Nujjoo Z. v BCP Bank (Mauritius) Ltd (formerly known as Banque des Mascareignes Ltee)

2025 IND 4

Cause Number 111/13

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil side)

In the matter of:

Mrs. Zeïnie Nujjoo

Plaintiff

v.

BCP Bank (Mauritius) Ltd (formerly known as Banque des Mascareignes Ltée)

Defendant

Ruling

The averments of this second amended plaint in a gist are to the following effect -

Plaintiff was in the continuous employment of Defendant from 24.1.2005 until 30.1.2013 (with a terminal monthly remuneration of Rs. 82,812.75) when her employment was terminated.

She was employed on 24.1.2005 as *'Conseiller Commercial'.* Thereafter, she had obtained subsequent promotions at different branches occupying the respective posts of *'Chargée de Clientèle Junior', 'Chargée de Clientèle Particuliers Senior', "*Team Leader" and finally *"Directeur d'Agence".*

By way of a letter dated 4.10.2012, Plaintiff was suspended from work pending her appearance before a Disciplinary Committee set up by the Defendant in order to answer charges of alleged misconduct and poor performance.

She appeared before the Committee, denied "the charge" and was assisted by Counsel. The Committee heard the Plaintiff and a number of witnesses and a number of documents were produced. The last sitting was on 25.1.2013.

By way of a letter dated 30.1.2013, delivered by hand on the same day, she was informed that the charges levelled against her were found proved and that as a result, the bond of trust between the Plaintiff and the Defendant no longer existed, so that the Defendant had no alternative but to terminate her employment with immediate effect.

Her employment was unfairly, unjustly and without any cause or justification terminated by the Defendant. Thus, Plaintiff has claimed from Defendant the sum of Rs. 2,249,347.98 comprising of severance allowance and other items of remuneration.

Defendant in its plea has denied liability. It has averred that Plaintiff started work with Defendant on 1.2.2005 and has denied that her terminal monthly remuneration at the time her contract of employment was brought to an end on 30.1. 2013 was Rs. 82,812.75.

Defendant has further averred that: -

(a) following a contract of employment dated 24.1.2005, she was appointed as "*Conseiller Commercial"* with effect as from 1.2.2005;

(b) following a letter dated 13.7.2006, she was appointed as "*Responsable de Caisse"* with effect as from I.8.2006;

(c) following an "*avenant"* to her contract of employment dated 1.9.2008, she was appointed as "*Chargée d'Acceuil"*;

(d) following an "*avenant"* to her contract of employment dated 5.11.2008, she was posted as *"Chargée de Clientèle Particuliers Senior"*;

(e) following an "*avenant"* to her contract of employment dated 9.8.2012, she was posted as "*Directeur d'Agence"* subject to a probation period.

(a) By way of a letter dated 4 October 2012, Plaintiff was duly charged with:

"…

1. *…the following act or acts of misconduct which taken jointly or singly constitute gross misconduct in relation to [her] work:*

   (a) *misleading and /or failing to disclose material facts to [her employer in relation to the internal audit carried out in 2011 in relation to the accounts and grievances of [a first named client]; and/or*

   (b) *misleading and /or failing to disclose material facts to [her] employer in relation to the internal audit carried out in 2012 in relation to the accounts of [a second named client]; and/or*

   (c) interfering and/or intermeddling with and/or carrying out unauthorised and/or improperly authorised operations or changes (whether for [her] own advantage or that of another) on the accounts of clients namely those of [the first named client] and/or those of [the second named client].

2. *Further to the matters set out in paragraph 1 above, … with the following (whether by [her] action or inaction), which taken jointly or singly, constitute poor performance at work:*

   (a) failing to comply with the internal procedures and/or good banking practice in relation to the operations and/or supervision and/or monitoring of the accounts of [the first named client] at the Bank; and/or

   (b) failing to comply with the internal procedures and/or good banking practice in relation to the operations and/or supervision and/or monitoring of the accounts of [the second named client] at the Bank; and/or

   (c) failing to properly supervise and/or monitor and/or comply with the anti-money laundering regulations and internal requirements in relation to the accounts of [the first named client] and/or those of [the second named client]; and/or

(d) by [her] conduct in relation to the above accounts and/or [her] own accounts and/or [her] conduct at work having breached the bond of trust which must exist between an employer and an employee.

3. [having] by [her] conduct as set out under paragraphs 1 and/or 2 above, if established, broken the bond of trust which must exist between an employer and an employee."

(b) By way of a letter dated 25 October 2012 the Plaintiff was additionally and duly charged with: -

"

(A) *act or acts of misconduct in relation to [her] work:*

interfering and/or intermeddling with and/or carrying out unauthorized and/or improperly authorised operations and/or changes and/or withdrawals (whether for [her] own advantage or that of another) on the accounts of a client of the Bank namely those of [a third named client].

(B) *(whether by [her] action or inaction), which taken jointly or singly, constitute poor performance at work:*

(a) failing to comply with the internal procedures and/or good banking practice in relation to the operations and/or supervision and/or monitoring of the accounts of [a third named client] at the Bank; and /or

(b) failing to properly supervise and/or monitor and/or comply with the anti-money laundering regulations and internal requirements in relation to the accounts of [a third named client] and/or

(c) by [her] conduct in relation to the above accounts and/or [her] own accounts and/or [her] conduct at work having breached the bond of trust which must exist between an employer and an employee.

[She had] by [her] conduct as set out in [the] letter of 04 October 2012 or under paragraph 2 above, if established, broken the bond of trust which must exist between an employer and an employee."

(*c)* The charges levelled against the Plaintiff were in relation to alleged misconduct, poor performance and breach of trust. They concerned the accounts of three named clients of the Defendant and were levelled against the Plaintiff in accordance with the delays and requirements set out in law.

Although Plaintiff was given every opportunity to answer the charges levelled against her, and although she was assisted by Counsel, she was either unable to answer the charges adequately or at all at the disciplinary committee of Defendant and which was chaired by an independent member of the Bar who independently found the charges levelled against the Plaintiff as having been established after having heard her and other witnesses in the course of an oral hearing.

On the whole, the bond of trust which should exist between an employer and an employee no longer existed and Defendant has reiterated the contents of its letter dated 30.1.2013 that it could not in good faith and in the circumstances take any other course of action than terminate the employment of the Plaintiff summarily. The employment of Plaintiff was fairly, rightfully, with cause and with justification lawfully terminated. Defendant has denied the sum claimed or in any other sum whatsoever.

Prior to the trial being started, learned Counsel for the Defendant explained in Court that the present case is between an ex-employee of the bank who is the Plaintiff in this matter and the bank being the Defendant.

The issue which arises is that during the disciplinary committee hearing of Plaintiff, the bank had to produce banking documents of the three named clients who are not parties to this case and, therefore, are innocent parties. Those same documents will have to be adduced in evidence before this Court and production of those documents will not be possible without the bank (i.e. Defendant) breaching Section 64 of the Banking Act 2004. She has referred to the plea where it is stated that the charges levelled against Plaintiff were in relation to alleged misconduct, poor performance and breach of trust because of the banking documents of three named clients of the bank and which will actually be produced during the trial so that it is not a mere speculation.

That is why the position of the Defendant is that in disclosing banking documents before the Court in the course of what is an employment dispute, measures have to be taken to protect the rights or privacy of third parties who are the holders of the relevant accounts at the bank and

who also benefit from the protection of Section 64 of the Banking Act. Thus, the Court will need to consider her motion for an appropriate order under the Courts Act for the protection of the privacy of the third parties so that their names and their details do not appear in public in the course of the trial proceedings.

Learned Counsel for the Plaintiff has agreed that at some point in time, the Court will have to make an order authorising the production of documents concerning the three named persons and which have already been disclosed to the Plaintiff and used during the disciplinary hearing of Plaintiff at the disciplinary committee of Defendant. The Bank, meaning the Defendant, has already stated that it will have to reveal confidential information relating to three named clients and who are unknown as they are not parties to this case. In order to strike a balance, based on Section 64 of the Banking Act 2004, she has invited the Court to consider granting an order that proceedings be held in private after all persons are excluded except for parties and their respective Counsel and further the Court should grant an order to prohibit publication of all information relating to these proceedings and the Court can prohibit publication of all the proceedings pursuant to Section 64 of the Banking Act which is a statutory provision which establishes the duty of confidentiality of the bank.

Both Counsel have submitted that it is within the jurisdiction of the Industrial Court which has the power to regulate its own procedure. The idea behind all this is just for them to find a way which works to preserve the identity of those clients who are not parties to this case and to protect their confidential information.

I have given due consideration to the submissions of both learned Counsel for the Plaintiff and Defendant and the authorities filed in their oral and written submissions.

It is useful to refer to the case of **Nundoosingh J v Standard Bank (Mauritius) Limited [2016 SCJ 494]** at page 4 and which concerned a case of alleged unfair and unjustified dismissal before the Industrial Court, the question which the Supreme Court had to address was a motion of the then Plaintiff before the Industrial Court for an order of disclosure of "certain information" which was allegedly a derogation of the duty of confidentiality imposed by Section 64(2) of the Banking Act for which the lower Court declined. The relevant extract reads as follows:

"From a reading of the ruling of the learned Magistrate, it appears that a motion was made at the outset of the case by learned counsel for the plaintiff for the disclosure of certain

information by the defendant. No representative of the defendant was summoned to give evidence before the Industrial Court.

Section 64(3)(h) of the Banking Act provides that any party to a proceeding before a court, may summon any person referred to in section 64(1) and the court shall order the disclosure of the information. A person referred to under section 64(1) is therefore competent to give evidence in court. The question as to whether confidential information between the bank and its customer will be allowed, is a matter of admissibility of such evidence in the context of the circumstances in which it is made. The court will have to consider the reasons for which the confidential information is sought, as well as the reasons for which the banker claims to be excused from answering the questions.

*In **Attorney-General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109 at page 281**, Lord Goff identified three limiting concepts to the principle of the duty of confidentiality: "first, that the principle of confidentiality does not apply to information that is generally accessible; second, that the duty of confidence does not apply to information that is useless or trivial; and third – which he said is "of far greater importance" – that in certain circumstances the public interest in maintaining confidence may be outweighed by the public interest in disclosure."*

*In **British Steel Cooperation v Granada Television Ltd [1981] AC 1096**, Lord Wilberforce stated that "Courts have an inherent wish to respect this confidence, whether it arises between doctor and patient, priest and penitent, banker and customer, between persons giving testimonials to employees, or in other relationships….. . But in all these cases the court may have to decide, in particular circumstances, that the interest in preserving this confidence is outweighed by other interests to which the law attaches importance."*

From the principles mentioned in the above cases, the test to be applied is one of proportionality between public interest in maintaining confidential information and the right of a party to a fair trial in proving his case. In the course of a trial there are different ways in examining the representative of the bank to elucidate information between the bank and its customer without in any way infringing the principle of confidentiality. The applicant may consider those possibilities before the Industrial Court. The trial Court shall be in a better position to weigh in the balance, the right of the plaintiff to a fair trial and the disclosure or non-disclosure of confidential information. (…)

*The Judge in Chambers cannot, on affidavit evidence, decide on the issue of confidentiality in the context of the case which is already before the Court. It is best left to be decided by the trial court, which is empowered by section 64(3)(h) of the Banking Act to decide on such issue." (**all the above underlining is mine**)*

Now the exception to the obligation of confidentiality is provided for under Section 64(3)(h) of the Act. This provision must be read together with subsections (1) and (2) of Section 64 as explained in **Taukoordass U. (Kriti) v The Mauritius Commercial Bank & Ors [2024 SCJ 44]** at page 2 as follows: -

*"**64. Confidentiality***

(1) (a) Subject to this Act, every person, including a service provider, who, by virtue of his professional relationship with a financial institution, has access to the books, accounts, records, financial statements or other documents, whether electronically or otherwise, of a financial institution shall –

(i) In the case of a director or senior officer, take an oath of confidentiality in the form set out in the First Schedule;

(ii) … … …

(iii) In any other case, make a declaration of confidentiality before the Chief Executive Officer or Deputy Chief Executive Officer of the financial institution in the form set out in the Second Schedule,

Before he begins to perform any duties under the banking laws.

… … …

(2) Except for the purpose of the performance of his duties or the exercise of his functions under the banking laws or as directed in writing by the central bank, no person referred to in subsection (1) shall, during or after his relationship with the financial institution, disclose directly or indirectly to any person any information relating to the affairs of any of its customers including any deposits, borrowings or transactions or other personal, financial or business affairs, without the prior written consent of the customer or his personal representative.

(3) The duty of confidentiality imposed under this section shall not apply where –

… … …

(h) any person referred to in subsection (1) is summoned to appear before a Court or Judge in Mauritius and the Court or the Judge orders the disclosure of the information;

… … … "

In the recent judgment of ***Stanford Asset Holdings Ltd v AfrAsia Bank Ltd [2023] UKPC 35****, the Judicial Committee of the Privy Council considered the effect and scope of section 64 of the Act. The Board analysed subsections (1) to (3) and held as follows: -*

"11. The structure of those subsections is reasonably straightforward. Subsections (1) and (2) impose obligations on any 'person having access to the books, accounts, records, financial statements or other documents of a financial institution.' The obligation in subsection (1) is to take an oath/make a declaration of confidentiality in the prescribed form as regards the affairs of the institution. Subsection (2) imposes a duty of confidentiality as regards information relating to the affairs of the customers of the institution. Subsection (3) provides for exceptions to the obligation of confidentiality imposed by section (2). Any contravention of the duty imposed by subsection (2) constitutes a criminal offence: see section 97(20) of the Act.

12. It is in the Board's opinion clear that ***subsections (1) and (2) impose obligations only on natural persons and not on the institution itself****. That appears from the facts that only a natural person can take an oath, as required by subsection (1), and that an institution cannot have a 'relationship', as referred to in subsection (2), with itself. Thus section 64(2) does not impose an obligation of confidentiality on a bank (as opposed to on its employees or other individuals) as regards its customer's affairs; nor is such an obligation imposed by any other provision of the section or the Act to which the Board was referred. It does not of course follow that banks are under no such obligation. On the contrary, it is well -established that an obligation of confidentiality is owed at common law." [my emphasis]*

In the light of the above opinion of the Judicial Committee, the applicant's reliance on section 64(3)(h) of the Act for a disclosure order is misconceived and erroneous. The application directed against a Bank itself while the Judicial Committee has made it clear that section 64 does not impose a duty of confidentiality on the banks themselves but on individual

employees and agents who are natural persons. There is such a duty on the banks but it arises at common law. The present application is, therefore, a non-starter in so far as the applicant has wrongly chosen to ground his action on section 64(3)(h) against the Bank itself.

(…) As already stated above, section 64 imposes an obligation of confidentiality, and provides exceptions thereto, on the bank's individual employees and agents, and not on the banks themselves. Since the application is directed against the Bank itself, it follows that the applicant is seeking to obtain the disclosure of confidential banking information from the wrong party."

Therefore, it is crystal clear that for the Court to be able to allow disclosure of confidential information namely the banking statements regarding the affairs of the three named persons pursuant to Section 64(3)(h) of the Act in order for the Defendant Bank to discharge the burden of proof placed upon it to establish that the dismissal of Plaintiff was justified, the bank's employee or agent will have to be summoned by the Defendant bank to depose in Court during the trial.

However, other prerequisites will have to be complied with as well, in order to ensure proportionality between the right to a fair trial of Plaintiff and the lifting of confidential information in relation to the three named persons who are protected under Section 64 (2) of the Banking Act bearing in mind that they had not consented in writing to have the confidentiality of information in relation to them as customers of the bank to be lifted by either the Plaintiff or the Defendant. Furthermore, such banking statements being voluminous, cannot be reduced as per the contention of learned Counsel for the Defendant.

At this stage, it is imperative to note that Section 64(1A) (c) of the Banking Act 2004 stipulates that: -

"(1A) Any person –

(c) who publishes, in any form whatsoever, any information relating to the affairs of a customer or financial institution without the express written consent of the customer or financial institution or in contravention of this section, shall commit an offence and shall, on conviction, be liable -

(i) In the case of an individual, to a fine not exceeding 500,000 and to imprisonment for a term not exceeding 3 years; or

(ii) In any other case, to a fine not exceeding one million rupees".

On the confidentiality issue under Section 64 of the Banking Act, in the case of **State Bank International Ltd v Pershing Limited** [1996 SCJ 331], the Supreme Court held that:

"We may usefully refer to Halsbury's, Laws of England, Vol. 3, Vo. Banking, page 72 at para 97 –

'It is an implied term of the contract between a banker and his customer that the banker will not divulge to third persons, without the express or implied consent of the customer, either the state of the customer's account, or any of his transactions with the bank or any information relating to the customer acquired through the keeping of his account, unless the banker is compelled to do so by order of a court, or the circumstances give rise to a public duty of disclosure or the protection of the banker's own interests requires it."

Now, it is appropriate to reconcile Section 161A subsections (a) & (c) of the Courts Act with Section 64(1A) (c) of the Banking Act 2004 and **State Bank International**(supra). In the present case, it is common ground that the banking statements of the three named clients are the relevant material in relation to the charges levelled against Plaintiff and which the bank employer relied upon to dismiss the Plaintiff employee, following the finding of its disciplinary committee where those documents were used and relied upon by that committee too and on the basis of which the Court will have to find whether the dismissal of Plaintiff was justified or unjustified.

Therefore, such confidential information will have to be compellingly disclosed irrespective of the absence of written consent from the three named persons, to ensure a fair trial of Plaintiff, but at the same time recourse can be made by the Court to other laws so as to proportionately preserve that confidential information in order to avoid an offence being committed under Section 64(1A) (c) of the Banking Act.

In the circumstances, the Court deems it fit to resort to Section 161A subsections (a) and (c) of the **Courts Act** in conformity with Section 10(10) of the Constitution which provide:

*"**161A. Persons may be excluded from proceedings***

Any judge, Magistrate or other person having by law authority to hear, receive or examine evidence may, where he considers it necessary or expedient –

(a) in circumstances where publicity would prejudice the interests of justice or of public morality;" (…)

(b) (…)

(c) in order to protect the privacy of persons concerned in the proceedings;

exclude from the proceedings (except the announcement of the decision) any person other than the parties to the trial and their legal representatives."

In the present case, publicity would prejudice the interests of justice, as it would breach the confidentiality of three named clients of the bank (see – Section 64(2) of the Banking Act) who are not parties to the case and which would in turn mean breaching Section 64(1A) (c) of the Banking Act so that it is expedient or necessary that proceedings be held in camera.

Having said so, hearing such proceedings in camera under Sections 161A subsections (a) & (c) of the Courts Act, would in no way hamper a fair trial of Plaintiff should the Court further under Section 18B(1)(d) of the Courts Act, expressly order the prohibition of publication of all information relating to the proceedings or of information of the description which is published relating to the three named clients of the bank not being parties to the case in order to proportionately prohibit a breach of Sections 64(2) and 64(1A) (c) of the Banking Act 2004 being committed in relation to them (see- **Nundoosingh** (supra)).

In relation to proceedings being held in private, Section 18B(1)(d) of the Courts Act provides:

*"**18B. Proceedings in private***

(1) The publication of information relating to proceedings before any Court sitting in private shall not of itself be contempt of Court except –

(d) *where the Court, having power to do so, expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published."*

I deem it apt to reproduce Section 10 subsections 9 & 10 of the Constitution:

*"**10. Provisions to secure protection of law***

(9) Except with the agreement of all the parties, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other authority, including the announcement of the decision of the court or other authority, shall be held in public.

(10) Nothing in subsection (9) shall prevent the court or other authority from excluding from the proceedings (except the announcement of the decision of the court or other authority) persons other than the parties and their legal representatives, to such extent as the court or other authority-

(a) may by law be empowered so to do and may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice, or in interlocutory proceedings, or in the interests of public morality, the welfare of persons under the age of 18 years or the protection of the privacy of persons concerned in the proceedings; or

(b) may by law be empowered or required to do so in the interests of defence, public safety or public order." (**emphasis added**)

It is apposite to note that Section 7(1) of the **Industrial Court Act 1973** provides:

*"**7. Institution and conduct of proceedings.***

(1) *Subject to the other provisions of this Act and to any specific procedural provisions in any enactment set out in the First Schedule, all proceedings before the Court shall be instituted and conducted in the same manner as proceedings in a civil or criminal matter, as the case may be, before a District Magistrate."*

Thus, by virtue of Section 21I of the District and Intermediate Courts (Civil Jurisdiction) Act, the Industrial Court can regulate its own procedure:

*"**21I. Proceedings of the Court***

(1) A Court shall regulate its own procedure and, in so doing, shall endeavour to avoid formality in its proceedings.

(2) A Court may, of its own motion or at the request of any party, summon any witness and require the production of any record, book, deed, writing or other document which is relevant in any proceedings relating to a claim.

(3) A Court shall deal with any matter which it may consider relevant to a claim, whether or not it has been raised by a party." (**emphasis added**)

It is significant to note that Section 64(3)(h) of the Banking Act has clearly spelt out that the duty of confidentiality is not absolute since it shall not apply where the Court or a Judge orders the disclosure of information (see- **SBM Bank (Mauritius) Ltd v The Independent Commission Against Corruption [2021 SCJ 159]**).

Indeed, in the case of **Foondun M.S. v Banque des Mascareignes and Anor [2019 SCJ 58]** at pages 15 and 16, the Supreme Court held that:

"The banks are compellable witnesses who may be summoned at the trial to produce the information sought and such information may be disclosed if the court so allows. It is a matter which is eminently within the discretion of the trial court to determine whether the information may be disclosed.

The duty of confidentiality is not applicable in such circumstance. In that connection Section 64(3)(h) of The Act provides that –

"The duty of confidentiality imposed under this section shall not apply where […]

[h] any person referred to in subsection [1] is summoned to appear before a Court or Judge in Mauritius and the Court or the Judge orders the disclosure of the information" (Emphasis added)"

In **Foodun** (supra), it was also highlighted that it will be for the trial Court to decide on the question of production and admissibility of the documents which in the present case are the banking documents of the three named persons and it will be for the trial Court to assess the relevance of those documents and whether in the circumstances, it is necessary that the confidentiality of the information be lifted.

At the appropriate time, when the employee or agent of the Defendant bank will be summoned be it by the Plaintiff or Defendant to give such evidence which is material to the present case in relation to the charges of misconduct, poor performance and breach of trust, then the present Court will decide on its admissibility and its relevance in relation to the charges levelled against Plaintiff and should both be in accord, then, the Court can exercise its power to have the confidential information disclosed pursuant to Section 64(3)(h) of the Banking Act 2004

having jurisdiction to do so [see- **Nundoosingh** (supra) and Section 21I of the District and Intermediate Courts (Civil Jurisdiction) Act] under proportionate conditions namely that-

(i) proceedings be heard in camera and all publicity is prohibited *as it would prejudice the interests of justice* and *in order to protect the privacy of persons concerned in the proceedings being the three named persons* under Sections 161A subsections a & c of the Courts Act;

(ii) an order be made expressly by the Court under Section 18B(1)(d) of the Courts Act, prohibiting the publication of all information relating to the proceedings or of information of the description which is published relating to the three named clients of the bank not being parties to the case;

(iii) and the Court in its judgment will refer to the first named, second named and third named persons as averred in the second amended plaint without having their identities divulged.

For the reasons given above, the Court will allow such disclosure under Section 64(3)(h) of the Banking Act 2004 within the ambit of the conditions highlighted above, in due course when the need arises and which has already been done before the disciplinary committee and which is imperative for the Court to assess whether the Plaintiff has run counter to the case she had run before the Disciplinary committee, in order for the Court to adjudicate on whether the Defendant has discharged the burden of establishing that at the time it took the decision to dismiss her , it could not in good faith have taken any other course of action, so that her dismissal was not unjustified, on the basis of the material it had or ought to have been reasonably aware at the time of her dismissal (see- **Smegh (Ile Maurice) Ltée v Persad D.** [2011 PRV 9]). However, although the banking statements of the three named persons are relevant to the charges levelled against the Plaintiff, they will be declared inadmissible by the Court should such information be outside the ambit of the material Defendant had following the finding of its disciplinary committee or of which it ought to have been reasonably aware at the time it dismissed the Plaintiff.

This matter is accordingly fixed *proforma* to 14 February 2025 for both learned Counsel to suggest common dates for trial.

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

7.2.2025