Dacruz J. v Seacom Ltd

2023 IND 23

Cause Number 448/14

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

Jack Dacruz

Plaintiff

v.

Seacom Ltd

Defendant

Judgment

The salient facts of this plaint as amended are as follows:

Plaintiff who was at all material times employed by Defendant as from on or about October 2008 as a Financial Controller had his last average monthly remuneration in the amount of 8,348.58 USD. By way of a letter dated 28.3.2014, his employment was terminated by Defendant. According to him, such termination was most unwarranted, unfair, unjustified and arbitrarily done.

There was a performance appraisal every year and Plaintiff always met the set target.

Moreover, Defendant has failed to hold any disciplinary committee or any other committee and has not offered any hearing (which it was duty bound to do) prior to his dismissal.

Thus, Plaintiff has claimed that Defendant is indebted to him as alleged in the sum of Rs 4,990,003 namely 168,560 USD as per a breakdown given in the amended plaint namely severance allowance, untaken leaves and salary short paid since on or about the year 2010 until on or about March 2014 and has moved for the Court to give a judgment condemning and ordering Defendant to pay to him the said sum.

Defendant, for its part, in its amended plea, has denied being indebted to Plaintiff in the sum of Rs 4,990,003 or in any other amount. It has averred the following:

(a) Defendant is the wholly- owned subsidiary of Seacom Capital Ltd (the 'Parent Company') incorporated under the laws of Mauritius. Defendant and the Parent Company form part of the Seacom Group (the 'Group').

(b) In addition to the Defendant and the Parent Company, the Group comprises of entities incorporated in Mozambique, Tanzania, Kenya, Uganda and France;

(c) The persons employed in Mauritius and forming part of the accounting and financial department (the 'Department') reported to the Chief Financial Officer (the 'CFO') who ultimately has the supervision and oversight of all accounting and financial operations of the Group.

(d) As a staff member of the Department, the Plaintiff reported directly to the CFO.

(e) Given that the Department staff was supervised from South Africa, the CFO coordinated the activities of the Department via email, telephone and video conference calls, and also had to travel to Mauritius, which proved to be ineffective, inefficient and costly due to the lack of any line of sight on the day-to-day activities of the Group's accounting function;

(f) The Defendant had to review the effectiveness of its global business, including the effectiveness of maintaining separate accounting and financial operations in Mauritius;

(g) The Defendant decided to consolidate the Department with all of the accounting operations located in South Africa, other than those day-to-day accounting functions currently carried out in each of the operational subsidiary offices (the 'Decision');

(h) The Decision was taken as there was a duplication of the finance roles in Mauritius and South Africa, the time difference between the countries did not optimize the efficiency of resources inasmuch as four working hours per day were lost, additional costs were incurred in sending documents between the countries, and most importantly there was a lack of daily supervision and oversight by the senior management located outside of Mauritius;

(i) This policy-driven Decision however entailed the closing down of the Department and the termination of employment of employees including that of the Plaintiff; and

(j) The termination of the Plaintiff's employment was therefore justified on economic and structural grounds.

(k) Defendant has denied that performance bonus formed part of the total monthly salary as the payment of such performance bonus was at the discretion of Defendant and was based on individual performance.

(l) Personal appraisal is of no relevance to the present case as the termination of Plaintiff's employment was justified on economic and structural grounds.

(m) Plaintiff was paid strictly according to his contract of employment and he chose to be paid in United States Dollars instead of Mauritius Rupees although Defendant was prepared to pay him in the latter currency. During the term of his employment, Plaintiff has never raised an issue with the Defendant as regards the alleged underpayments in salary. He was fully aware of the annual paid leave policy (the 'Policy") of the Defendant. Defendant did compensate Plaintiff partly and was working out a complete compensation package in good faith whilst Plaintiff persistently made unwarranted and unfounded accusations towards Defendant in order to claim severance allowance which was not accepted as the termination was justified on economic and structural grounds. It is evident that Plaintiff is bent on obtaining monetary compensation from the Defendant (which in the present circumstances has no legal basis), as demonstrated by his bad faith throughout the negotiations in April 2014 and thereafter. Thus, it has prayed that the Court sets aside the claim with costs.

The case for the Plaintiff rested solely on the evidence given by Plaintiff himself and that of the Defendant rested solely on the evidence given by Mrs. Jackie Demetriou in her capacity as Chief Human Resource Manager and Administrative Officer.

The unrebutted evidence given by the Plaintiff and the Defendant's witness boils down to the following:

- Defendant owns a cable under the sea and sells internet capacity on that cable. Seacom Capital Ltd (the 'Parent Company') incorporated under the laws of Mauritius wholly owns the Defendant company which has 7 subsidiaries. Defendant and the Parent Company form part of the Seacom Group (the 'Group').

- Plaintiff as Financial Controller had to consolidate and oversee the billing accounts of 3 East African countries namely Mozambique, Tanzania and Kenya and of Mauritius and report to the Chief Financial Officer (the 'CFO') of the Group who has the supervision and oversight of all accounting operations of the Group.

- The cable starts in South Africa and then runs on the East coast of Africa up to North of Africa where one leg goes to Marseilles in France and another leg goes to Mumbai. Defendant could be spoken as an international organization as it has got its presence in many countries. So, the cable itself is run on the coast and the cable itself runs into international water and then there is a branch of it that connects to the eastern countries like Mozambique, Tanzania and Kenya.

- As regards Mozambique, Tanzania and Kenya the cable runs on their coasts but as regards Mauritius the cable does not run on its coast but in international water only.

- There are 2 parts when Defendant is selling capacity on the cable, the local part and the part on international water. The said African countries sell capacity on the cable and which was done through Defendant. Thus, they have their subsidiary offices where the internet capacity is billed locally because the cable runs on their coasts and then Mauritius bills for the part of the cable on international water through the Plaintiff for Defendant.

- So, the local countries having their subsidiary offices were supposed to raise an invoice for only part of the services on the total cable. For example, if we take Mozambique, Defendant sells capacity on the cable with TDM which is the telecommunications company of Mozambique. Say for 100 million USD, 90 million USD is going to be invoiced by Mauritius and only 10 million USD will be invoiced locally. That would be roughly that proportion. In other words, the Mozambique office would invoice its clients in Mozambique for services which are provided for the Mozambique part. The same thing for Tanzania and Kenya. There was an Accountant for each country. The three Accountants for the three African countries were under Plaintiff's responsibility and they would also send him their figures and he was doing the consolidation for the account in Mauritius for the audit purpose as Financial Controller and there was another staff, one Mr. David Mercer who was doing the consolidation for the management account on a monthly basis.

- There is a sort of group convergence partners and there are several organizations that own and have an interest in Defendant in terms of shareholdings as per Doc. F.

- At some point, Defendant appointed a Finance Manager in South Africa after Plaintiff joined the Defendant company. An entity was incorporated in South Africa as the latter was set up in order to benefit from the new regulation in place in South Africa which is about international headquarters. The international headquarters were supposed to provide the same sort of services as the Defendant in Mauritius, that is, tax incentive and all sorts of incentives and then there was the plan to transfer the whole Defendant company to South Africa under the international headquarters scheme which did not materialize. So, Defendant decided to stay in Mauritius and the CFO of the Group was based in Mauritius as well.

- Subsequently, the CFO left Mauritius to be based in South Africa. Thereafter, there was a Board decision of Defendant as recommended by the CFO to have the whole accounting department forming part of the finance department of Defendant transferred to South Africa in view of operational efficiencies and policy-driven reasons.

- In order to implement the decision of the Board, as per a letter dated 28.3.2014 namely Doc. J. which was sent by the Defendant to all its employees namely Plaintiff and his 3 colleagues whereby he was informed of the decision of the management as follows:

  "(…) to eliminate the operational inefficiencies and difficulties that come with having the accounting function located in a different country from that in which the CFO resides. These include the duplication of finance roles, the four working hours per day during which the two offices are not both open, the costs of couriering documents backwards and forward and the lack of senior management oversight over the accounting function on a day to day basis."

- On 28.3.2014, it could be after 1.00 p.m. when he was informed of the decision of the Defendant company to terminate his employment and it could be that he left the premises around 2.00 p.m. He and his colleagues did not leave within 30 minutes as they needed to pack as much as they could and it was a big shock to all of them. As per the letter dated 28.3.2014 namely Doc. D., he was informed that Defendant had decided to outsource most of the administrative and support services to the South African company. Those outsourced services included oversight of financial management systems used by all Seacom entities. He was also informed that over the past few months, Defendant had been reviewing the effectiveness of maintaining separate accounting and financial operations in Mauritius and had, for various policy reasons relating to efficiency and oversight, decided to consolidate those functions with other key administrative and small services and moved all its accounting operation to South Africa other than the accounting functions currently carried out at the operational subsidiary offices. Defendant said in spite of its endeavours, that change would bring about a reduction in the workforce and it was with regret that he was advised the position that he currently occupied would be made redundant. By that letter he was hereby given notice that his employment with Defendant would be terminated with effect from 31 of March 2014. The decision was not related to his work performance but was solely based on policy and operational efficiency reasons. There was an offer that was made and at the penultimate part of the letter, it was said that please consider its proposed payment and revert with his response at the meeting scheduled for Tuesday 1.4.2014 at 1.00 p.m.

At this stage, **the contentious issue as per the Plaintiff's testimony** is that true it is that there was a Board decision of Defendant to terminate his employment including the 3 others in the accounting part of the financial department. However, Defendant should have terminated their contracts in a fair way because it was on a working day which was business as usual, they were sort of given 30 minutes to pack everything and leave the office on the ground of redundancy on economic, structural and efficiency reasons. For him, it was a kind of summary dismissal as per the letter dated 28.3.2014 viz. Doc. D. as for him efficiency would not be achieved by having chopped the jobs of 4 people representing practically less than 2 % of the total expenses of Defendant when it has a bank balance of 40 million USD in the Standard Bank of Mauritius and of which he was a signatory. Subsequently, he conceded that he was allowed to evacuate his office on another day by the Human Resource department. Then, he further conceded that he did have a round of discussions spanning over the month of April 2014 with the Human Resource people for a settlement package and that he was given the laptop and mobile phone as per his request. Furthermore, he was paid 2 months' wages in lieu of notice. He did not accept any sum proposed by Defendant as he was looking for a sum aligned with the amount he would have received as a result of unjustified dismissal. Defendant did not accept that Plaintiff was unfairly dismissed and thus, did not agree to compensate him in that amount. As at 28.3.2014, Plaintiff had been working for 6 years as Financial Controller of Defendant and his average monthly remuneration was 8,348.58 USD which at that time would be equivalent to Rs 247,117.67. He was overseeing all the financial units of Defendant in African countries namely Mozambique, Kenya and Tanzania including Mauritius. The fifth worker, Mr. D. Mercer was not made redundant. He did not agree that Mr. D. Mercer was more of a financial analyst and was separate from his department. But he agreed that Mr. D. Mercer was preparing the consolidated management account and was not accountable to him but directly to the CFO to South Africa.

On 28.3.2014 as per Doc. D. as per that letter, Defendant had decided among other things to consolidate the functions of separate accounting and financial operations in Mauritius and move all its accounting operations to South Africa other than the accounting functions currently carried out in the operational subsidiary offices. At that point in time when Plaintiff terminated his employment, there was no alternative proposed to him. Then, he said that there was a sum of 33,145 USD proposed to him as a settlement package but he refused to cash same as he did not think that his dismissal was fair. Defendant had decided to relocate the office to South Africa and so he was made redundant. He did not have any notice or discussions either formal or informal about that so that he would be allowed at a certain point in time to leave office and to go and find jobs elsewhere. He did not accept that according to that letter his employment was terminated solely on policy and operational efficiency reasons. At no point in time, there was ever any meeting of high-level managers including him, whether in face to face or by video conference to say that the company was facing difficulties, there was a need to restructure and to relocate resources.

Plaintiff was not aware of a letter dated 11.3.2014 from Defendant informing the Ministry of Labour and Industrial Relations pursuant to the provisions of the Employment Rights Act 2008 of Defendant's decision to reduce its personnel whereby it mentioned that it had decided to terminate the employment of four employees as a result of a policy-driven decision to relocate financial operations from Mauritius to South Africa. His colleagues and he were treated in a discriminatory manner while the position of Mr. David Mercer was still valid at that time and he attended all finance meetings and was doing the consolidated management account and the budgets as well.

Thus, he made his claim as per the breakdown given in his plaint as amended.

Defendant's contention as per the testimony of Mrs. Jackie Demetriou in her capacity as Chief Human Resources Officer (the 'CHRO') and Administrative Officer having occupied such post for the past 6 years is as follows:

The Defendant which is the Mauritian entity holds shares in subsidiaries in Africa. It has seven subsidiaries and one is in France. The entities in South Africa do not fall under the holding company of Defendant but they do carry the same shareholders as the shareholders of Defendant and there are two main entities in South Africa called Seacom Shared Services which is a shared services organization providing services to the rest of Defendant Group and there is another entity called Seacom South Africa that has operating companies which operate in South Africa. The entity called Seacom Shared Services provides services to the Seacom Group namely the Group. The types of services provided by Shared Services are financial services, product management services, nature cooperation, commercial and billing services, costs and so on.

Defendant which is based in Mauritius it does not have clients as such in Mauritius but it has a partnership with Mauritius Telecom. They have a shared capacity and they connect to Mauritius Telecom via the LION line to Defendant's cable station in Mombassa. So, they can keep connectivity onwards from Mombassa and Defendant that is why Defendant calls it a reciprocal deal. Defendant gets its capacity from Mauritius Telecom to provide its capacity requirements in Mauritius which is for the office as Defendant has an association with Mauritius Telecom. Jointly with Mauritius Telecom, there are certain services which are provided by Defendant. Defendant has got offices in its subsidiaries in East Africa and then there is the office in Mauritius.

Prior to 2013, Defendant locally had 6 departments, human resources and as part of the finance department there was accounting, financial planning and analyst and then Defendant had service delivery, nature cooperation, billing and collections and there were between 12 and 14 people employed in the Mauritian office.

As regards the finance department in Mauritius, there was the Seacom Group Finance Department and Defendant had a Finance Controller in Mauritius namely Plaintiff. The latter reported to Chief Financial Officer ("CFO") and the CFO was based in South Africa under Seacom Shared Services. Plaintiff was responsible for the accountancy in the African countries except for South Africa. They reported to him, so he was responsible for managing and supervising the works of the Accountants in Mozambique, Tanzania and Kenya and in Mauritius.

Plaintiff was in charge of the Mauritian Office and was accountable to the CFO who was based in South Africa. There were 3 offices on the African continent which were accountable to Mauritius and there were 3 Accountants meaning from the African countries who reported to Plaintiff as Financial Controller. Each of those African countries had its own accounting department namely just one Accountant. Those Accountants would be responsible for all aspects dealing with the accounting of their specific entity, that would be billing to a certain extent. It is quite a complicated billing system where customers would be billed partially from Defendant in terms of the international use of the cable and part of the cable which lands in the country, the local Accountant would actually do the billing in the country, in respect of the entity in that particular country. They would be responsible for writing up the books in terms of recording all the cash receipts and all the expenses and costs that go out in each country and then dealing with the various countries, legislative authorities where they could be taxed, the tax authorities.

For example, Kenya, there was the cable that runs close to the coast of Kenya. The Kenyan office was providing cable services to entities within Kenya and to other East African countries as well on the border of Kenya. Those entities to which services were being provided, they had to pay Defendant for the services. The Accountants who were based with those countries had to do the collection of all dues to Defendant. The Accountants would assist Defendant's billing Manager with the collection of all dues. They would have a cooperative role so to speak. Those Accountants reported to the Plaintiff which means that whatever the accounting works that they did, they were accountable to Plaintiff who was himself accountable to the CFO in South Africa.

In the Mauritian Office, in the accounting department apart from Plaintiff, there were an Accountant, 2 account payable ladies and Mr. D. Mercer who was not in the accounting department but reported into the finance functions, he did the planning which is budgeting and financial analyst.

The accounting department was initially set up in Mauritius and was applicable as at July 2010 when all the executives were based in Mauritius including the CFO and the accounting department was formed under the CFO who was posted in Mauritius. In July 2010, a decision was taken that the executive would move back to South Africa under the Shared Services entity. So, the CFO rolled and relocated back to South Africa at the end of 2010 or early 2011 and the accounting department for the Group remained in Mauritius.

As per an extract of the minutes of the proceedings of Defendant, at some point in time, early 2014, it was decided that the accounting would be transferred to South Africa. The final decision for that transfer laid with the Governance Company Committee and the Board of Defendant. The CFO was supervising Mauritius from South Africa.

Sometime early 2014, it was decided that the accounting department would be transferred. The reason was that the CFO at the time had just taken up his role in

October 2013. Defendant was looking at that time after going through the organizational chain and was looking at the right size in the organization of which the CFO would have played a predominant part given its financial role. The first department that Defendant looked at was the financial department namely the accounting department which was part of the financial function to see where Defendant could achieve efficiencies. At that time, Defendant also had a financial manager based in South Africa who also reported to the CFO and his and Plaintiff's role as financial controller were similar in many ways and reported to the CFO. The financial manager was responsible for managing and supervising the day to day tasks. Plaintiff and Mr. Coopsamy who was the financial manager also worked closely together, they interfered with the consolidating of the financial accounts.

So, it was found that from the role perspective that the roles of the financial manager and financial controller could be consolidated into one role which it was done and it was also felt that the position of the accountant and accounts payable could also be performed from South Africa for the following reasons. The CFO was based in South Africa, all the documents for the group accounting were returned in Mauritius. So, there were inefficiencies in terms of, if the CFO needed anything, either things had to be scanned through to him or that there was a courier to go through him. The CFO used to visit Mauritius probably a couple of times a year in order to meet with the Plaintiff and the financial department to go through the financial accounts. There is also a 2 hours' difference between South Africa and Mauritius which actually translates into 4 hours a day viz. 2 hours in the morning and 2 hours in the afternoon. Additionally, Defendant would have a team of auditors, auditing the books in Mauritius from Mauritius and another team of auditors in South Africa auditing the books in South Africa. What Defendant was able to achieve by consolidating the financial controller and financial manager's roles and by moving the accounting department into South Africa was also streamlining the auditing and getting auditors from the same region having actually ordered the books to South Africa. The CFO at any time should he wish to have a look for any information, it would be before him and he would also have much closer supervision or management of the Group accounting function.

She stated that firstly there was an issue of access to file, that is, the CFO was in South Africa and the documents were in Mauritius. Secondly, there was an issue of timing, that is, the hours of work of Mauritius in South Africa did not coincide. Thirdly there was some kind of duplication of work.

The post of financial analyst was occupied by Mr. David Mercer. He was not part of the accounting department meaning the finance department headed by Plaintiff but he formed part of the CFO's team but not part of Plaintiff's team as per Doc. T.

She produced the decision of the Board whereby the Board decided that the accounting department would be transferred to South Africa as per Doc. S. As a result of the Board to transfer the accounting services to South Africa, Defendant had to terminate the employment of Plaintiff, and the three other employees. One of them had been with the Defendant for a very short period. As per Doc. D., the CFO addressed to Plaintiff on 28.3.2014 whereby he was informed of the decision to transfer accounting services to South Africa and in addition the Defendant made a proposal for a settlement of the matter. Such proposals were also made to 2 other employees. The Plaintiff was invited to leave the office on that day. On that day, Mr. Smyth namely the CFO and herself were present in the room when they informed each and every one of the people affected that their role in Mauritius will be made redundant. Plaintiff was the Financial controller and the leader of the team so that he was called first where Mr. Smyth informed him of the rationale for the decision and had a discussion with him and also said to Plaintiff as he said to all the other 3 people that they called in that day that they were going to lose their job. They said to each of them that they need not remain in their post for the rest of the day. They gave them the letters and they said that they could actually leave the office. They informed Plaintiff that they were going to inform the rest of the staff. It was not that Plaintiff was forced out of office but was asked very gently to go home it was Friday and everybody was invited to come back on the following Tuesday to consult on the proposal for a settlement given to them on Friday. The letter was handed over to Plaintiff on the 28th which was a Friday.

Her relationship with Plaintiff and the CFO, Mr. Smyth, with Plaintiff was professional. There was no possibility of having the Plaintiff transferred to South Africa as Defendant has made the decision to consolidate the roles of financial controller and financial manager into the single role. There was a financial manager in South Africa and Plaintiff was based in Mauritius. All the employment contracts in the accounting department in Mauritius were terminated.

Plaintiff did receive an increase in salary in January before his termination of employment in March. Subsequent to the termination of the employment of Plaintiff, there were attempts to have a discussion with Plaintiff and the 2 other staff members who have been made redundant. The 28th of March was a Friday and they did not attend the meeting scheduled to Tuesday the 1st. Defendant had received a notice from the department of Labour to go and conciliate with them. They wanted to pay those employees rather than having to pay a recycling fee over to a recycling department. They could not reach a settlement as per the offer in the letter dated 28.3.2014 as per Doc. D. as they wanted to have the punitive amount that is paid in terms of unfair dismissal. Plaintiff never came back with a reasonable amount but requested that he and two other employees if they could retain their company phones and laptops which Defendant in good faith happily agreed to give them.

She disagreed that Plaintiff's employment was unfairly terminated as he was not the only person as there were 3 other people who lost their positions at the same time. Because the Defendant had to transfer the accounting operation in South Africa in view of the circumstances, the employment of Plaintiff was terminated. So, the question of unfair termination does not arise.

She stated that the subsea cable is owned by the Mauritian entity which is the Defendant and which owns about 80% of the assets. Plaintiff was employed as financial controller since about 2008 on a contract and he was responsible for accounting operations in the non-South African entities. He was responsible for Mozambique, Kenya and Tanzania regarding the accounting features of the company. Defendant has a human resource department still based in Mauritius whereas the financial department has been moved to South Africa. In the human resource department currently, there are 4 people and in 2014, there were 2. At that time in 2014, Mr. Chris Smyth was the CFO of the group. Mr. D. Mercer was the financial planner and analyst. Plaintiff reported to Mr. Smyth and Plaintiff's termination of employment occurred before he passed away.

The financial department was not shut down in Mauritius for economic reasons, but it was the accounting department which was a section of the finance department which was shut down for costs efficiency reasons.

The four employees were not made redundant so as to completely annihilate those costs. The reason for their redundancy was for costs and efficiency reasons and the fact is three of the people who were made redundant were replaced in South Africa. There were two positions, there was Plaintiff's position as financial controller and Defendant had a financial manager in South Africa. Those two roles were consolidated into a single role which meant that Defendant has been paying only one person to perform the role of financial manager and financial controller for the Group. Besides the salaries, there were also other costs, that Defendant took into consideration. They were the costs of the CFO having to fly a few times a year to Mauritius to meet with the team here. Defendant no longer had those costs. With the costs of the shipping or the couriering of documents between South Africa and Mauritius, those were costs paid. In terms of efficiencies, the CFO at that time wanted to have the financial controller with him in South Africa in order to be able to work more efficiently like you can pop into each other's offices when there was a need to respond to questions raised in South Africa. In Mauritius, there were two hours' time lapse so that it was not always possible. In addition to that, Defendant used to have a group of auditors at its South African office, doing the South African books and then the group of auditors will come into Mauritian office and do the accounts of Mauritius there. They no longer happen because we have one group of accounts of auditors that actually do their accounts in South Africa. So, the reasons for the redundancy, they were costs efficiency reasons taking all those elements into account.

It was costs efficient in terms of economic ground, instead two positions were consolidated into one. So, there was a cost saving in that regard. Economic, financial or structural that is where efficiencies come in as well. So, Defendant was perhaps talking about the same thing and also bearing in mind that an organization does not need to be suffering financially in order to make changes in terms of costs efficiencies. A company does not have to be in a poor financial position. You can save costs and you can become more efficient even if a company is performing acceptably and even well. To part with Plaintiff was a cost efficiency exercise, so Defendant could operate more efficiently as an accounting department which also resulted in two positions becoming one and she thought in any organization if there is an opportunity to consolidate positions, organizations do have that right to actually make that decision and there was the cost saving in that respect two positions became one. The other three positions were relocated to South Africa and Defendant did employ people in South Africa. Mr. David Mercer was not made redundant as he was not part of the accounting department. He was part of the budgeting financial analyst department. He was involved with the day to day accounting or transactional aspect of the accounting department and it was believed that his position could be continued to be efficiently performed from Mauritius.

To terminate Plaintiff's employment, Defendant followed the procedure in terms of Labour Law. Plaintiff was not an executive in the organization and did not present to the Board of Directors so that there was no need to consult him prior to any such decision being taken. That was the responsibility of Defendant's CFO.

The CFO started in October the previous year viz. 2013 and had during that time reviewed his organizational structure and the efficiencies and had made the decision. He wanted to make recommendation to the Board that he wanted to restructure, relocate for the reasons given. The Plaintiff and the three employees were asked to come on the Tuesday to consult with Defendant in terms of the remuneration that was offered. As far as she was aware, Defendant was not facing any financial difficulty. Doc. D was the letter that was sent to all the staff. Mr. J. Coopsamy, the financial manager, was based in South Africa at that time. On the day prior to Plaintiff being dismissed, the accounting staff in the Mauritian office were reporting directly to him except may be Mr. D. Mercer. She was in charge of the entire Mauritian office just from a day to day management perspective. In March 2014, Defendant was not facing any financial difficulties. She disagreed that because of that there was not any justification on economic ground. There was no malice intended when the employees including the Plaintiff were invited to leave early given the emotional impact. It was done out of sympathy. Defendant tried throughout the month of April to try to reach a settlement. It is never an easy thing to do for any organization to inform staff that their positions are being made redundant. Sometimes organizations need to do that for organizational reasons. As for the HR department she was responsible for HR for the entire Group and that also she was based in Mauritius. She can effectively operate in Mauritius as it was a different type of work, a different department. The CFO made a decision that based on improving the costs efficiencies in his particular accounting department that he wanted his accounting department to be with him in South Africa. She was the CHRO based in Mauritius and he was the CFO based in South Africa. She disagreed that Plaintiff's dismissal was unjustified and did not agree that she was liable to pay to the Plaintiff the sum claimed in his plaint as amended. The termination of the employment of the employees concerned was following a Board decision upon the recommendations of Mr. C. Smyth, the CFO.

I have given due consideration to all the evidence put forward before me and the submissions of learned Senior Counsel for the Defendant and learned Counsel for the Plaintiff. It is abundantly clear from the unrebutted evidence on record that the Defendant was not in any financial difficulty and that the Plaintiff did not commit any misconduct and that it was not the finance department that was transferred to South Africa, but the accounting department forming part of the financial department that was transferred to South Africa which explained why Mr. D. Mercer was not made redundant. Plaintiff admitted that he was given 2 months' salary in lieu of notice so that he had ample time to look for another job. Furthermore, his request was accepted namely to keep the Defendant's laptop and mobile phone but his request for a settlement package akin to an unfair dismissal was not accepted as according to Defendant the termination of his employment was justified and there was no malice intended. He was proposed an amount of 33,145 USD which he refused and there were other attempts to find a settlement package in the span of the month of April 2014 which is a far cry from being treated in an unfair manner. Indeed, he said that he had no qualm if it was a Board decision to have him made redundant provided that he was treated in a fair manner. Firstly, as admitted by Plaintiff himself, the major proportion of the billing was for the cable passing on international water and which was done by Plaintiff (which obviously needs to be closely overseen by the CFO) and consolidated with other billings of those where the cable pass along their coasts for the audit process to be forwarded to the CFO in South Africa. Indeed, an entity was registered there precisely for the international headquarters scheme as there were laws passed there so that there were tax incentives amongst others as per the admission of Plaintiff himself. The CFO who was based in Mauritius left for South Africa and he suggested to the Board to have the accounting department to be transferred to South Africa and which was also the view of the Governance Company Committee and which was the cause for the redundancies.

At this stage, I find it appropriate to reproduce the provisions of Section 46(5)(d) of the Employment Rights Act 2008 as follows:

*"**46. Payment of Severance allowance***

(1) Subject to subsection (1A), an employer shall pay severance allowance to a worker as specified in subsection (5) where the worker has been in continuous employment with the employer –

(a) for a period of not less than 12 months on a contract of indeterminate duration and that employer terminates his agreement;(…)

(…)

(5) Where a worker has been in continuous employment for a period of not less than 12 months with an employer, the Court may, where it finds that –

(d) the grounds for the termination of agreement of a worker for economic, technological, structural or similar nature affecting the enterprise do not constitute valid reasons,

order that the worker be paid severance allowance (...).”

In the present case, it is not disputed that the financial situation of Defendant was good on the day of the termination of Plaintiff’s contract of employment by Defendant and that there was no misconduct committed on behalf of Plaintiff and the three other employees that were made redundant on that day. It is relevant to note that in the supreme Court case of **Nestlé Products (Mtius) Ltd v Dabysingh** [1988 SCJ 423], it was highlighted that even in the absence of any financial difficulties or technological changes, there could still be *“licenciements pour motif économique”* where the termination or modification is being made to preserve the competitiveness of the business.

In the same breath, I find it also relevant to quote an extract from **Précis Dalloz, Droit du travail, 26e édition, Jean Pélissier, Gilles Auzero, Emmanuel Dockès, Note 458, p. 495**:

“Lorsqu’un employeur supprime ou modifie des emplois en l’absence de difficulltés économiques ou d’innovations tecnologiques pour sauvegarder la compétitivité de l’entreprise, les licenciements décidés à cette occasion seront des licenciements pour motif économique. ***Soc. 10 mai 1994, RJS 6/94, no 674, Soc. 8 juin 1994, Bull. civ. V, No 193.****”* (emphasis added)

I find it pertinent to quote an extract of the learned Author, **Dr. D. Fok Kan,** from his book **Introduction au Droit Du Travail Mauricien 2ème édition** at page 389 **[**as in the present case where the exigencies of **Part VIIIA – Reduction of workforce and closing of enterprise** as per the **Employment Rights Act 2008** will not find its application as “employer” in Section **“39B. Reduction of workforce”** means an employer of not less than 20 workers and in the present case there were only 4 workers in all in the accounting department of the Defendant and they were all made redundant**]** where he had this to say:

"Le Termination of Contracts of Service (amd) Ordinance de 1966 institua un Board, le Termination of Contracts of Service Board (TCSB), auquel les cas de 'reduction of workforce' étaient désormais référés. Le Board avait pour mission de "consider whether there is a valid reason for such reduction of the employer's work-force having regard to the operational requirements of the undertaking, establishment or service". Cette disposition a été reprise dans le LA sauf que le législateur ne précisait plus les raisons du 'reduction of workforce'. <u>Avec l'ERA, c'est le retour à la case départ, les licenciements pour cause "economic, technological, structural or of a similar nature" étant à nouveau examinés dans le cadre du régime général du licenciement.</u>" (**emphasis added)**

Thus, in the present case the *"economic, technological, structural or of a similar nature"* will have to be examined by way of general application for redundancy.

<u>At pages 391,392 of the same Book, the learned author</u>, **Dr. D. Fok Kan**, said the following:

"Pour déterminer l'éligibilité à l'indemnité de licenciement de l'employé, il convient ainsi d'examiner d'une part la validité du motif "economic, technological, structural or of a similar nature" invoqué part l'employeur et d'autre part son application à l'égard de l'employé licencié. L'approche adoptée par l'arrêt La Bonne Chute Ltd v Termination of Contracts of Service Board [1979 MR 172. Voir également Madelen v Termination of Contracts of Service Board 1981 MR 289: "…it would be the Board's duty firstly to satisfy itself that the reduction was justified in terms of numbers and then that the dismissal of each particular was justified."] <u>par rapport à l'application du LA est à notre sens encore plus pertinente aujourd'hui</u>;
(…)
We accordingly hold that, <u>in determining whether an employer is justified in reducing his work force</u>, the Board <u>should not limit its exercise to a mathematical computation, but consider also whether the employer has shown good cause</u> to lay off the particular worker or workers concerned. (…)
Quant aux considérations économiques, il convient de faire ressortir que le législateur mauricien, contrairement au législateur français, ne se réfère pas ' à des difficultés économiques' (…).

<u>Il suffit qu'il y ait une motivation économique même si l'entreprise serait rentable</u>."
(emphasis added)

In the present case, the CFO of the Group being based in South Africa made a decision that was based on improving the costs efficiencies in his particular accounting department that he wanted his accounting department to be with him in South Africa. It was far from being a mathematical calculation to cause all the employees in the accounting department to be made redundant so that costs could be saved by annihilating their jobs. The reason being that he had to employ 3 more persons in South Africa in that department save and except for Plaintiff where his role of Financial Controller and that of Financial Manager were both doing similar roles and reporting to the CFO and as such the Financial Manager posted in South Africa would have sufficed avoiding duplication of work. Other costs efficiency advantages being met by having the accounting department removed from Mauritius and brought to South Africa are as follows:

(a) It was a cost efficiency exercise by consolidating 2 positions into one which was costs saving so that Defendant could operate more efficiently as an accounting department.
(b) The costs saving of not having the CFO to fly a few times a year to Mauritius to meet with the team here.
(c) The costs of the shipping or the couriering of documents between South Africa and Mauritius were eliminated.
(d) In terms of efficiencies, the CFO by having the financial manager with him in South Africa is able to work more efficiently by reaching into each other's offices when there is a need to respond to questions raised in South Africa. In Mauritius, there are two hours' time difference so that it is not always possible.
(e) Defendant used to have a group of auditors at its South African office, doing the South African books and then the group of auditors will come into Mauritian office and do the accounts of Mauritius there. That will no longer happen because Defendant has one group of accounts of auditors that actually do their accounts in South Africa which obviously is more efficient.

For all the reasons given above, I am convinced on a balance of probabilities that the Defendant has discharged the burden laid upon it in that it was a valid justification to render all the employees concerned in the accounting department forming part of the financial department in Mauritius redundant inasmuch as it was bound to be more costs efficient by relocating its accounting department in South Africa where the CFO of the Group is based so that the exigencies of Section 46(5)(d) of the Employment Rights Act 2008 have been met in terms of economic, technological, structural or similar nature in terms of organizational structure and costs efficiencies affecting the enterprise in order to preserve the competitiveness of its business as per its corporate structure as per Doc. F which was not contested and its converging interests from different entities in terms of shareholdings.

Thus, I hold that the termination of Plaintiff's employment on the ground of redundancy was justified as the post occupied by him was no more required in the context of a reorganization for costs savings and efficiencies as a merging strategy in terms of consolidation of two positions into one for the supervision and oversight of consolidation of accounts of the Group. Hence, Plaintiff was not entitled to payment of severance allowance. As far as notice was concerned, Plaintiff admitted that he was paid two months' salary in lieu of notice. As regards the salary short payments since on or about the year 2010 until on or about March 2014 were never claimed before by Plaintiff and was based on a mere conjecture which was not sufficiently substantiated by Plaintiff as per the evidence borne out by the record. Be it as it may, it is interesting to note that as regards Plaintiff's claim for untaken leaves, he is not qualified a worker for such item under Section 2 of the Employment Rights Act 2008 as his basic wage is at a rate in excess of 390,000 rupees per annum and thus, the Court has no jurisdiction to entertain such item. The plaint as amended is accordingly dismissed and I make no order as to costs.

S.D. Bonomally (Mrs.) *(Vice President)*
14.4.23