**IMTEAZ BHOYROO VS SMS PARIAZ LTD - RULING**

**2024 IND 2**

**IMTEAZ BHOYROO VS SMS PARIAZ LTD**

**Cause Number: 412/20**

**THE INDUSTRIAL COURT OF MAURITIUS**

(Civil Division)

**In the matter of:-**

**IMTEAZ BHOYROO**

Plaintiff

**VS**

**SMS PARIAZ LTD**

Defendant

**RULING**

*Introduction*

This is a case where the Plaintiff is claiming from the Defendant the sum of Rs 800,037 for unjustified termination of his employment.

On the 10th October 2023, the case was made out against the Defendant and the matter was fixed for judgment to be delivered on the 20th October 2023. On the 20th October 2023, the Attorney for the Defendant came to Court and the matter was fixed for judgment or proforma on a subsequent day. When the case was called on the 31st October 2023, Counsel for the Defendant moved that the case be re-opened and Counsel for the Plaintiff moved to take a stand. On the 8th November 2023, Counsel for the Plaintiff had no objection that the case for the Defendant only be opened but Counsel for the Defendant maintained that the whole case ought to be reopened. An argument was heard on the matter.

*The chronology*

According to the records, the parties were absent at the preliminary stages and the Defendant has always been absent, save and except after the case has been made out against him. However, the parties were represented by Legal representatives in Court. The case was first called on the 14th January 2021 and was fixed for Demand of Particulars on the 18th

February 2021, on which date the demand of particulars was duly filed. The case was fixed for Answer to Particulars to be furnished on the 25th March 2021. Same was filed on the 24th June 2021, after the resumption of Court sittings following the confinement attributed to the Covid 19 pandemic. Since the 24th June 2021, the case has been postponed for the Defendant to file a plea. From the 24th June 2021 to 12th May 2022, the case was fixed for demands and answers to Further and Better particulars and a motion for Argument. The Argument was scheduled to be heard on the 4th November 2022 but on that day, the Defendant moved that the case be fixed for plea anew to the 26th January 2023. On the 26th January 2023, the Defendant again moved for a postponement for plea to the 23rd March 2023. On the 23rd March 2023, the case was again postponed for plea to the 15th June 2023. On the 15th June 2023, the Defendant being absent, the Plaintiff moved that the case be made out against the Defendant and the matter was fixed for the case to be made out on the 20th July 2023.

On the 20th July 2023, the Defendant's Counsel put in an appearance and moved for preliminary objections and the matter was fixed for stand on the 28th August 2023. On the 28th August 2023, the Defendant being absent yet again, Counsel for the Plaintiff moved that the preliminary objections be set aside and moved that the matter be fixed for Make Out anew on the 5th October 2023. The motion was granted.

On the 5th October 2023, Counsel for the Defendant appeared in the case and stated that no one had appeared for the Defendant on the previous occasion due to a confusion as to the dates and the Defendant's Attorney was sick. The Plaintiff's Counsel went through a history of the case and insisted that the case be made out, the moreso as the Defendant was still absent. However, the Defendant's Counsel averred that the case was coming at formal stage and reiterated the preliminary objections. The case was then fixed for Arguments.

On the same day, Counsel for the Plaintiff moved that the case be called anew before the Ag President. Parties were duly represented and the case was fixed for disposal with the specific proviso that Defendant's representative ought to be present on the 10th October 2023.

On the 10th October 2023, when the case was called at 10 11 am, the Defendant was absent and the Plaintiff moved that the case be made out. The motion was granted, the case was made out and judgment was fixed to the 20th October 2023.

On the same day, that is, on the 10th October 2023, the Defendant's Attorney sent a letter to the Court to state that the matter was not fixed for Make Out on the 10th October 2023. He further averred that the representative of the Defendant's company reported to the 4th floor of the New Court House at 09 30 hours with a letter from Counsel to have the case fixed for Argument. However, since the case did not appear on the Cause list, the representative of the Defendant left the Court premises.

On the 20th October 2023, the case was fixed for proforma or judgment to the 31st October 2023. It was then that Counsel for the Defendant moved that the case be re-opened. Counsel for the Plaintiff moved to take a stand on the 8th November 2023. On that day, Counsel for the Plaintiff had no objection that the case for the Defendant be opened but Counsel for the Defendant maintained that the whole case ought to be reopened. The case was fixed for Argument on the 12th January 2024 and the Court heard submissions from both Counsel.

*Discussions*

THE LEGAL BASIS OF REOPENING OF CASE AFTER MAKE OUT

I have considered the submissions of both Counsel. First and foremost, I have considered the viability of the point raised by Counsel for the Defendant, namely whether the Defence can move to re-open the case for the Plaintiff when the Defendant has not adduced any evidence at the time the case was heard.

The purport of a motion to reopen a case is for a party to adduce further evidence after it has closed its case. I deem it fit to refer to the case of SEERUTTUN V MOOSUN [1973 MR 193] where the Court held that:

> *"The general rule as to the admissibility of further evidence..... is that the judge has a discretion at any stage of a trial to allow a party to produce further evidence, even if such evidence could have been produced in the first instance, if he considers that it is necessary in the interests of justice to admit such evidence. The judge will generally allow further evidence to be produced where the party who seeks to produce it has been taken by surprise or misled and for that reason did not produce it in the first instance. The rule applies in both civil and criminal proceedings. The discretion enjoyed by the judge is one that should be exercised with great caution."*

However, the present case has its own specificity in as much as no evidence was adduced at all by the Defendant and the issue is no longer centered around further evidence being produced. The point to be thrashed out is whether the Defendant can at this stage adduce evidence in the first place when it had not adduced any evidence at all.

On this score, I am of the view that a Defendant can move that the case be reopened after the case has been made out. I find comfort in my reasoning through the application of the dicta from the case of MUNGRA A & ORS VS SUNASSEE A & ANOR (2004) SCJ 67. In that case, there was a judgment against the Appellant, then Defendant, when the case was made out against the Defendant. The Magistrate subsequently refused to grant a new trial. The

Defendant appealed against the decision of the Magistrate not to grant the new trial and the Appeal Court stated in its conclusive remarks that:

> *"We also take note that the trial court delivered judgment twelve days after the case had been made out. Had the appellants or their legal representative been following the case, a motion to re-open the case could well have been made before judgment."*

In view of the above, I find that there is a legal basis for the Defendant to move to re-open the whole case after a case has been made out against the Defendant.

SHOULD THE CASE BE REOPENED?

The next question to be determined is whether I should allow the motion of the Defendant to re-open the case, bearing in mind that the decision to grant a motion for a new trial must be exercised judiciously. (RE: MOHABEER S.K & ANOR VS BEEZADHUR VS (2023) SCJ 406). I have considered the facts of the present situation and the conduct of the parties.

At the outset, I find the version given by the Defendant as to why the case should be re-opened to be flimsy and to lack substance. I say so for the following reasons. First, it is true that the case was not fixed for Make Out on the 10th October 2023 since it was fixed for Disposal for the Defendant to be personally present. However, it is noteworthy that the Court can proceed with the Make Out of a case when the Defendant is absent, even if the case is not specifically fixed for Make Out. I deem it to refer to section 16(1) of the District and Intermediate Courts (Civil Jurisdiction) Act which reads:

> *"Where on the day so fixed in the summons, or at any continuation or adjournment of the Court or cause in which the summons was issued, the defendant does not appear, or does not sufficiently excuse his absence, the Court upon the proof of the service of the summons, may give judgment in terms of the plaint or, where the cause includes a claim for substantial damages, proceed to the hearing of the witnesses and trial of the cause on the part of the plaintiff only, and in either case, the judgment shall, subject to subsection (2), be as valid as if both parties had attended."*

Second, it is totally normal that the case would not appear on the Cause List on the 10th October 2023 since the case was called on the 5th October to be fixed on the 10th October, especially because there was a matter of urgency caused by the delay on the part of the Defendant. The 5th October was a Thursday and the 10th October was a Tuesday. The Cause List was already prepared and finalised at that time. The legal representative of the Defendant

was fully aware of the situation since the 5th October 2023 and should have done needful to ensure the attendance of the Defendant in Court on the 10th October 2023.

I have assessed the conduct of the Defendant. I find that it is most unbecoming on the part of the Defendant to have allowed a case to be postponed for plea for about 2 years. I note with concern that every time the case was fixed for plea, the Defendant filed a demand of Further and Better particulars. The Defendant did so on the 29th July 2021 and the 10th February 2022. The Plaintiff answered the Demand of Further and Better Particulars on every scheduled date. When the case ought finally to have been fixed for plea, the Defendant raised preliminary objection on the 11th August 2022, nearly about 1 year later.

On the day that the Defendant ought to have substantiated the preliminary objections, that is on the 4th November 2022, he again moved that the case be fixed for plea and stretched the delay for a period of more than 6 months, marked with several requests for postponement for plea on the part of the Defendant. As at todate, there is no plea on record.

It was only when the case was fixed for Make Out after the Defendant failed to be present and file a plea on the 15th June 2023, that the Defendant suddenly turned up on the 20th July 2023 to file preliminary objections again. What is shocking is that the Defendant conveniently puts up a legal appearance every time the case is fixed for Make Out. The Court was lenient enough to allow the case to be fixed for stand on the 28th August 2023 after the Defendant raised preliminary objection on the 20th July 2023. Yet again, on the 28th August 2023, the Defendant failed to turn up to Court, causing the matter to be fixed for Make Out anew on the 5th October 2023.

Once again, the Court acceded to the request of the Defendant for a postponement when he suddenly turned up again on the 5th October when the case was scheduled to be made out. Despite the strong argument put forward by Counsel for the Plaintiff to proceed with the Make Out on the 5th October, when the case was already fixed for Make Out on 2 previous occasions, the Defendant chose to be absent on the 10th October 2023 when the case was called anew. I have considered the version of the Defence that the Defendant allegedly turned up to Court at 09 30 hours with a letter from Counsel but subsequently left when he did not find his case listed, to be totally devoid of substance. I find that if there is any credence in the version of the Defendant, he ought to have waited for his turn for the case to be called, or to contact anyone to submit the letter. This is the expected behaviour of reasonable party to a case, the moreso when the Defendant has been the source of unjustified delay. Simply leaving without putting in an appearance is clearly not credible nor does it represent a viable excuse.

I have perused the judgment of AMODE OWADALLY VS NAVNISH TRANSPORT LIMITED (2020) INT 185 produced in Court by Counsel for the Defendant. This judgment is

of persuasive value to this Court and I rely on the essence of this judgment to the effect that there has been no denial of a fair trial since the defence was well aware of the schedule of the case.

I have kept in mind the golden rule that *"when a litigant has obtained a judgment in a Court of Justice ..... he is by law entitled not to be deprived of that judgment without very solid grounds"*. (RE: BROWN VS DEAN, A.C. (1910), 373). In the present case, I find that it would be most unfair to deprive the Plaintiff of his judgment. *"To accede to such a request would be to open the door to countless applications of a similar character on the part of any number of persons who might choose to come forward with flimsy excuses. We are here to further the ends of justice not to assist in defeating them."* (RE: LOCHUN BAGUTH V. DR. H. MOLLIERE [1934 MR 19].

I have borne in mind the rule that "*the discretion of the Court to allow a reopening of a case after it has been closed is quite restrictive which should be used sparingly, exercised with great caution and allowed only in special circumstances such as on issues which have arisen ex improviso in the sense that they could not have reasonably been foreseen at the time of pleadings"*. (RE: WONG YUN SHING J. T. v CHAN KAUL LIN D. O (2024) SCJ 10). In the present case, I find no justifiable reason to exercise my discretion to allow the Defendant to reopen the case. There is no exceptional or unforeseeable circumstance. I shall therefore proceed to deliver judgment against the Defendant.

Ruling delivered by: M.GAYAN-JAULIMSING, Ag President, Industrial Court

Ruling delivered on: 30th January 2024