LECLEZIO Marie Francois Arnaud V/S ISLAND MANAGEMENT LTD & ANOR

2020 IND 24

THE INDUSTRIAL COURT OF MAURITIUS

(CIVIL JURISDICTION)

C N 692/15

In the matter of :

LECLEZIO Marie Francois Arnaud

Plaintiff

v/s

1. **ISLAND MANAGEMENT LTD**
2. **ISLAND FERTILISERS LTD**

Defendants

JUDGMENT

1. In a plaint dated 30 December 2015, the Plaintiff averred that he was in the continuous employment of the Defendants since 01 May 2004, as General Manager and this until 22 December 2015 when he was forced to sign a resignation letter. He is thus claiming severance allowance at the punitive rate from the Defendants for constructive dismissal.

The Plaintiff's Case: The gist of the Plaintiff's' case is as follows:

2. The Defendant no.1 is a management company which manages, **amongst others**, the Defendant no.2 and another company known as Island Salt Limited, which

company, the Plaintiff had offered to acquire in July 2015 and effectively acquired in October 2015.

3. Both Defendants were controlled by another entity known as United Investments Limited (UIL), which had as its Chairman, Mr Didier Merven ('Mr Merven') and as Executive Director, Mr Michel Guy Rivalland ('Mr Rivalland'). Messrs Merven and Rivalland were also the directors of the Defendants.

4. During the year 2015, due to a restructuration of the business of the Defendants, (in the sale of fertilizers) , it was decided that all the employees of the Defendant no.1 would be transferred to a new entity which would be called FERTCO Ltd.

5. FERTCO Ltd was incorporated as a new company to manage and market the products of the Defendant no.2 and that of another entity known as MCFI, which latter is controlled by Harel Mallac Ltd. The beneficial owners of FERTCO Ltd are Harel Mallac Ltd and United Investments Ltd.

6. It was averred that the Plaintiff, then proposed to leave the position of general manager of the Defendants upon being paid a compensation of 1½ month per year of service. Three other employees of the Defendants were also offered a package to accept the termination of their contracts of employment.

7. Plaintiff averred that it was therefore agreed that his last day of work was 22 December 2015.

8. On the 22 December 2015, the Plaintiff met Mr Rivalland with a view to collect his severance allowance. At that meeting, Mr Rivalland was accompanied by Mr Merven whilst, Mr Joumont, the finance manager of the Defendants, who had accompanied the Plaintiff to that meeting,(which was incidentally the latter's last day of work), was not allowed to join the Plaintiff and was asked to wait at the reception. It is to be noted that Mr Joumont was also part of the employees which were to leave upon being paid compensation.

9. At that meeting, the Plaintiff was accused of disloyalty by Messrs Merven and Rivalland and was shown two quotations for the sale of fertilizers addressed to a Malagasy company known as Societé Trade One Sarl – the first quotation, dated 29 June 2015, emanates from a company known as Tsar Ltd (fully owned by the Plaintiff) and the second one dated 06 July 2015 emanates from Island Salt Ltd.

10. Plaintiff averred that he then explained to Messrs Merven and Rivalland, that the said quotations were provided to one Mr Zosoa Rasoarahona, ('Mr Zoo'- a Malagasy national), who was an employee of a company known as Axys Group, (a subsidiary

controlled by United Investments Ltd) and managed by Mr Rivalland and that the latter was aware of Mr Zoo's request for the quotes, and for a commission.

11. Plaintiff averred that Tsar Ltd had been chosen to bid for that busines to avoid that the Defendant no.2 is seen as bidding against Mauritius Chemical Fertilizers Industries Ltd ('MCFI') which was also a supplier of fertilizers in Madagascar.

12. The Plaintiff, however, quoted a very high price in order not to be awarded the contract. He was then contacted by the said Mr Zoo who requested Plaintiff to lower the bid as there was a strong chance that the new lower bid will be accepted.

13. Plaintiff, had then sent a lower bid, (the second quotation) in the name of Island Salt Ltd.

14. Plaintiff averred that he was then made to listen to a recording of a conversation concerning that bidding exercise between Mr Zoo and himself and recorded without his knowledge. Plaintiff further averred that he then realised that he had been deliberately trapped and framed by the Defendant, through Mr. Rivalland and/or Mr Merven, to make the said quote and the amended one.

15. It was at this stage that the Plaintiff was threatened by Messrs Merven and Rivalland, that if he did not submit his resignation straightaway, the matter would be referred to the police and that he would have to spend Christmas in jail. He was also informed that they were given instructions by the corporate governance of the United Investments Ltd to refer the matter to the Police but would not do so if he submitted his resignation. He was then showed a letter of resignation which had already been drawn up and which also contained a complete discharge towards the Defendants. Under duress and under threat of being arrested Plaintiff signed that letter. Plaintiff was also remitted a draft resignation letter which was to be signed by Ms Vimi Sawmy, the assistant of the Plaintiff.

16. Plaintiff avers that on the next day, i.e. 23 December 2015, after talking to his wife and obtaining legal advice, he wrote to Mr Rivalland, in order to inform the Defendants that he had been coerced into submitting his resignation which was not valid and he would take legal action against the Defendants.

17. **Whilst giving evidence in Court**, the Plaintiff maintained all the averments in the proecipe and further added the following: prior to the two quotations mentioned above, he had in the past quoted for Tsar Ltd acting on behalf of Defendant No.2 and that there was a case regarding that transaction before the Supreme Court. He added that he was reluctant to quote for the business brought in by Mr Zoo as he did not

want to undercut the business of MCFI. He produced a copy of the two quotations as mentioned in the proecipe (Docs.P1 & P2). He further produced the letter dated 10 July 2015 which he wrote to the shareholders of Island Salt Ltd concerning his offer to purchase all the shares of the said company (Doc.P3). During the meeting of 22 December 2015 he was taken to tasks regarding these two quotations. Then he was confronted with a selective part of a tape recording of his conversation with Mr Zoo.

18. He explained that both Messrs Merven and Rivalland, were his good friends, but both were very aggressive on the 22 December 2015. He was panicked when they threatened him that he would spend Christmas time in jail and so he had no option when they threw the already drafted letter of resignation (which he produced – Doc.P4) in front of him and told him that they had the backing of UIL's Corporate Governance Committee. He preferred to miss the compensation than to go to jail.

19. After having talked to his wife and sought legal advice, on the next day he went to the Labour office accompanied by his legal adviser to put up a complaint and he also sent a letter to Mr Rivalland, a copy of which he produced (Doc.P5). He also sent a SMS to Mr Nicholas Maigrot, the recent Director of UIL and also met him the next morning. He came to know that the latter was not aware of anything.

20. On the 23 December 2015, after he had sent the letter he received an SMS message from Mr Merven which was as follows: " *Hi Arnaud …. For reasons known only by you, you have decided to fight the accusations brought against you by the company. I believe you understand the consequences of such an action and I urge you to reconsider before it goes any further as there can only be one loser. It is evident to me today that our friendship means nothing to you and that once again you have acted without thinking of the consequences to Margie and your sons…. As explained yesterday we are almost at a point of no return as this become public knowledge tomorrow morning…"* (Doc.P6). Plaintiff did not reply to the said message. Plaintiff further added that on the same day on which he met Messrs Merven and Rivalland, he was also given a document to hand over to Ms Sawmy (Doc.P7)

21. ***In cross-examination*** it was initially put to the Plaintiff that he had entered a similar case before the Supreme Court against Messrs Merven and Rivalland dated 5th January 2016. However this is no longer an issue as during the course of the trial the Court was informed that the said case has been withdrawn by the Plaintiff. Plaintiff stated that as Messrs Merven and Rivalland are the Directors of the two companies he is suing, they are the préposés of both companies and in that capacity the two companies would be liable to him.

22. Plaintiff admitted that on 25 September 2015 he had sent an email to Mr Rivalland (Doc.P8) informing the latter that, unless there was adherence to a tight schedule to

sort out the finances of the Defendant no.2 and another related company, he would have no choice but to submit his resignation as general manager as he was no more in a position to fulfil his duties and responsibilities. Plaintiff admitted that he did not write this email under coercion. He explained the context in which he wrote this email namely following the meeting which he had on 22 June with Mr Guy Rivalland and whereby it was agreed to adopt a cost cutting exercise, and hence 4 employees to leave and be compensated for same. So he was referring to him leaving the company in view of the compensation already agreed upon.

23. A second email dated 11 December 2015 and addressed to Mr Michel Guy Rivalland was produced (Doc.P10) which the Plaintiff conceded having written on his own free will. The subject of the said email is "Termination of employment at IML" (i.e defendant no.1). Upon being referred to Doc.P3, Plaintiff agreed that the letter was addressed to the shareholders of Island Salt Ltd and also to NWT (Mauritius) Ltd. He confirmed that by virtue of that letter he made a proposition to the shareholders for the purchase of shares.

24. Plaintiff further conceded that at no point in time did he qualify his resignation as per the letter which he signed on 22 December 2015. He also admitted having known Messrs Merven and Rivalland for about 10 to 12 years and been a director of companies over the same period of time. He had never yielded to pressure from anyone except on the 22 December 2015. Plaintiff confirmed that he addressed the letter dated 23 December 2015 i.e Doc.P5 to Mr Michel Guy Rivalland . The letter as per Doc.P3 was addressed to the company as well as the company secretary. He explained that in both P4 and P5 the address is that of the company.

25. Plaintiff also explained that on 23 December 2015 he went to meet one Mr Maigrot, a member of the corporate governance committee of UIL but was received by Mr Merven with whom he had a long chat. He also met Mr Maigrot.

26. Plaintiff agreed that Mr Zoo is only an Executive of Axis Investment Partners Ltd and has nothing to do with both Defendants. He confirmed that he is the sole shareholder of Tsar Ltd which he stated is not involved in the business of agro-chemicals and is not registered with the pesticide control board. He further confirmed that there was a Ruling delivered by the Commercial Division of the Supreme Court in the matter of Tsar Ltd and Island Chemicals Ltd (as Plaintiffs no.1 and no.2 respectively) against Volcano Agro Science, and in which he represented Tsar Ltd, and that the findings of the Court were that Mr Leclezio i.e himself, had made a certain number of admissions as to the forgery of documents (Doc.P 11).

27. ***In re examination*** he maintained that he was coerced in signing the already prepared letter of resignation which was handed over to him by Mr Rivalland in presence of Mr Merven. Further in respect of the case before the Commercial Division of the Supreme Court, he explained that there were two Plaintiffs namely himself representing Tsar Ltd and Mr Rivalland representing Island Chemicals whilst the Defendant, Volcano Agro Science was represented by Mr Maigard. The document referred to in the judgment was prepared by Mr Gilbert Maigard, the brother of Robert Maigard, owner of the company 'Volcano'. He further stated that all the parties involved in the case were aware of the existence of the document.

28. Mrs P Seegoolam, a Senior Labour and Industrial Officer was called as a witness for the Plaintiff. She produced a certified copy of the complaint (with annexures) made by the Plaintiff on the 23 December 2015 (Doc.P12).

The Defendants' case:

29. The Defendants' pleaded case was mainly that the Plaintiff (and another employee) had committed serious acts of misconduct and disloyalty by acting in breach of his obligation de non-concurrence whist in the employment of the Defendants. When this was discovered, the Defendants decided that the agreement which they had with the Plaintiff to pay him compensation for 1½ month per year of service could no longer stand. Defendants denied having "trapped" or "framed" the Plaintiff. It was also pleaded that the Plaintiff was a shrewd and experienced businessman and that they did inform the Plaintiff that if the latter denied any wrongdoing, they would have no alternative but to refer the matter to the police for a formal enquiry to be carried out.

30. Although the Defendants initially denied having employed Plaintiff, this was subsequently admitted during the course of the deposition of their representatives.

31. The Defendants' first witness was **Mr Rivalland.**

32. In substance his depositions during examination in chief were as follows: Employees of Island Management Ltd were paid by Island Fertilizers Ltd (IFL). Plaintiff was employed by Island Management Ltd as Managing Director. He is the CEO of UIL which owned 100% of Island Fertilisers Ltd.

33. He explained that FERTCO was a project that Island Fertilizers Ltd had with Mauritius Chemical Fertilizers Industries Ltd so as to create a joint venture that would commercialise both liquid and solid fertilizers in Mauritius. He confirmed that there was a link between FERTCO and the reduction in terms of expenses to the tune of 12

million rupees because both IFL and MCFI were making losses and they needed to cut costs. There were also a lot of duplication of duties between the two companies. They were competitors as they were both dealing with the manufacturing and selling of the same type of fertilizers i.e granular fertilizers. But the project did not materialize.

34. Mr Rivalland further explained that Harel Mallac owns about 77% of MCFI and they were in the negotiations as holding company. There were talks about restructuring both in terms of capital and staff of both Defendants. Hence employees from both Defendants were to be made redundant. Amongst those employees were the four mentioned at paragraph 17 of the proecipe. He confirmed that Mr Joumont and Mr Reevanand were given a package but as regards the two other employees namely Ms Vimi Sawmy and Plaintiff financial arrangements were discussed at a certain point in time but they were not paid.

35. While discussions were ongoing regarding the package to be paid to the employees the two quotations were discovered and this was brought to the attention of the chairman and the corporate governance committee which did not give permission to go through the financial arrangement. The Defendants viewed the said quotations as blatant breach of trust as the Plaintiff was competing with them.

36. It was one Laurent Bourgault who discovered about the said quotations and informed Messrs Merven and Rivalland in July 2015. An investigation which took some two/three months was carried out at the same time that discussions were being carried out with Harel Mallac for the new company FERTCO to be set up. The corporate governance committee usually meets twice a year. Its members would be members of the board i.e directors. They have to report to the Board which is mandated by law to take decisions.

37. The first person to be informed of the matter was Cyril Mayer, a director of UIL and a member of the corporate governance committee. As the investigation was developing, the Committee was made aware of the suspicions which they had. But the Defendant could not take any decision as regards the Plaintiff without the approval of the corporate governance committee.

38. It was only in December that a decision was taken for the Plaintiff because the investigation had to be finished, they had to clear out whether other employees were not involved and there was also the FERTCO situation to manage.

39. Mr Rivalland confirmed that Mr Zoo was employed by Axys as its portfolio manager. Axys is subsidiary of UIL and he is the CEO of Axys.

40. Mr Rivalland stated that there was a client from Madagascar who wanted to buy fertilizers and the latter approached Mr Leclezio for a quotation. He found no issue with the payment of a commission, which in this case would be Island Salt paying Zoo.

41. He also added that he found the explanations of the Plaintiff strange concerning these quotations as Plaintiff was meant to be the new managing director of FERTCO. He considered that if Plaintiff brought down the price this shows that he believed he would get the contract. Furthermore, Plaintiff should not have sent an amended quotation because Island Salt Limited was in direct competition with IFL.

42. The witness also said that he has never heard of fertilizer contracts being awarded to Tsar Ltd or to Island Salt Ltd and money coming back to Defendant no.2. He could not remember if Tsar Ltd had made a tender on behalf of Defendant no.2.

43. As regards the recording of a conversation with Mr Zoo, it was the latter who imparted that recording to Mr Laurent Bourgault who in turn informed him about same. According to Mr Rivalland, the recording was played to the Plaintiff to be totally honest to him and to put everything in front of him, without trying to ensnare Plaintiff. He was shocked that the Plaintiff used his personal company to sell products that his employer could actually quote and sell.

44. The witness also agreed that the letter of resignation was prepared in advance of the meeting of 22 December 2015 by UIL. The meeting lasted for about an hour and Mr Joumont was all the time in his office. He denied that the Plaintiff was threatened at any stage nor was there any threat that Plaintiff would spend Christmas in jail. He added that the corporate governance committee's stand was that the Plaintiff should not be paid a cent and that he took it upon himself to try to solve the issue in the best way possible. He also added that after the meeting the Plaintiff stayed alone with Mr Merven for about 15-30 minutes. The latter was the chairman of the corporate governance committee.

45. After the meeting Mr Joumont was still there and he had a conversation with him. He denied that Plaintiff was coerced to sign the resignation letter

46. According to Mr Rivalland, after he and Mr Merven had put everything on the table and made the Plaintiff listen to the recording, the latter, in his own words said that he had been malicious and that there has been a 'faute' and then they discussed the way forward. This meant either for the Plaintiff to be suspended or he had to resign. Plaintiff then accepted to resign.

47. He admitted that the other letter concerning Miss Vimi Sawmy was already prepared and it was Plaintiff himself who asked to give him the letter to hand over to the said Vimi Sawmy.

48. Referring to Doc.P9, Mr Rivalland confirmed that Plaintiff entered an action before the Supreme Court against him and Mr Didier Merven in their own personal names and that Doc.P10 refers to the corporate email address of the Plaintiff.

49. Mr Rivalland stated that he had a very good relationship with the Plaintiff and the latter's family members. At the office they used to have lunch regularly together. There was never a situation where he had threatened him or prevented him from talking.

50. ***During cross-examination*** Mr Rivalland stated that paragraphs 4 and 5 of the plaint which were initially denied in fact represent the correct version. To that effect the contract between Island Fertilizers Ltd and Traman Co Ltd (which is now Island Management Ltd) was produced – Doc.P13. He further agreed that paragraphs 13 and 14 of the plaint (concerning the costs cutting) too are admitted.

51. Mr Rivalland confirmed that apart from the case entered by the Plaintiff against Mr Merven and himself (Vide Doc.P14) , there is another case lodged by Island Management & Ors against Mr Leclezio and Tsar Ltd (Doc.P15) and he gave proper instructions to his Attorney to enter those proceedings.

52. The above witness further confirmed that he was made aware of the recordings since July 2015 but he did not call Plaintiff. He stated that at that point his relationship with the Plaintiff was not great. Same started to get sour during the negotiations of FERTCO.

53. Mr Rivalland contended that the Plaintiff had apologized ten times when the recording was played to him. From the very start they showed Plaintiff the quotations which he readily accepted. When confronted to paragraph 21 of the plea in Doc.P14 which was to the effect that Mr Merven and himself did not believe the far fetched explanations of the Plaintiff and then confronted him with a voice recording made by Mr Zoo, Mr Rivalland explained that as Plaintiff accepted that the quotations were made by him they had no issue of not believing him. But they nevertheless confronted him with the tape recording because Plaintiff stated that the first quotation was made in good faith.

54. The witness confirmed that the first time the Plaintiff was called in relation to the quotations was on 22 December 2015.

55. It was put to the witness that the Plaintiff's last day of work was 22 December 2015. The witness denied same and said that the Plaintiff had come to see him to inquire if the payment of compensation was approved by the Board or not. He also added that such payment was agreed but that board approval was pending. He was thus confronted to the averments in the plea wherein it was averred that the Defendants had already agreed to pay one and a half month per year of service to the Plaintiff.

56. Mr Rivalland stated that discussions for payment of compensation to the Plaintiff started in August or September 2015. In October 2015, it was also clear that the Plaintiff had renounced to become the CEO of FERTCO and that he was sponsoring his appointment until October 2015. He was also confronted to the emails of 25 September 2015 (Doc.P8) and 5 October 2015 (Doc.P16) sent by Plaintiff and addressed to him.

57. As regards Mr Zoo he stated that the latter came to see him once before this particular transaction i.e the fertilizer deal, and for this one he came to see him for the commission. He further stated that he did not know that Mr Zoo was the representative of the Societé Trade One Sarl in Mauritius though he contended otherwise in the pleadings before the Supreme Court (Vide Doc.P14, paragraph 19 of the plea). He further denied having ever traded with the company Trade One Sarl before though in the plaint he entered before the Supreme court he mentioned having done business with this company (Vide Doc.P15).

58. It came out that the deal for Island Salt was completed in October 2015 whilst the two quotations as per Docs.P1 & P2 lapsed on 16 July. Mr Rivalland admitted that when Island Salt was finally transferred this deal was off. In fact it never materialized. It further came out that Societé Trade One Salt is a non existent company (Doc.P 20).

59. As regards the meeting of 22 December 2015 Mr Rivalland stated that it could have been him who had convened this meeting. He conceded that though Mr Joumont was present he was not admitted in the meeting. He agreed that if Plaintiff has been threatened to sign the letter of resignation this could render this letter abusive.

60. The witness however denied having told the Plaintiff that if the latter would not sign the letter of resignation the matter will be reported to the police. However, when confronted with the plea, where it is mentioned at paragraph 12(c) that *"the Plaintiff was simply informed that if he denied having committed the above wrongful acts and doings, the defendants would have no alternative but to refer the matter to the police…"* the witness answered that this was the legal advice he had obtained. He added that the Plaintiff was also given the option of a suspension and again it was put to him that this was never pleaded by the Defendants.

61. Mr Rivalland did not agree that the last day of work of the Plaintiff was on 22 December 2015 though he was confronted to the email dated 11 December 2015 sent by Plaintiff to him (Vide Doc.P10). He stated that Plaintiff was paid until 31 December but he conceded that he was not physically present as from the 22 December. He further added that he was given specific instructions not to pay one cent to Plaintiff. But he did not agree that this means that he was going to kick him out.

62. The second witness for the Defendants was **Mr Didier Merven** who deposed as representative of Defendant no.2.

63. According to this witness, the purpose of the meeting with Plaintiff on the 22 December 2015 was to ascertain whether or not there was a parallel business being run by the Plaintiff whilst being employed by the Defendants and to decide whether or not to pay compensation to the Plaintiff given the latter's acts and doings.

64. The witness stated that the Plaintiff was shown two documents, one of them being the letter of resignation and the other one was possibly a letter to attend a disciplinary committee. He maintained that the Plaintiff had agreed being malicious and apologized for his actions and thereafter agreeing to sign the letter of resignation.

65. He denied that the Plaintiff was coerced to sign the letter of resignation and that he was threatened with police action. He also said that the Plaintiff spoke to him after the meeting for about 15-30 minutes.

66. ***In cross examination***, the witness stated that it was in the morning of the 22 December 2015 that he was requested by Mr Rivalland to attend the meeting but he did not ask for the reason.

67. Regarding the alleged option of the disciplinary committee which was given to the Plaintiff, Mr Merven was confronted to the plea which was given on his behalf in the present case where there is no mention of this choice being given to the Plaintiff. Further there is no copy of this purported document which has been produced.

68. He said that it was Mr Bougault who came to him with the information regarding what Plaintiff was allegedly doing. Initially he did not initially believe Mr Bourgault and the latter then said that he will get proof and come back to him. This happened in June 2015. Mr Bourgault came back in July 2015.

69. The witness stated that the Plaintiff was given a choice either to sign the letter of resignation or that he will be charged before a disciplinary committee. He denied that

what was proposed to Plaintiff was either he signed or the matter reported to the police.

70. When referred to the SMS which he sent to the Plaintiff on 23 December 2015 (Vide Doc.P6) he stated that he did not consider it as a threat. When asked about the consequences he referred to in this SMS, the witness said that he meant that the Plaintiff would not want to be known as someone who has done a 'faute' grave.

Submissions

71. On behalf of the Defendants, it was submitted that the Plaintiff voluntarily resigned from work and was not constructively dismissed as alleged or at all. The Defendants invite the Court to consider the following themes which, according to them, support the conclusion that they advocate:
    (i) The letter of resignation dated 22 December 2015 is a voluntary and unequivocal act witnessing the will of the employee to resign.
        - According to the Defendants, there is evidence that the Plaintiff was poised and calm and was not under any empowering state at that particular time.
        - The Plaintiff resigned without passion and without even stating any intent or showing any equivocal feelings of not wanting to resign when he was tabling his resignation. It was only when he went home to speak to his wife that he then decided that he should not have resigned.
        - The Plaintiff did not make any attempt to withdraw his resignation. He only decided to attack the Defendants to obtain a pecuniary advantage from them. This course of action confirms that he had the intention of resigning from his employment which he had already communicated by email dated 25 September 2015.
        - The Plaintiff was unhappy that he was no longer offered a 'golden parachute' when the Defendants discovered his acts of gross misconduct. Had the Plaintiff been innocent he would have told Messrs Merven and Rivalland that a resignation was out of the question and he would have opted for a disciplinary committee to clear his name. He was an experienced businessman of caliber and would never have been intimated by two gentlemen who were also his close friends. Even a suggestion of police involvement would certainly not lead him to resign if he did not want to and believe that it was the best solution for him and his family at the relevant time.
        - The Plaintiff did not adduce any evidence capable of establishing that his resignation was tainted by a "violence morale ou de quelque atteinte à l'intégrité de son consentement'.
        - The option given to the Plaintiff (resign or face disciplinary charge) cannot be equated with coercion from the Defendants as the Plaintiff had committed a 'faute grave': putting in a tender for the benefit of his own company; use of insider information and acting for his personal gain.

- He decided to resign rather than attempt to convince Messrs Merven and Rivalland that their interpretation was misconceived.
- The case of Dindoyal P v Gourrege A [2015] SCJ 418 was referred to and it was contended that in the present case there was no heated argument if any argument at all and no impulsive statement from the employee acting on the spur of the moment under the spell of emotion or anger.

(ii) There is no evidence of duress or threat.

- The first time the Plaintiff alleged duress was by way of letter dated 23 December 2015.
- The evidence of Messrs Merven and Rivalland given under oath give the lie to the existence of any form of threat and coercion towards the Plaintiff in the course of the meeting of 22 December 2015. Both agreed that they had been very transparent with the Plaintiff and never exceeded what would have been appropriate in a business meeting. They said that the Plaintiff apologized for his misdeeds on several occasions after admitting the facts.

(iii) The relevance of the professional and social attributes of the Plaintiff

- being a seasoned professional, it is reasonable to infer that he did not resign without giving a thorough thought about it, knowing the consequences.
- Reference was made to Jurisclasseur Fasc. 45 on “Contrats” as well as note 214 of the same fascicule ; and the case of Dindoyal (supra).

(iv) The special relationship shared by the Plaintiff and the representatives of the Defendants

- Reference was made to the email sent to Mr Rivalland on 11 December 2015 which did not betray a relationship wherein the Defendants would entrap and coerce the Plaintiff to resign as alleged.
- The email of Mr Merven to the Plaintiff on 01.01.16 wherein the former expressed concern for the wife and children of the Plaintiff when the latter sent the letter that he was coerced.

(v) Private meeting with Mr Merven

- The Plaintiff’s version that he was coerced is undermined by the fact that just after he had signed the letter of resignation he met Mr Merven alone for some 15-30 minutes. Had Mr Merven planned to force the Plaintiff to resign, Mr Merven would have no interest to meet the Plaintiff alone. The Plaintiff must have been sufficiently comfortable to spend time with Mr Merven whom Plaintiff had described as being aggressive in the meeting.

(vi) Plaintiff failed to challenge the veracity of the conversations contained in the recording played to him.

- It was submitted that Plaintiff never denied the truthfulness of its contents.

(vii) The failure of Plaintiff to call Nicholas Maigrot to confirm the Plaintiff's version.

It was therefore submitted that there was no undue or illegitimate pressure exerted by Messrs Rivalland and Merven on the Plaintiff. The resignation of the Plaintiff was from "une volonté claire et non équivoque". In view of Plaintiff's experience, position, and caliber his claim that he was a victim of the Defendants' coercion and pressure is not credible. Hence his resignation was a voluntary decision in order to avoid the embarrassment of the consequences that disciplinary action would entail for him and his family.

72. The submissions on behalf of the Plaintiff were as follows:

(i) there were serious inconsistencies between the plea of the Defendants and what their representatives said in Court- namely in relation to the fact that there has been no mention of any board approval to pay severance allowance to the Plaintiff in the plea contrary to what has been averred in Court; Plaintiff was never given the choice of accepting to face a disciplinary hearing instead of an outright resignation; Mr Rivalland stated that not a cent was to be paid to the Plaintiff and then came up with the explanation that the decision to compensate Plaintiff needed board approval.

(ii) Learned Senior Counsel for the Plaintiff highlighted the elements of entrapment in relation to the issue at hand namely:

- the quotations were to the knowledge of the Defendants, and more specifically to the knowledge of Mr D Merven since July 2015 but the decision to confront the Plaintiff with same was taken on 22 December 2015 – and this without respecting the statutory delay of 10 days nor did they follow the appropriate procedure in such cases to convene the Plaintiff to a disciplinary commitee.
- Even if the Defendants' representatives are given the benefit of doubt that they did carry investigations, they decided to keep the Plaintiff in the dark in respect of his alleged misconduct and also that they sponsored the latter for a post of CEO as late as in October 2015.
- It is submitted therefore that the Defendants were, through their representatives, concocting against the Plaintiff and were minded to keep from him any charges or allegations that would jeopardize their scheme to make him resign.

- What is even more significant is that searches from the Economic Development Board of Madagascar revealed that the company Trade One Sarl is a non-existent company. This was sufficient to bespeak of the intention of the aforementioned representatives to entrap the Plaintiff.
- The fact that voice recordings were made of the conversation of the Plaintiff and Mr Zoo showed the premeditation of the representatives of the Defendants. Documents P18 and P19 which are emails exchanged between Mr Zoo and the préposés of the Defendants are evidence of such a scheme.

(iii) As regards the element of coercion, Learned Senior Counsel submitted as follows:

- He argued that the fact the Plaintiff was confronted with the alleged acts of disloyalty on the last day of work as previously agreed and having isolated the Plaintiff (the finance manager who had accompanied Plaintiff was not allowed to join in the meeting) was calculated to put pressure on the Plaintiff.
- The threat that the Plaintiff would spend Christmas in jail had to be viewed in line with the plea that should the Plaintiff refuse to sign the resignation letter, the matter would be referred to the police.
- Moreover, the tenor of the message sent by Mr Merven to the Plaintiff on 23 December 2016 further illustrates the coercion the Plaintiff was subjected to.
- The fact that the resignation letter was pre-prepared and the illegal use of the voice recordings were matters which gave colour to the evidence of the Plaintiff.
- Plaintiff was not given an opportunity to seek legal advice and this confirms the intention of Mr Rivalland and Mr Merven to force him signing the resignation letter.

(iv) In relation to the issue of constructive dismissal, the following points were highlighted:

- Plaintiff resignation was as a result of the Defendants' conduct and not of his own free will.
- Plaintiff attended the meeting of 22 December 2015 for the payment of the agreed compensation and never anticipated that he would be pressurized to sign a letter invalidating his entitlement to such compensation.
- The cases of Nanette P A v Evaco Holiday Resorts Ltd [2017] IND 6 was referred to and the principles set out in the case of Georges Mahadeo (supra) reviewed.
- Though both Mr Rivalland and Mr Merven were well aware of the alleged acts of disloyalty since July 2015 they chose to keep Plaintiff in the dark until the meeting of 22 December. This shows that they wanted to

ambush him during the said meeting where he was on his own and hence constrained to sign the pre- prepared letter.

- Illegal use of voice recordings without the knowledge of the Plaintiff were played so as to give the Plaintiff no other choice than to resign, especially with the police threat.
- The pre-prepared resignation letter purports to demonstrate that Plaintiff was never contemplating to resign.
- The text message sent by Mr Merven to Plaintiff demonstrates the clear element of threat.
- No opportunity was given to plaintiff to seek legal advice and further the procedures under the now repealed Employment Rights Act 2008 were not followed by the Defendants namely they ought to have taken actions within ten days they became aware of the alleged misconduct – Re: Mauvilac Industries v Rohit Ragobeer [2006] PRV 33.

It was therefore submitted that there is undisputable evidence on record to establish that Plaintiff did not resign of his own free will and hence his contention that he was constructively dismissed.

ANALYSIS

73. Having regards to the chronology of events, the following facts have emerged:

(i) The Plaintiff had, in September 2015, informed the Defendant of his intention to resign as from 31 December 2015. His last day of work was to be the 22 December 2015.

(ii) The Defendants were aware, since July 2015, that the Plaintiff had issued two quotations to bid for business in Madagascar.

(iii) The Defendants had, until 5 October 2015, approved the appointment of the Plaintiff as CEO of a newly formed company, FERTCO Ltd following the partnership between Harel Mallac Ltd and United Investments Ltd (UIL).

(iv) The Defendants first confronted the Plaintiff with the two quotations on 22 December 2015 without giving any notice to the Plaintiff.

(v) The request to submit quotations for the sale of fertilisers to a Malagasy firm came from Mr Zoo, an employee of Axys group, a subsidiary of UIL and whose CEO was Mr Rivalland.

(vi) Mr Zoo was authorized to transact private business and could obtain commission.

(vii) The Malagasy firm turned out to be a non-existent entity.

(viii) Mr Zoo had recorded the conversation he had with the Plaintiff regarding the quotations.

(ix) The quotations were issued on 29 June 2015 and 6 July 2015 respectively.

(x) The first one (from Tsar Ltd) was superseded by the second one from Island Salt Ltd, a company in which Mr Merven was a Director.

(xi) The said quotations were brought to the attention of the Defendants in June 2015 and the recording in July 2015.

(xii) At the meeting of the 22 December 2015, a resignation letter was already prepared for the Plaintiff to sign.

(xiii) The meeting of 22 December took approximately two hours and thereafter Plaintiff spent some 15-30 minutes to talk privately to Mr Merven.

(xiv) On the 23 December 2015, the Plaintiff sent a letter to Mr Rivalland to the effect that he was coerced into signing the resignation letter.

(xv) Mr Merven replied by an SMS to the Plaintiff warning the latter of the consequences of his decision to retract from his resignation.

74. It is the case for the Plaintiff that the above sequence of events showed that he was put in a situation that his decision to accept to resign was extracted from him on the promise that he would not be reported to the police for alleged shortcomings in his dealings with Mr Zoo, and that he would have faced dire consequences almost immediately if he did not do as ordered by Messrs Merven and Rivalland. It is now beyond dispute that the said individuals did inform the Plaintiff that the matter of sending quotations Tsar Ltd and Island Salt was so serious as to warrant a police enquiry. They said so in their plea and in Court.

75. It is therefore the plaintiff's contention that his resignation on the 22 December was not given freely and hence he considered that he was constructively dismissed.

76. It is trite law that in a claim for constructive dismissal the burden lies on the Plaintiff to establish how he/she had been constructively dismissed.

77. Constructive dismissal is defined in ***"Introduction au droit du travail Mauricien" 2nd Edition by Dr D. Fok Kan***, as being *"……une rupture prise sur l'initiative de l'employé mais dont l'employeur est malgré tout responsable".* And in ***Raman Ismael v UBS Ltd [1986] MR 182*** constructive dismissal is defined as being *"inherently different from dismissal in the sense that it is the employee who necessarily takes the initiative in considering the contract as having been repudiated."*

78. The following observations made by their Lordships in the Supreme Court case of ***Joseph v Rey & Lenferna Ltd [2008] SCJ 342*** are pertinent to the instant case:

"….constructive dismissal by an employer occur where an employee is entitled to put an end to his contract of employment by reason of his employer's conduct. Although the employee terminates his employment, it is the employer's conduct which constitutes the breach of contract. It is therefore imperative that the employee clearly indicates, by word or conduct, that he is treating the contract as having been terminated by his employer and if he fails to do so, he will not be entitled to claim he has been constructively dismissed". See also ***Periag v International Beverages (supra)*** *and* ***Constance & La Gaieté S E Co Ltd v Bhungshee [2000] SCJ 67.***

79. In the case in hand, based on all the evidence on record and as per the Defendants' own admission in their plea, it is clear that the Plaintiff was placed in front of a situation where if he did not accept the allegations to which he was confronted the Defendants would report the matter to the police. Hence the question remains as to whether the option given to the Plaintiff was a fair option assuming that the acts which were reproached were in fact acts of gross misconduct.

80. After a thorough analysis of all the evidence on record, the Court is of the considered view that the chronology of events as enumerated above clearly demonstrate that the meeting of the 22 December 2015 was a firm scenario to corner the Plaintiff to make him submit his resignation. I come to this conclusion based on the following reasons:

(i) Whilst the Court considers that undermining one's company's business by competing against it is a serious misconduct, yet the fact that the Plaintiff explained the purpose of his deliberately inflating the quote from his own company and sending a revised quotation on behalf of another company which was still being controlled by the Defendant no.1 (with Mr Merven as shareholder) is a plausible explanation which the Defendants have failed to satisfactorily rebut.

(ii) The Court also bears in mind the undisputed evidence on record to the effect that: the alleged client Trade One Sarl has been proved to be a non-existent company; the person who contacted Plaintiff , was a Mr Zoo, who worked under Mr Rivalland, CEO of Axys Group, and who was allowed to have a free hand in private business and getting commission. It is to be noted that the said Mr Zoo was not called as a witness for the defendants to explain the circumstances in which he recorded the Plaintiff and the purpose of the recordings though he was present in Court.

(iii) It is quite suspicious for the Defendants to sponsor the Plaintiff as CEO of another new company which was being formed to re-structure the business of the Defendants and another enterprise despite the Plaintiff being suspected of disloyalty since July 2015.

(iv) The timing of the meeting with Plaintiff is a pointer to the effect that the representatives of the Defendants wanted to corner the Plaintiff at a time when the latter would be unprepared to rebut an accusation of insider dealing and disloyalty as the 22 December was his last day of work although it was agreed that he would be resigning as from 31 December 2015.

(v) The fact that the said representatives asked Mr Joumont who was accompanying the Plaintiff, but who was the finance manager of the Defendants,

to stay in another office is again evidence of the necessity of having the Plaintiff in a vulnerable position.

(vi) The argument that the Plaintiff was a shrewd and experienced businessman is neither here nor there. Any person being faced with two close friends suggesting that he had committed a criminal act with proof in the nature of a recording which will be remitted to the police and with a real prospect of being arrested, is likely to be emotionally destabilized.

(vii) The Court fails to understand why, if the Defendants had so much proof to prove the disloyalty of the Plaintiff, did their representatives, not conform to the law and set up a disciplinary committee. There was absolutely no reason for the Defendants' representatives to require the Plaintiff to submit his resignation on the spot. In matters of termination of contracts of employment, there can be no shortcuts as far as the law is concerned. The applicable legislation to the present issue at hand – i.e the now repealed ***Employment Rights Act (ERA) 2008*** required the employer willing to terminate the services of an employee for misconduct to carry out a specific procedure (see ***Section 38 (2) of the Act***). Offering to the employee an option to resign or to be reported to the police is not provided by law and is in fact, a blatant form of coercion.

(viii) The Court is also unable to see the logic behind the Defendants waiting until five months (22 December 2015) after being made aware of the alleged misconduct of the Plaintiff (in July 2015) before taking action and in a two-against-one meeting- without giving the Plaintiff an opportunity to seek legal advice.

(ix) Moreover, the SMS message sent by Mr Merven to the Plaintiff on the 23 December 2015 with the allusion to the consequences to the latter's family is another example of a threat. Why should the Plaintiff be warned of "consequences" his wife and children if the only outcome would be a dismissal without compensation? This supported the Plaintiff's evidence of the threat meted at him at the meeting of the 22 December 2015 if he did not submit his resignation.

(x) The case law referred to by both parties namely ***Georges Mahadeo Industries Ltd v Issory N [2010] SCJ 369*** where extensive extracts from ***Dalloz, Droit du Travail, janv.1994*** were cited, lay out clearly that, unless a resignation is free and unequivocal, the termination of the contract of employment would be considered to be a dismissal. The following extracts are pertinent to the present matter:

"As the authorities establish, a fundamental principle in an employee's resignation resides in the free exercise of her will to do so……"

"The rationale behind the existence of this principle resides in the adverse consequences that flow from such an act in the case of a worker inasmuch as the objective of labour law is to protect the interests of the worker:

"……..compte tenu des conséquences qui s'y attachent: perte de tout droit à indemnité de licenciement: rupture instantanée ou à l'issue d'un préavis souvent plus court que celui qui est du en cas de licenciement; exclusion du bénéfice des allocaitons chômage puisque celles-ci sont en principe réservés aux salariés qui ont été "involontairement privés d'emploi"(V. infra, nos 122 et s.) ……..

For that reason, it is the court's business to ensure that a resignation is given thoughtfully and freely:

"Mais au-delà de la forme que peut revêtir la démission, se pose une triple exigence: la déemission doit etre sérieuse, c'est à dire n'être pas irréflechie; elle doit être libre, c'est à dire n'avoir pas été imposée par des manoeuvres ou des pressions; elle ne doit pas être assimilée à l'absence non autorisée ou non justifiée (qui ne traduit pas la volonté de quitter l'entreprise). Dalloz, Droit du Travail, janv. 1994, para. 20 ."

81. In the present case, the Court is satisfied that the Plaintiff has proved on the required standard of proof that the Defendants' conduct (through their representatives) on the 22 December 2015 has caused him to sign this already drafted letter of resignation. It is significant to point out that the Plaintiff revised his decision to resign under coercion the very next day. He entered the present case in the shortest possible time. His explanations as to why he had signed the letter of resignation are plausible whilst the defence has failed to justify their haste in obtaining the resignation of the Plaintiff on the already planned last day of his employment

82. In these circumstances, the Court is satisfied that the Plaintiff has proved his case on a balance of probabilities to the effect that he was constructively dismissed by the Defendants' on the 22 December 2015.

83. This constructive dismissal amounts to an unjustified termination of the Plaintiff's employment which entitles him to the payment of severance allowance as provided by ***Section 46 (5) (e) of the now repealed ERA 2008.***

84. I therefore order the Defendants, jointly and in solido, to pay the Plaintiff the sum of Rs **16,722,999.** as detailed in the proecipe (paragraph 35), together with interests at the rate of 12% per annum as from 22.12.2015, until final payment. With costs.

This 31 August 2020

K. Bissoonauth (Mrs)

President, Industrial Court.