Vrugtman R. v Renoir Consulting Ltd

2024 IND 20

Cause Number 504/2021

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

Mr. Robert Vrugtman

Plaintiff

v.

Renoir Consulting Ltd

Defendant

Ruling

The salient averments of this amended plaint hereinafter referred to as "plaint" are in short that Plaintiff joined the employment of Defendant on 4 April 2009. The terms and conditions of his employment were contained in an indeterminate contract of employment dated 1 July 2017.

During his 12 years of employment, he was assigned several key tasks such as Operations Manager for India, Global Business Analyst, Chief Operating Officer for Europe and lastly Business Development Director for the Middle East.

Plaintiff's duties and responsibilities were set down in the said contract of employment which also established a mechanism for the review of performance expectations, namely in the event that the performance of Plaintiff would fall below expected levels.

Plaintiff's last posting was in Oman where he was leading a large project which was prematurely terminated and he was requested by Defendant to work on the commercial aspect namely to develop the Defendant's business in the Middle East.

Then, by way of a letter dated 28 July 2021, Defendant acting through its Group Head of Human Resources, informed Plaintiff that the Middle East region was an underperforming market and that Defendant had decided to optimize its costs in such underperforming markets.

Consequently, Defendant was terminating Plaintiff's appointment by giving him a written notice of 3 months with effect from 28 July 2021.

During the 3 months' period, he would remain in the employment of Defendant and would continue to seek new opportunities for Defendant. In the event that he would secure an "Analysis" that would lead to a project worth GBP 500,000/- or above, the said three-month written notice would be rescinded and he would remain in his employment.

Given that his assigned telemarketer was withdrawn from him since the beginning of October 2012, any possibility for him to find new opportunities was greatly diminished.

By way of another e-mail dated 10 September 2021, he was informed by the Group Head of Human Resources of Defendant that the termination of his employment was based on the alleged fact that he was not "delivering revenue in the region".

He was also informed by way of another email dated 13 October 2021 by the said Group Head of Human Resources that the balance of his accrued and untaken vacations would be paid to him at the end of the three- month notice period.

Thus, at the end of the said three-month notice period, his employment was terminated by Defendant.

Defendant has in or around the month of June 2022 caused a job vacancy to be published on its website whereby Defendant is looking for a potential candidate for the post of 'Partner, Middle East.' By publishing the said job vacancy, Defendant has acted in stark contradiction with its previous statement in the letter dated 28 July 2021 namely that Defendant was allegedly trying to optimize its costs in underperforming markets such as the Middle East.

It is evident that by withdrawing the Plaintiff's assigned telemarketer, Defendant purposely wanted the Plaintiff to fail to come up with any new 'Analysis' and the Defendant's said course of action thus amply demonstrates that the termination of his employment as a result of his alleged poor performance was unlawful and without justification thus entitling the Plaintiff to the payment of severance allowance.

Therefore, Plaintiff is claiming from Defendant Severance Allowance in the sum of EUR 825,237.27/- with interest and such amount by way of expenses incurred by the Plaintiff in attending Court.

The relevant answer to Demand of Particulars of the plaint is reproduced below:

*"**Under Paragraph 1 of the Amended Plaint***

Q.2. Will Plaintiff say if he has ever been posted in Mauritius during his employment with Defendant?

A.2. This question does not arise under the said Paragraph. However, the Defendant is referred to Paragraph 3 of the Amended Plaint." (**emphasis added**)

Paragraph 3 of the plaint is reproduced as follows: *"The Plaintiff avers that, during his 12 years of employment, he was assigned several key tasks such as Operations Manager for India, Global Business Analyst, Chief Operating Officer for Europe and lastly Business Development Director for the Middle East."*

Defendant took a "preliminary objection *in limine"* which is essentially as follows:

1. The Industrial Court of Mauritius has no jurisdiction in the present case which is based on Plaintiff's Employment Agreement with Defendant inasmuch as the said Agreement is governed by the laws of England and Wales and, any claim brought by the Plaintiff, in relation to the said agreement, is subject to the exclusive jurisdiction of the Courts of England and Wales, by virtue of Clause 34 of the Employment agreement dated 1 July 2017.

2. Defendant therefore refuses to submit to the jurisdiction of the Industrial Court of Mauritius which has no jurisdiction in the present case and moves that the Plaintiff's case be set aside with costs.

Court remarks that a challenge to the jurisdiction of the Court by way of an objection in law can either be by way of a preliminary objection or a plea *in limine* as

the difference in terminology has little importance. Having said so, I respectfully consider that it may be desirable not to raise a combined terminology like "*preliminary objection in limine"* as it is an incorrect appellation. (see- **Ramgoolam N. Dr GCSK FRCP v. The State of Mauritius & Anor.** [2020 SCJ 91] at page 8 highlighting the following:

"(…) that a challenge to the jurisdiction of the Court can be raised either as a preliminary objection or as a plea in limine. The terminology (…), in other words whether it is styled "Preliminary Objection" or "Plea in limine litis" is of little importance so long as it is an objection in law as to jurisdiction or limitation of action which is required to be raised at the very outset of the case.").

The objection in law was resisted and the matter was fixed for arguments.

For that purpose, Plaintiff deposed in Court and the following documents were produced upon agreement of both parties to the case:

(a) A certificate of incorporation of Defendant company effective from 17 April 1995 being incorporated as a Private Company limited by shares (Doc. AG1);

(b) A Global Business Licence Category 1 granted to Defendant under Section 20(5) of the Financial Services Development Act 2001. That licence was subject to the Terms and Conditions described therein and was valid for the period from 19 April 2007 to 18 April 2008 as per Doc. AG2. The relevant condition reads as follows:

"CONDITIONS

1.RENOIR CONSULTING LIMITED (the "Company"), the stated purpose of which is to engage in consultancy services, shall be a Category 1 Global Business Company.

2(a) The Company shall only conduct such business or activity, being business or activity permissible under the laws of Mauritius and those of the jurisdiction where the business or activity is being carried out. Where such business requires any licence, authorisation, permission or consent (however described), the business must not be undertaken until such has been obtained;" ;(**emphasis added**)

(c) Another Global Business licence (Category1) pursuant to Section 72(6) of the Finances Services Act (the Financial Services Development Act 2001 having been repealed) with effect from 19 April 1995 subject to the Terms and Conditions set out therein (Doc. AG3).

(d) Contracts of employment dated 27.3.2009, 1.1.2011, 1.4.2011 and 1.7.2017 as per Docs. AG4, AG5, AG6 and AG7 respectively;

(e) A Variable Pay Calculation Change (Doc. AG8);

(f) E-mail of Contract Termination (Doc.AG9);

(g) Pay slips of Plaintiff collectively produced as Doc. AG10;

(h) Document from Registrar of Companies to the effect that the Defendant being a Global Business Company was still live as per Doc. AG11.

The Plaintiff gave evidence in Court solely for the purposes of the arguments.

He stated that he had been working for Defendant since the beginning of the year 2010 and his employment was terminated in the year 2021. He has instructed his Attorney to enter a case before the Industrial Court of Mauritius and he was claiming Severance Allowance. The latest contract was dated 1.7.2017 namely Doc. AG7 where the relevant Clause 34 was referred to and which is reproduced below:

*"**34. GOVERNING LAW AND JURISDICTION***

34.1 This agreement will be governed by the laws of England and Wales.

34.2 If you are working outside the European Union at the time that the agreement is terminated, this agreement shall be subject to the nonexclusive jurisdiction of the Courts of England and Wales in the case of any claim by the Company, and to the exclusive jurisdiction of those Courts in the case of any claim by you. If in one of the member states of the European Union including the UK, then the agreement shall be subject to the nonexclusive jurisdiction of the Courts of England and Wales, subject to applicable EU laws as to jurisdiction over employment claims."

Plaintiff further stated that upon termination of his contract of employment by Defendant, he sought legal advice and decided to start proceedings in Mauritius as he had no relationship with the U.K. His salaries were not paid from there and his contract was not a U.K. one as he had never worked there. Nor did he own

properties there and nor did he live there. His contract of employment was a Mauritian one with a Mauritian Company and that was why he came to the Mauritian Court. To enter a case in the U.K. would have been highly significantly expensive. In any event he could not pursue a claim in England and Wales as it was too late as the time limit was 3 months. He had been working in many countries during his ten-year employment with Defendant. He had never worked professionally in the U.K. All his salaries were paid by Defendant from Mauritius as per his pay slips namely Doc. AG10. During his ten-year employment with Defendant, he had never worked in Mauritius and had never come to Mauritius. His last posting at the time of the termination of his contract of employment by Defendant was in Oman in the Middle East. He had never paid taxes on his salaries in Mauritius. Nor had he paid any social security contributions in Mauritius on his salaries. He paid taxes in Europe originally and Oman was an income tax free country.

The main thrust of the argument of learned Counsel for the Defendant in relation to the issue of jurisdiction of this Court raised was based on the last contract of employment as agreed by learned Counsel for the Plaintiff and which was operative at the material time as per Doc. AG7. Plaintiff was working in Oman at the material time namely at the time of termination of his contract of employment by Defendant. As per Clause 34 of that contract, the action has been brought by the Plaintiff and not by the Defendant, so that the competent and exclusive jurisdiction is the Court of England and Wales as per the intention of the parties pursuant to Article 1156 of the Civil Code (i.e. Code Civil Mauricien). In fact, all the contracts produced show an intention of the parties to be governed by the laws of England and Wales in relation to such a claim brought by Plaintiff. Hence, there is no issue of conflict of laws because the intention of the parties is clear. If ever we were to talk about the *forum non conveniens* aspect, the test in **Spiliada Maritime Corp v Cansulex Ltd [1987] AC 460** has been explained in the case of **Atlantic Pictures Ltd v Ten 10 Films Limited [2020 SCJ 225]** where basically the test is that a stay will be granted on the ground of *forum non conveniens* where the Court is satisfied that there is some other available forum having competent jurisdiction which is the appropriate forum for the trial of the action. It means that the case may be tried more suitably for the interests of all parties and the ends of justice. The burden is on the employer, meaning Defendant to persuade the Court to exercise its discretion to grant a stay. If the Court is satisfied that there is another available forum, then the burden will shift on the Plaintiff to show special circumstances by reason of which justice requires that the trial should nevertheless take place in Mauritius. The first stage, is for the Court

to examine the factors which point in a direction of another forum than Mauritius which are connecting factors like the availability of witnesses, where the parties reside and carry on business and the burden is on Defendant to show that there is another forum. His friend needs to show that the ends of justice require that the case be heard in Mauritius. He submits that there are numerous connecting factors which indicate that the Court of England and Wales is the most natural forum for which the action has the most real and substantial connection. Clause 7.1 of Doc. AG7 shows that normal working hours stipulated in the Workers' Rights Act is 45 and not currently 37.5 which is below the normal hours stipulated by the Act. The agreement itself does not really pay attention to Mauritian laws in any event Clause 34.1 says that the agreement is governed by the Laws of England and Wales. Plaintiff has no tax deductions in Mauritius, no taxes paid in Mauritius and Plaintiff had never worked in Mauritius. There is no natural connection with Mauritius. There is a variable clause 13 which is subject to work in the European region and not in Mauritius. Clause 17 is unlike Mauritian law where sick leaves are paid. Many concepts are not to be found in Mauritian law like summary dismissal in case of poor performance without any disciplinary hearing. The Plaintiff is to comply with the Copyright Patents and Design Act 1988 which is English law as per Clause 27(2). These obligations survive the termination of employment by Clause 22.8 and which is English law again. Clause 25 talks of Garden leave unknown to our law which shows connections with England and Wales and not Mauritius. A Global Business Company does not operate in Mauritius. The last issue was the connecting factors as per Doc. AG9 namely the letter of termination wherein all the properties were to be returned to the UK office and not the Mauritian one. So, based on the arguments, those connecting factors, the Defendant has discharged the burden under **Spiliada** quoted in **Atlantic Pictures** which is the burden of showing that the natural forum for which the action has the most real and substantial connection, is England and Wales. The only connection with Mauritius is that Defendant is incorporated in Mauritius and that is all the connection. Even if *forum non conveniens* is considered, Mauritius is not the appropriate forum.

The main thrust of the argument of learned Counsel for the Plaintiff is that it would be logistically difficult and expensive to bring witnesses from England to Mauritius. In order to be deemed to have adequate substance in Mauritius, amongst other requirements, a Global Business Company must be managed and controlled from Mauritius and have its place of effective management in Mauritius and not UK and not England and Wales. To perform its core income generating activities in or

from Mauritius and incur a minimum level of expenditure that is proportionate to its level of activities, it has to be administered by a management company in Mauritius. Defendant is managed by a management company which is also its Corporate Secretary and which is Rogers Capital Corporate Services as per Doc. AG11. The U.K. has nothing to do with Defendant as Plaintiff was employed by a Mauritian company. He relied on the Supreme Court case of **Fuel Transport Holdings Ltd v PrimeFuels Holdings Ltd** [2018 SCJ 350] as regards the connecting factors. His contention is that there is no U.K. Director, there is no person who is based in the U.K. where this case should be heard in the U.K. so that a U.K. Director will come from there, or a witness in the U.K. will come. The Board of Directors of Defendant is based in Mauritius. Even the Directors are residents of Mauritius. Defendant is governed by its Constitution which is subject to Mauritian Law. The books of records of Defendant are kept in Mauritius and not U.K. and not England and Wales. The resolutions of the Board and shareholders of Defendant are issued by its company secretary. Rogers Capital Corporate Services Ltd is incorporated and domiciled in Mauritius since 2004. Defendant is connected to Mauritius contrary to England and Wales. True it is that Plaintiff was not posted in Mauritius but he was employed by a Mauritian registered company. All the setbacks drawn by his learned friend have to be adapted to the law in the relevant countries and which are contained in the Clauses of the contract itself. He relied on the case of **Hugnin T v Hugnin M.T.I. [2023 SCJ 93]** showing that it would be more inconvenient and expensive for the matter to be heard in England. He relied on Articles 2 and 59 of the Code de Procédure Civile. The doctrine of *forum non conveniens* decides the appropriate forum for the trial of the action where it may be tried more suitably for the interests of all parties and the ends of justice. The decision in **Spiliada** established a two-stage test for determining whether a Court should decline jurisdiction on the basis of *forum non conveniens*. The first stage involved identifying whether there is another forum and where it is clearly more appropriate to hear the case. Then, the second stage considered whether there are strong reasons why the case should be heard in the current forum instead. Overall, the case illustrates the importance of considering all relevant factors when determining the most appropriate forum for a legal dispute and the discretion of the Court to decline jurisdiction on the basis of *forum non conveniens*. His submission is that the Plaintiff be allowed to proceed with his case in Mauritius in an individual capacity.

Learned Counsel for the Plaintiff submitted in reply that there is no expert evidence as regards the law in force in England and Wales on the issue of limitation

of action which is three months and why Plaintiff did not enter his action within delay. His friend has shown connecting factors of Defendant only, the Directors, the Management Company. But the action itself is a Severance Allowance action concerning termination of employment. So, where is that employment more connected? Not where the Defendant is more connected. Defendant is incorporated in Mauritius but it does not conduct business in Mauritius. By law, Defendant must have Mauritian Directors and of course it has a Mauritian Management Company. However, the contract remains as per the exclusivity of jurisdiction as per the intention of the parties. Plaintiff is coming here because he missed the train of the three months in England and Wales and we do not know that. **Hugin(supra)** is a family law case and it is not a contract case and even less an employment contract case.

Learned Counsel for the Defendant submitted in reply that Plaintiff could not proceed in the U.K. as there was no connection as per Plaintiff's legal advice in U.K. He could not proceed in U.K. as there was insufficient connection with the U.K. There was more connection with his employer which is entirely Mauritian and that was why he came to Mauritius.

Learned Counsel for the Plaintiff further replied that it was a matter of law and Plaintiff cannot come and say someone told him that there was not enough connection with England and Wales.

Learned Counsel for the Defendant further replied that the Court will appreciate the weight of the authorities and the law to decide what is the appropriate forum.

I have given due consideration to the law and arguments of both learned Counsel including their written submissions and authorities relied upon.

The point that I have to decide is whether by virtue of the common intention of the parties, the present case is within the exclusive jurisdiction of the Court of England and Wales by virtue of Clauses 34.1 and 34.2 of Plaintiff's Global Business Employment Contract with Defendant dated 1 July 2017 as per Doc. AG7.

Secondly, should Mauritius be a competent jurisdiction, then by virtue of the doctrine of *forum non conveniens* in the light of the facts and evidence canvassed, whether England and Wales can be another competent jurisdiction for the interests of

both parties and ends of justice so that the present proceedings be stayed and set aside before the Mauritian Court.

The Financial Services Commission, hereinafter referred to as ("FSC") is a body corporate established under Section 3 of the Financial Services Act 2007. Defendant is a private company limited by shares (Doc. AG1) incorporated in Mauritius on 17 April 1995. It holds a Global Business Licence category 1 since 19 April 2007 subject to conditions 2(a) and 2 contained in its respective Global Business Licences namely Docs. AG2 and AG3.

I deem it appropriate at this stage to reproduce Section 72(6) of the Financial Services Act 2007 (Section 20(5) of the Financial Services Development Act 2001 having been repealed) pursuant to which a Global Business Licence Category 1 was issued to Defendant. Section 72(6) of the Financial Services Act 2007 hereinafter referred to as "FSA" provides:

"72. Application for a Category 1 Global Business Licence or a Category 2 Global Business Licence

(6) Where an application is approved under this section, the Chief Executive shall, on payment by the applicant of such fee as may be specified in the FSC Rules, issue a Category 1 Global Business Licence or a Category 2 Global Business Licence, as the case may be, on behalf of the Commission subject to such terms and conditions as the Commission may deem necessary." (**emphasis added**)

Now the enabling Section for the FSC to impose conditions for the most effective furtherance of its objects [which for our concern is the one to ensure the orderly administration of the financial services and global business activities pursuant to Section 5(1)(a) of the FSA] is to be found under Section 6 of the FSA which reads as follows:

"6. Functions of Commission

The Commission shall have such functions as are necessary to further most effectively its objects, and in particular, shall –

(b) license, regulate, monitor and supervise the conduct of business activities in the financial services sector and of global business;

(c) set rules and guidance governing the conduct of business in the financial services sector and of global business;"

(m) take measures for the better protection of consumers of financial services;

(o) do such acts or things as are incidental or conducive to the attainment of its objects." (**emphasis added**)

Hence, a Global Business Licence (category 1) hereinafter referred to as "G.B.L" was issued to the Defendant pursuant to Section 20(5) of the defunct Financial Services Development Act 2001 (Doc. AG2) and the said Section 20(5) of the repealed Act has been revived in Section 72(6) of the FSA. That G.B.L. was subject to the terms and conditions contained therein in conformity with Section 72(6) of the FSA and was valid as from 19 April 1995 as per Doc. AG3 (bearing in mind that Plaintiff was employed in April 2009-2010 by Defendant).

The relevant part of Doc. AG3 (bearing in mind that Condition 2(a) of Doc.AG2 & Condition 2 of Doc. AG3 are the same) reads as follows:

> *"This is to certify that,* ***RENOIR CONSULTING LIMITED*** *holds a Category 1 Global Business Licence pursuant to Section 72(6) of the Financial Services Act with effect from 19th April 1995 subject to the conditions set out herein.*
>
> *(…)*
>
> ***CONDITONS:***
>
> *2. The Company shall only conduct such business or activity, being business or activity permissible under the laws of Mauritius and those of the jurisdiction where the business or activity is being carried out;"* (**emphasis added**)

Therefore, Defendant was an authorized company for the purposes of Global Business or Activity subject to the relevant Condition 2 imposed by the FSC of Mauritius under Section 72(6) of the FSA as per Doc. AG3 at the time of Plaintiff's

alleged unlawful and unjust termination of his contract of Global Business employment by Defendant (Doc. AG7).

It follows that the country where the Global Business was being carried out by Defendant where Plaintiff was employed at the time of termination of his said contract of employment (as Business Development Director for the Middle East) was in Oman (as the above averments of the plaint are deemed to be accepted by Defendant for the purposes of the point taken *in limine* (***see- Rama v Vacoas Transport Co. Ltd*** ***[1958 MR 184]***) and also in view of Plaintiff's own admission.

It means that Defendant was authorized to conduct such Global business or activity permissible under the laws of Mauritius and also permissible under the laws of Oman as it is where its business or activity was being carried out as per Condition 2 contained in its G.B.L. (Doc. AG3) imposed by the FSC pursuant to Section 72(6) of FSA.

This is because Oman is where Plaintiff was employed by Defendant at the time of his alleged unlawful and unjust termination of his Global business contract of employment by Defendant and it was where the business of Defendant was being carried out so that Plaintiff's job was to develop the Defendant's business in the Middle East in his capacity as Business Development Director for that region.

Therefore, by virtue of the said Condition 2 pursuant to Section 72(6) of the FSA, the laws of Oman will have to be equally complied with in relation to the clearances needed for the Defendant to be licensed meaning authorized to conduct its business in Oman, although the G.B.L. was issued by the FSC.

Thus, the jurisdiction of Oman cannot be overlooked although the FSC issued the G.B.L. to Defendant.

Now the FSC has imposed such a Condition 2 in the G.B.L. so that Defendant is authorized to conduct its business in Oman.

However, the FSC has not been created for it to act merely as a licensing authority for the conduct of a Global Business and no more. But on the contrary, it issues a G.B.L. with Conditions imposed therein, for the effective furtherance of its objects (which for our concern is under Section 5(1)(a) of the FSA), through the function of monitoring and supervising the conduct of such Global Business which in the present case is in Oman pursuant to Section 6 of the FSA.

Therefore, Section 72(6) of the FSA has to be imperatively interpreted concurrently with Section 6 of the FSA in conformity with its functions.

Hence, given that Section 72(6) of the FSA is imperatively qualified by the above provisions of Section 6 of the FSA in order to authorize Defendant to conduct its business in Oman compliant with the laws of Oman, that Condition 2 found in Defendant's G.B.L. (Doc. AG3) will also cover the manner in which the business of Defendant is conducted in Oman in relation to which Plaintiff was allegedly unlawfully and unjustly been dismissed by Defendant.

Therefore, although the FSC in Mauritius has issued the G.B.L., the laws of Mauritius and the laws of Oman only have to be complied with in the manner the business of Defendant is conducted in Oman in relation to which the Plaintiff employee was dismissed.

Now the conduct of the business in Oman by Defendant is done through its employees and for which it is licensed meaning authorized by both Mauritius and Oman although it is Mauritius through the FSC that issues the G.B.L. (Doc. AG3) to Defendant and not Oman.

Likewise, for the manner in which the business has been conducted in Oman whereby Plaintiff employee alleges that he was unlawfully and unjustly dismissed by Defendant, such legal impediment in the manner of the conduct of such business by Defendant, is imperatively subject to the laws of Mauritius and the laws of Oman only, pursuant to Section 72(6) of the FSA qualified by Section 6 of the FSA.

It means that the legal impediment namely the alleged unlawful and unjust termination of Plaintiff's Global contract of employment (Doc. AG7) has to be imperatively resolved by the application of the laws of Mauritius and the laws of Oman only and not the laws of England and Wales. In the same breath, Defendant cannot invoke that Plaintiff's Global Business contract (Doc. AG7) was to be governed by the laws of England and Wales upon the common intention of both parties under Clause 34.1 pursuant to Article 1156 of the Code Civil Mauricien which reads as follows:

"Art. 1156. On doit dans les conventions rechercher quelle a été la commune intention des parties contractantes, plutôt que de s'arrêter au sens litéral des termes."

Therefore, only the Courts of Mauritius and Oman are competent to hear the present employment issue in relation to Plaintiff's said contract of employment (Doc. AG7) by the application of the laws of Mauritius and Oman only and not England and Wales by virtue of Section 72(6) of the FSA qualified by Section 6 of the FSA.

The Defendant having invoked that, it is the common intention of the parties as per the Global Business contract of employment of Plaintiff(Doc. AG7) as per Clauses 34.1 and 34.2, to have such an agreement to be governed by the laws of England and Wales and that the present case be heard exclusively under the jurisdiction of England and Wales, should a case be entered by the Plaintiff employee, by invoking Article 1156 of the Code Civil Mauricien, is to flout Section 72(6) of FSA qualified by Section 6 of the FSA and would be against Public Order and Public Policy and which cannot be condoned pursuant to Article 6 of the Code Civil Mauricien which reads as follows:

*"**6.** On ne peut déroger par des conventions particulières aux lois qui intéressent l'ordre public et les bonnes moeurs."*

Furthermore, Learned Counsel for the Plaintiff relied on Articles 2 and 59 of the Code de Procédure Civile which provide:

*"**2.** En matière purement personnelle ou mobilière, la citation sera donnée devant le juge du domicile du défendeur; s'il n'a pas de domicile, devant le juge de sa résidence;*

***59.** En matière personnelle, le défendeur sera assigné devant le tribunal de son domicile; s'il n'a pas de domicile, devant le tribunal de sa résidence;"*

Now, it is equally significant to note that the present plaint has been entered in the specific context of Global Business, so that whether it concerns Articles 2 & 59 of the Code de Procédure Civile or Article 1156 of the Code Civil Mauricien, they are general laws in the application of contractual principles and not for the specific application of a Global Business Contract governed the FSA.

In the same breath, it is equally of paramount importance to note that Article 1156 of the Code Civil Mauricien, on the basis of the common intention of the parties, Defendant cannot flout the principle of *"Generalia Specialibus Non Derogant".* At this stage, the following extract from the decided case of **OLA Energy Holdings Ltd**

& Ors v The Financial Intelligence Unit [2023 SCJ 326] at page 6, is relevant and it reads as follows:

"I will therefore address my mind as to the applicability of this principle to the preliminary issue to be determined in the present case.

"Generalia Specialibus Non Derogant" is a latin maxim used in the interpretation of statutes, which in more common terms means that general laws do not prevail over special laws, and which in effect means that if two laws govern the same factual situation, a law governing a specific subject matter overrides a law governing only general matters.

However, this principle finds its application when there is a conflict of interpretation of two statutes, more generally a conflict between an earlier and a later statute."

In the present situation therefore, the later specific FSA under Section 72(6) of FSA will prevail over the earlier Article 1156 of the Code Civil Mauricien.

Thus, for the purposes of the alleged unlawful and unfair termination of the Global Business contract of employment of Plaintiff by Defendant, such contract cannot be governed by the laws of England and Wales and cannot be exclusively tried in England and Wales, by way of common intention of parties, because its Clauses 34.1.and 34.2 (Doc.AG7) cannot stand as they are against Public Order and Public Policy and against the principle of *"Generalia Specialibus Non Derogant".*

Therefore, pursuant to Section 72(6) of FSA (under Condition 2 found in Defendant's G.B.L. as per Doc. AG3), Mauritius is a competent jurisdiction to hear the present matter. However, the point that I have to decide is whether there is another competent jurisdiction which will be for the interests of both parties and for the ends of justice so that the present plaint be stayed before the Mauritian Court in view of the doctrine of *forum non conveniens*.

It is relevant to quote an extract from the decided Supreme Court case of **First Global Funds Ltd PCC and another v Financial Services Commission of Mauritius and another [2016 SCJ 14]** at page 80, where the case of **Peeroo v Peeroo [2003 SCJ 132]** a family law matter was referred to, although the case had nothing to do with family law and which reads as follows:

"In that case, the learned Judge referred to the decision of the House of Lords in Spiliada Maritime Corp v Cansulex ltd [1987] AC 460 which is the key English authority on forum non conveniens and which sets out the criteria governing the application of the doctrine –

"The basic principle is that a stay will only be granted on the ground of forum non conveniens where the Court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice".

The learned Judge also set out the other essential criteria that govern the application of the principle of forum non conveniens as including the following-

> *"(1) the burden is upon the claimant to persuade the Court clearly as to the appropriate forum for the trial of the action.*
>
> *(2) one must consider first what is the 'natural forum', namely that with which the action has the most real and substantial connection. Connecting factors will include not only factors concerning convenience and expense (such as the availability of witnesses) but also factors such as the law governing the relevant transaction and the places where the parties reside.*
>
> *(3) in considering where the case can be tried most 'suitably for the interests of all parties and for the ends of justice' ordinary procedural advantages are normally irrelevant"."*

Now by operation of the law namely Section 72(6) of the FSA under the provisions of which Defendant is an authorized Global Business Company, the *'natural forum'* with which the action has the most real and substantial connection is the Oman Court and not the Court of England and Wales (- see Condition 2 of the G.B.L. as per Doc. AG3). Should the present Court find that it should be England and Wales, then it would be tantamount to the Court changing the Condition 2 of G.B.L. as per Doc. AG3 issued to Defendant pursuant to Section 72(6) of the FSA, as it had never been the place of business of Defendant and Plaintiff had never been posted there in the course of his employment with Defendant. The cause of action arose in Oman in relation to the Defendant's business in the Middle East for the optimization of the generation of revenue in that region in relation to which Plaintiff allegedly failed to meet the target and thus, his contract of employment was

terminated having nothing to do with England and Wales. It is apposite to note that in **Hugnin (supra)** where the case of **Peeroo(supra)** was referred to, the Supreme Court held:

*"There is the need to discourage recourse to "forum shopping" in circumstances where it may result in a "fraude procédurale" as laid down in the case of **Peeroo(supra)** where the Court observed that it was "apposite for the Court to take any action that may be necessary to foil any attempt by any of the parties to make any abusive use of the jurisdictional process"."*

In the circumstances, finding that England and Wales as being another competent forum would be condoning a *"fraude procédurale"* and I, accordingly disallow such an attempt by Defendant to make an *"abusive use of the jurisdictional process".*

Therefore, the only other competent forum is Oman inasmuch as it has remained undisputed and unrebutted that Plaintiff was never posted in Mauritius during his twelve-year employment with Defendant. He had never paid any tax nor contributed to any fund in Mauritius. The plaint is silent as to where Plaintiff resides as it has not been averred that he resides in Mauritius. Now Plaintiff's contention is that he was advised to come and enter his case in Mauritius, because he was outside the limitation period of three months, as per the prevailing law in England and Wales. There is no expert evidence to that effect, as a foreign law is a matter of expert evidence (see- **Bayer Healthcare LLC v Suvaman Trading Limited [2015 SCJ 356]** applied in **Luc et Luc Ltd v Societe Lazuli & Lakaz Chamarel Ltd [2023 SCJ 225]**). Only his pay slips were obtained from Mauritius as per Doc. AG10, as it is abundantly clear, for the purpose of monitoring only under Section 6 of the FSA. Although Defendant is incorporated in Mauritius, it does not conduct its Global business in Mauritius.

By operation of the law, Defendant must have Mauritian Directors and a Mauritian Management Company in order to comply with the prerequisites to be covered in Mauritius as highlighted under Section 71 of the FSA for the application for such a Global business licence, so that on that score, Mauritius cannot be construed as being a *'natural forum"* by virtue of such insufficient *"connecting factors"* for the employment issue and which have been heavily relied upon by learned Counsel for the Plaintiff.

Likewise, general procedures like those contained in Articles 2 and 59 of the Code de Procédure Civile, relied upon by learned Counsel for Plaintiff, "*in considering where the case can be tried most 'suitably for the interests of all parties and for the ends of justice'"* those "*ordinary procedural advantages are normally irrelevant" (*see- **Peeroo(supra)).**

Besides, the issue in the present case and the prayer sought namely severance allowance, are not in relation to the internal affairs of the Defendant, as it was the case in **Fuel Transport Holdings(supra)** so that Mauritius would have been more connected.

As rightly pointed out by learned Counsel for the Defendant, one has to consider where the employment of Plaintiff is more connected which for the present purpose, is whether it is Mauritius or Oman. The cause of action arose in Oman and not in Mauritius whereby Plaintiff's contract of employment was allegedly unlawfully and unjustly terminated. It is apposite to note that, it has never been Plaintiff's contention by way of evidence in Court, **[** bearing in mind that all the averments of the plaint are deemed to be accepted by Defendant for the purposes of the point taken *in limine* (see- **Rama(supra)]** that there was a connecting factor to the jurisdiction of Mauritius, inasmuch as the unlawful termination of his contract, was because of a breach of Section 72(6) of the FSA namely Condition 4 of the Defendant's G.B.L. (Doc. AG3) which is reproduced below:

"4. (a) Where in the usual course of business, a director or manager or senior officer is asked to resign or is removed, 'the Licensee shall forthwith inform the Commission of the resignation/ removal and shall include a description of the circumstances surrounding such request for resignation and removal.

(b) The Company shall at the request of the Commission remove a director or a manager or senior officer from office, if, those persons are not, in the opinion of the Commission, fit and proper."

But the point that I have to decide is whether I can stay the present proceedings in Mauritius on the ground of *forum non conveniens.* I take the view that there is another available forum with competent jurisdiction namely the Oman Court which would be more appropriate than the Mauritian one, to entertain the present

case, as it would be more suitable for the interests of the parties and the ends of justice.

It is appropriate to quote an extract from the decided Supreme Court case of **Atlantic Pictures Ltd v Ten 10 Films Limited** [2020 SCJ 225] at page 3 which reads as follows:

*"In **Spiliada Maritime Corp v Cansulex Ltd [1986] 3 All ER 843** Lord Goff of Chieveley, after having considered several sauthorities summarized the law in England in respect of forum non conveniens as follows –*

(a) The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, ie in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

(b) As Lord Kinnear's formulation of the principle indicates, in general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay (see, eg, the Société du Gaz 1926 SC (HL) 13 at 21 per Lord Sumner and Anton Private International Law (1967) p 150). It is, however, of importance to remember that each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favour, and that in respect of any such matter the evidential burden will rest on the party who asserts its existence. ***Furthermore, if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country (see para (f) below).***

….

(d)Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. These are the factors which Lord Diplock described, in Mac Shannon's case [1978] A.C. 795, 812, as indicating that justice can be done in the other forum at "substantially less inconvenience or expense." Having regard to the anxiety expressed in your Lorships' House in the

*Société du Gaz case, 1926 S.C. (H.L.) 13 concerning the use of the word "convenience" in this context, I respectfully consider that it may be more desirable, now that the English and Scottish principles are regarded as being the same, to adopt the expression used by my noble and learned friend, Lord Keith of Kinkel, in Abidin * 478 Daver[1984] A.C. 398, 415, when he referred to the* ***"natural forum" as being "that with which the action had the most real and substantial connection."*** *So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction (as to which see Crédit Chimique v, James Scott Engineering Group Ltd., 1982 S.L.T. 131), and* ***the places where the parties respectively reside or carry on business.***

(Emphasis added)

It is also apposite to refer to the two stage process mentioned by Lord Goff in ***Connelly v RTZ Corporation Plc and others [1997] UKHL 30*** *–*

"25. … It was further stated that the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay. For that purpose, he has to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum in which jurisdiction has been founded by the plaintiff as of right. In considering that question, the court will look first to see what factors there are which point in the direction of another forum, i.e. connecting factors which indicate that it is with the other forum that the action has its most real and substantial connection. This is the first stage. However, even if the court concludes at that stage that the other forum is clearly more appropriate for the trial of the action, the court may nevertheless decline to grant a stay if persuaded by the plaintiff, on whom the burden of proof then lies, that justice requires that a stay should not be granted. This is the second stage."

The English principle in respect of forum non conveniens has been adopted by the Courts in Mauritius – see ***Peeroo A.K v Peeroo M.J*** *[2003 SCJ 132]; **Kardec L.E v Kardec M.M.Y** [2003 SCJ 199]; **Hofman P.F.R v Hofman P.M.G.G** [2008 SCJ 107]; **First Global Funds Limited PCC & anor v Financial Services Commission & anor** [2016 SCJ 14]."*

Since, Defendant carries its business or activity outside Mauritius, so that Plaintiff has never been posted in Mauritius and his alleged unjust or unlawful termination of his contract of employment, relates to his work done in Oman, I find that justice can be done in Oman at "*substantially less inconvenience or expense*" (see - Mac Shannon's case [1978] A.C. 795) applied in **Atlantic Pictures(supra)**). It would be more expensive and highly inconvenient for the parties to summon witnesses who live in Oman and to usher evidence which are found in Oman before the Mauritian Court let alone that there is nothing to suggest that Plaintiff resides in Mauritius.

Therefore, I find that the present action has its most *"real and substantial connection"* with the jurisdiction of Oman so that the Oman Court is the most appropriate competent forum meaning the *"natural forum"* for the trial of the present case, in the interests of justice, upon failure of Plaintiff to discharge the burden of proving that there are special circumstances by reason of which, justice requires that the trial should nevertheless take place in Mauritius. Furthermore, the grounds relied upon by learned Counsel for the Plaintiff, are not sufficient enough to show that, justice requires that a stay should not be granted.

In the light of the reasons given above, I find that the Industrial Court of Mauritius is not the appropriate forum of competent jurisdiction to hear the present case, but the Court of Oman. I have not been convinced by the Plaintiff on whom the burden of proof then lies, that justice requires that a stay should not be granted. Thus, I grant an order for a stay of the present proceedings under the doctrine of *forum non conveniens*.

S.D. Bonomally (Mrs.) *(Vice President)*
10.6.24