliminary plea of *lis alibi pendens* and in merit rebutted all of plaintiff's claims as unfounded in fact and at law.

Having seen the list of witnesses annexed to the reply.

Having seen its **decree of the 2nd March 2022** by virtue of which the Court ordered that the proceedings continue in the English language.

Having seen that during the sitting of the 31st May 2021 it ordered the parties to bring evidence in relation to the plea of *lis alibi pendens* raised by defendant Bank.

[1] Fol 20

Having seen all the evidence brought forward by the parties in relation thereto.

Having heard the oral submissions made by the lawyers of the parties.

Having seen that the case was adjourned for judgement for today about the plea of *lis alibi pendens*.

Having seen all the other acts of the case.

Considered:

From the acts of the case it transpires that -

i) Plaintiff was an employee of defendant Bank on a contract for a definite period of time starting on the 3rd February 2020 up to 2nd February 2022[2]. According to clause 1.3, at its sole and exclusive discretion, the Bank may opt to renew the contract for a further period of employment not exceeding 2 years in aggregate from the date of employment.

ii) He claims that his job was terminated on the 15th February 2020 only one day after he requested the Bank to give him a copy of the Whistleblowing Policy of the Bank and this after he had been filing reports in good faith about what he deemed as *"inappropriate practices"* about regulatory matters, which matters were allegedly not investigated by the Bank;

iii) As a result of this termination plaintiff is also seeking redress in front of the Industrial Tibunal in the case number 3917/MD *Florin Coseraru vs Bank of Valletta plc*. The case was filed on the 13th November 2020. The defendant Bank

[2] Fol 33 et seq

raised a preliminary plea that the Tribunal does not have jurisdiction to hear the case because plaintiff's dismissal took place during his probationary period. In front of the Tribunal plaintiff claimed that –

- He was an employee of defendant Bank on a contract for a definite period of time (two years) starting on the 3rd February 2020;

- His job was terminated on the 15th February 2020 only one day after he requested the Bank to give him a copy of the Whistleblowing Policy of the Bank and this after he had been filing reports in good faith about what he deemed as *"inappropriate practices"* about regulatory matters, which matters were allegedly not investigated by the Bank;

- His employment was terminated while he was still under probation;

- The reason why his job was terminated was due to his victimisation after he had filed the above mentioned reports to the Bank.

iv) He requested the Tribunal to –

- Hear his complaint in terms of article 30 of Cap.452;

- Conduct the necessary investigations in terms of article 30 (1) of Cap. 452;

- Award him a compensation for the losses and damages he suffered as a result of the said events if the Tribunal finds in favour of his claims.

iv) On the 26th November 2020 plaintiff filed an *"external Whistleblowing Disclosure"* with the Malta Financial Services Authority. The investigation by the Authority is ongoing;

v) On the other hand the Bank denies, among other things, that plaintiff is a victim of a detrimental action. According to the Bank, plaintiffs's employment was not terminated due to the reports he made about alleged inappropriate practices but because the same Bank, *qua* employer chose to terminate the employment during the course of the probationary period. The Bank insisted that it was unfounded that plaintiff's employment was terminated when he requested a copy of the whistleblowing policy of the Bank; rather it was plaintiff who asked for the said policy after he got to know that his employment was going to be terminated. The Bank argues that plaintiff is using these allegations to try and get his job back.

Preliminary Plea

The first plea of defendant Bank states –

"Preliminarjament, il-lis alibi pendens, billi l-kwistjoni mertu ta' din il-kawża diġa' tifforma mertu ta' proċeduri li l-istess rikorrent ħa kontra l-esponenti permezz ta' proċeduri quddiem it-Tribunal Industrijali fil-każ numru 3917/MD fl-ismijiet Florin Coseraru vs Bank of Valletta plc, fejn jallega li ġie mkeċċi mix-xogħol u vittimizzat minħabba li għamel rapport dwar prattiċi mhux xierqa u talab li l-esponent jiġi kundannat iħallsu d-danni li jallega li ġarrab b'konsegwenza."

With regard to the plea of *lis alibi pendens*, **article 792 of Cap. 12 of the Laws of Malta** provides that -

"Where an action is brought before a competent court after another action in respect of the same claim has already been brought before another competent court, the second action may be transferred for trial to such other court."

Article 794 of the Act stipulates that -

"(1) The plea of lis alibi pendens or of connection of actions may be raised at any time until judgment is delivered.
(2) The court shall determine the plea; and if such plea is disallowed, the court may at the same time decide on the merits of the action."

As is clearly shown in the wording of the above quoted provisions of the law, pleas raising the *lis alibi pendens* necessarily require the existence of two court cases that are being heard contemporaneously, and which are both pending in front of the courts and have the same merit. The institute of *lis alibi pendens* is in fact intended to avoid conflicting judgements about the same merit between the same parties.

Should it transpire that proceedings which are brought before a competent court after another set of proceedings about the same merit are already pending, then in terms of article 792 of the Act, the Court in front of which the last proceedings were instituted, may transfer them to the other court so that they are heard and decided upon by that other court.

In the case **Paolo Gatt et vs Fayton Falzon et decided on the 15th October 2015**[3] the Court stated that -

[3] App No. 918/2014

*"L-iskop tal-eċċezzjoni tal-lis alibi pendens hu li jimpedixxi li fuq l-istess kontroversja bejn l-istess partijiet jiġu mogħtija minn żewg qrati differenti żewġ sentenzi, li jista' wkoll, ikunu inkonciljabbli. (**Vol 34 p 358**). Skont il-ġurisprudenza tal-Qrati tagħna, l-eċċezzjoni tal-lis alibi pendens hija fondata fuq l-istess tlett elementi ta' res iudicata: eadem res, eadem causa petendi u eadem personam. (**Crocefissa Sammut et. v Joseph Spiteri et.** - App. Ċiv. 10 ta' Ottubru 2003; **Dingli Co Int.l Ltd noe. V Rainbow Productions Ltd** – PA(RCP) 12 ta' Ottubru 1999)."*

In the case **Joseph Chetcuti et vs Jason Caruana et decided on the 20th May 2019** the Court added that -

"Fir-rigward ġie imfisser li:

La litis pendentia si verifica quando due azioni identiche sono proposte davanti a giudici diversi. È necessario quindi che lo stesso diritto sia fatto valere in giudizio, tra le stesse parti, inanzi a due giudici diversi (identità di soggetti, petitum, causa petendi). Quando vengono proposte contemporaneamente due azioni identiche, il legislatore impone di eliminare uno dei due processi sulla stessa controversia, per evitare uno spreco di attività processuale e sopratutto il pericolo di un contrasto di giudicati.

*Fil-kawża **Anatoli Reznikov et. vs. Nikolai A. Kotivov pro et noe** deċiża mill-Qorti tal-Kummerċ fl-24 ta' Marzu 1994 gie kkunsidrat illi:*

The plea is somewhat parallel with the plea of exceptio rei judicatæ. Just as a suit cannot be decided upon more than once, so also there cannot be at the same time more than one judicial relation between the same persons on the same merit, because this would imply a plurality of decisions on the same issue. The effect of

the plea of litis pendentia in the words of section 792 of the Code of Organization and Civil Procedure is that the court before which the second action is brought may order the suit to be remitted to the first court. In fact, doctrine and case law in the matter are to the effect that it is in fact mandatory for the court to declare its own incompetence ex officio if such plea is founded, in spite of the use of the word 'may' in the said section quoted herein.

The essential condition for this plea is the identity of the two actions which results from the identity of all the elements thereof, i.e. the parties, the subject matter and the case of the demand.

Huwa risaput, anka mill-insenjament hawn kwotat, illi l-Qorti tista' hija stess tissolleva ex officio l-eċċezzjoni tal-lis alibi pendens meta jinġieb a konjizzjoni tagħha li hemm proċedura oħra pendenti quddiem Qorti oħra li tkun f'posizzjoni aħjar minn dik il-Qorti sabiex tisma' l-kawża. L-eċċezzjoni tal-litis pendentia hija ta' ordni pubblika u hija għalhekk li din l-eċċezzjoni tista' tiġi sollevata ex officio.

Sabiex tirnexxi l-eċċezzjoni tal-lis alibi pendens iridu jissussistu tliet rekwiziti: (i) iż-żewg kawżi jridu jkunu bejn l-istess partijiet u dawn ikunu qegħdin jaġixxu fl-istess kwalità (eadem personae); (ii) iż-żewġ kawżi jrid ikollhom l-istess suġġett (eadem res); (iii) it-talbiet fiż-żewġ kawżi irid ikollhom l-istess causa (idem ius u eadem causa pretendi) u dawn iridu jirriżultaw ictu oculi."

Applied to the facts of the case the Court makes the following observations –

1. The first requirement connected to this plea is satisfied because the parties in both proceedings are the same and they are both acting in the same capacity;

2. With regards to the second requirement, it also transpires that both actions stem from the same set of events, namely the redress sought by plaintiff following the termination of his employment by the Bank for reasons which he deems are in breach of the law. So this criterion is satisfied;

3. It is the third requirement which however the Court considers is not satisfied for the following reasons –

i) The two proceedings are filed in front of different fora with different powers and jurisdictions under different laws. The first proceedings were filed in front of the Industrial Tribunal in terms of Cap. 452 of the Laws of Malta. Plaintiff's claims are made in terms of article 30 (1) of that Act. It is to be pointed out that article 30 (4) of that Act does not exclude the right of an individual who opened proceedings in front of the Tribunal to also lodge another action concerning related issues in front of the Civil Court. Article 30 states that –

(1) A person who alleges that the employer is in breach of, or that the conditions of employment are in breach of articles 26,27, 28 or 29, may within four months of the alleged breach, lodge acomplaint to the Industrial Tribunal and the Industrial Tribunal shall hear such complaint and carry out any investigations as itshall deem fit.

(2) If the Industrial Tribunal is satisfied that the complaint is justified, it may take such measures as it may deem fit including the cancellation of any contract of service or of any clause in a contractor in a collective agreement which is discriminatory and shall orderthe payment of compensation for loss and damage sustained by theaggrieved party as a consequence of the breach.

(3) For the purposes of hearing and deciding cases of alleged discrimination, breaches of the principle of work of equal value,victimisation or harassment, the

Industrial Tribunal shall becomposed of a chairperson alone in the manner set out in article73(4).

(4) ***Any action taken by a complainant in accordance with the provisions of this article shall be without prejudice to any further action that such complainant may be entitled to take under anyother applicable law and shall also be without prejudice to anyother action to which the respondent may be subject in accordancewith any other applicable law[4].*** *"*

ii) On the other hand, the second proceedings were filed by plaintiff in front of the First Hall Civil Court after those of the Tribunal but in terms of article 7 of Cap.527 which states that -

7.(1) A person who believes that detrimental action has been taken or is to be taken against him in reprisal for a protected disclosure may file an application to the First Hall, Civil Court for –

(a) an order requiring the person who has taken the detrimental action to remedy that action; or

(b) an injunction.

(2) The court, pending the final determination of an applicationunder this article may –

(a) make an interim order; or

(b) grant an interim injunction.

[4] Emphasis by the Court in bold type

(3) If, in determining the application under sub-article (2) the court is satisfied that a person has taken or intends to take detrimental action against a person in reprisal for a protected disclosure, the court may:

(a) order the person who took the detrimental action toremedy that action and determine the amount ofdamages, including, but not limited to, moral damagesas the court may determine, due to the person whosuffered the detrimental action; or

(b) grant an injunction in any terms the Court considersappropriate.

(4) In proceedings referred to in sub-article (1), where thewhistleblower establishes that he made an internal, external orpublic disclosure and suffered a detriment, it shall be presumed that the detriment was made in retaliation for the report or the public disclosure. In such cases, it shall be for the person who has taken the detrimental measure to prove that, that measure was based onduly justified grounds.

(5) Notwithstanding the provisions of the Code of Organizationand Civil Procedure, an injunction granted in terms of sub-article (3)(b) shall be for an indefinite period until an application for itsrevocation is made and need not be followed by an action on themerits. The provisions of articles 873 and 875 of the Code of Organization and Civil Procedure shall apply to warrants issuedunder sub-article (3)(b).

(6) The provisions of articles 829 to 838B of the Code of Organization and Civil Procedure shall not apply to injunctions granted in terms of sub-article (3)(b).Cap. 12.

(7) Notwithstanding the provisions of Schedule A of the Code of Organization and Civil Procedure, no registry fees shall be charged on an application filed in

the First Hall of the Civil Court by the person referred to in sub-article (1) but, if granted, an award on costs shall be made against the respondent.

iii) So it is apparent that in similar situations as the case in front of this court, the **clear** intention of the legislator was to allow actions being filed concurrently both under Cap 452 of the Laws of Malta in front of the Industrial Tribunal and under Cap.527 in front of the First Hall Civil Court. One does not exclude the other but thus certainly exclude the application of the *litis pendentia* invoked. This is possible because the jurisdictions don't overlap. Whilst, for the purpose of the present case, the remit of the Industrial Tribunal is to investigate and provide redress as necessary with regard to alleged victimisation referred to in article 28 of the Act and in accordance with article 30 of Cap 452, the remit of the Court in these proceedings is to investigate whether a detrimental action has been taken or is to be taken against a person in reprisal for a protected disclosure in line with article 7 of Cap 527. Should that be the case, a monetary compensation may be awarded.

iv) In fact as stated in his application in front of the Industrial Tribunal, plaintiff filed those proceedings *"mingħajr preġudizzju għal kwalunkwe drittijiet oħra tar-rikorrent, inkluż illi jintavola azzjoni ulterjuri ai termini tal-Kap 527 u illi jintavola kwerela ai termini tal-artikolu 32 tal-Kap 452 stante illi ksur tal-artikolu 38 huwa reat."*

v) another point to be taken into consideration is the very wording of the law, article 792 referred clearly speaks of identical actions brought in front of two different *competent court*s, Article 3 and 4 of Chapter 12 of the Laws of Malta define in a comprehensive manner the Maltese Courts to the exclusion of any other tribunal.

As a result, the plea of *lis alibi pendens* has not been proven.

For all the above reasons the Court decides to reject the first preliminary plea of defendant Bank and orders the continuation of the case. Costs are to be borne by the defendant Bank.

Hon. Dr. Miriam Hayman LL.D.
Judge

Victor Deguara
Deputy Registrar