

Dilmohamed S.A. v ABSA Bank Mauritius Limited formerly known as Barclays Bank Mauritius Limited

2021 IND 1

Cause Number 536/12

**IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)**

In the matter of:-

Mr. Sakeel Ahmad Dilmohamed

Plaintiff

v.

**ABSA Bank Mauritius Limited formerly known as
Barclays Bank Mauritius Limited**

Defendant

Ruling

In this amended plaint, Plaintiff is claiming the sum of Rs. 30,542,873 as severance allowance at punitive rate from Defendant on the basis that the termination of his employment by it by a letter dated 30 April 2012 was allegedly unfair, unlawful and unjustified.

Plaintiff avers that he has reckoned 25 years of service after having joined employment with Defendant on 8th January 1987 as Clearance Clerk at B1 level with ongoing upgrading to top managerial levels so that in the year 2003 he joined Defendant Country Management Committee as the Corporate Credit Director and was subsequently upgraded to Country Credit Director and Regional Credit Director in 2004 leading to his secondment to the Commercial Department in the role of Head of Business Banking and SME in 2009.

Plaintiff further avers that in early 2009, Oskar Co. Ltd represented by Mr. Muhammad Osman Karamuth made an application to Defendant for a facility of Rs.50 Million which was approved by the Corporate Credit Director on 1 July 2009 subject to stringent securities being furnished and other covenants followed.

Plaintiff later came to know that Mr. M.O. Karamuth committed a fraud (identified by his father, Mr. Abdool Ahad Karamuth) in August 2009 by misrepresenting another person as his father for the signing of loan documentations and he subsequently failed to comply with the terms and conditions of the loan and the case was watch listed in April 2010 and was then referred to Defendant Business Support team for collection and recovery of the debt as alleged.

Plaintiff further alleges that Defendant started internal investigations in November 2011 and charged four Bank Officers for negligence in December 2011 including the Plaintiff to appear before a disciplinary committee.

It is common ground that –

(a) A number of bank officers were called to give statements including the Plaintiff;

(b) By a letter dated 22nd December 2011, he was requested to appear before a disciplinary committee to answer the following charges:

(1) As Head of Business Banking and SME he has been grossly negligent and he has failed to exercise proper skill, care, attention, control, supervision and due diligence in the discharge of his professional duties and responsibilities in the handling of the credit application/proposal made by Oskar Company Limited.

(2) He has acted in breach of the Bank's established policy directives and procedures namely the Barclays International Corporate Credit Policy and the Barclays International Wholesale Credit Risk Policy.

(3) He has failed to ensure that, inter alia, the terms and conditions on which the loan was sanctioned were complied with and proper procedures were followed prior to, during and after disbursement of the funds.

Plaintiff was also provided with written detailed particulars of the charges during the course of the hearing which boil down to his acts, omissions and lack of

caution are tantamount to poor performance and/or gross misconduct on his part and are likely to cause financial prejudice to the Bank.

Defendant, for its part, in its Amended Plea has essentially averred that Plaintiff was appointed as Head of Corporate Credit Risk as from 1 December 2003 and that he was at all material times aware of the fraud and the misrepresentation and as such was guilty of gross misconduct. The Disciplinary committee after having heard Plaintiff in its 25-page report found him guilty of gross misconduct. It was a big fraud which has occurred at the Bank in the course of which the Bank lost more than Rs.50 million. The bond of trust which should exist between an employee and an employer between the Defendant and the Plaintiff could no longer exist. Acting as a reasonable employer, it could not in good faith take any other course of action but to dismiss the Plaintiff. The Bank also reported the matter to the Police and following the inquiry of the Police, Plaintiff was arrested, charged provisionally and released on bail. Defendant has therefore prayed that the Amended Plea be dismissed with costs.

Prior to the trial day, I have been apprised with a letter dated 22 July 2021 emanating from Plaintiff's learned Attorney to the effect that he has been advised by learned Counsel for the Plaintiff to submit a list of questions on personal answers to be put to Defendant. I have acknowledged receipt of that letter at the bottom on 23 July 2021 wherein I have stressed that a proper motion was to be made in Court in that respect and the said learned Attorney was informed accordingly. That letter contained an attached list of 28 questions to be put to Defendant on personal answers. My attention has been drawn to the fact that on another occasion such similar request was again made at the level of the Registry by the same learned Attorney and that the same answer was provided to him namely that he was directed by me to make such a motion in open Court.

When the case came before me in open Court, at the outset, I drew the attention of learned Counsel appearing for the Plaintiff of his motion to be made in Court in relation to the putting of the Defendant on personal answers. At that stage, learned Counsel for the Plaintiff stated that he was going to make two motions to the effect that his instructing Attorney has applied to the Court for Defendant to be called on personal answers and he was turned down and again he did it on another occasion, he was again turned down and he has moved the Court to give a written ruling in respect of those refusals in the light of which he will take a stand thereon. He further stated that on or about June, his instructing Attorney applied to the Court

for leave to call Defendant on personal answers in respect of 14 questions and that was turned down and there was no written ruling in that respect and again he has made another application on or about July and a second list was annexed and he was turned down again.

Learned Senior Counsel appearing for the Defendant has further stated that his instructing Attorney has received a series of questions on personal answers dated 8 June namely the 14 questions referred to by his learned friend and he has not received any further questions on personal answers which are allegedly dated 22 or 23 of July. He has only the first one in June which his friend has communicated to him and on which on the last occasion he stated that before he takes a stand whether he will be answering them or he will be objecting to them, he wanted to know the purpose for which those personal answers were being put, that was why the case is coming for stand for them to know the purpose of those personal answers for the questions which have been requested for personal answers.

The ruling was accordingly reserved given that learned Counsel for the Plaintiff was expecting a ruling from this Court.

At this stage I find it appropriate to reproduce the relevant provisions of the law on the issue of examination on personal answers (*interrogatoire sur faits et articles*) which have been highlighted in the Supreme Court case of **Couacaud H. & Anor v Island Management Ltd & Ors** [\[2017 SCJ 364\]](#):

“Articles 324 and 336 of the Code de Procédure Civile read as follows:

324. *Les parties peuvent, en toutes matières et en tout état de cause, demander de se faire interroger respectivement sur faits et articles pertinents concernant seulement la matière dont est question, sans retard de l’instruction ni du jugement.*

336. *Seront tenues les administrations d’établissements publics, de nommer un administrateur ou agent pour répondre sur les faits et articles qui leur auront été communiqués; elles donneront à cet effet un pouvoir spécial dans lequel les réponses seront expliquées et affirmées véritables, sinon les faits pourront être tenus pour avérés, sans préjudice de faire interroger les administrateurs et agents sur les faits qui leur seront personnels pour y avoir, par le tribunal tel égard que de raison.*

Moreover, section 167 of the Courts Act provides:

167. Examination on faits et articles

Where a party to a suit is called upon to give his unsworn personal answers, he may be examined as an adverse witness by a party calling him and afterwards examined on his behalf, but only as to matters arising out of the examination made by the party calling him, and he may then be re-examined touching any question put to him on his behalf.

Further, the procedure is set out in rule 36 of the Supreme Court Rules which reads as follows:

36. Examination on personal answers

(1) *Where a party intends to call another party to give his unsworn personal answers, he shall apply ex-parte to the Master for an order summoning to do so.*

(2) *Where the party to be examined on personal answers is a corporate body, only a person who can legally represent the body may be summoned, and a list of questions to be put to the body shall be served upon it.*

(3) *The Master shall on good cause shown, order the other party to appear before the Court for his examination on personal answers.*

(4) *The order and in the case of a corporate body, the list of questions shall be served upon the other party at least 5 days before the date fixed for the examination on personal answers.*

(5) *Where the other party who has been duly summoned does not appear, his attendance may be enforced in the same way as in the case of a witness.*

(6) *Notwithstanding paragraph (1), any party may at the hearing of a case, where the other party is present, move the Court to call the other party to be examined on his personal answers.*

(7) *The party giving his personal answers shall not be required to be sworn or to take an oath when examined as a witness and Counsel may put any question which the Court considers proper and relevant to the matter in issue between the parties.*

(8) *The party giving his personal answers shall not while under examination, communicate with his Counsel or attorney.*

(9) *After the examination on personal answers, the Court may proceed to hear the case.” (emphasis added)*

Now, I understand the predicament of learned Attorney appearing for the Plaintiff that true it is that when our District, Industrial and Intermediate Court Rules 1992 are silent on that issue which is the case, we follow Supreme Court Rules for guidance. But it is significant also to note that such course can be only be adopted provided that no repugnancy is being caused to our rules of court (see - **Jhundoo v. Jhurry**[1981 SCJ 98]). It is only at the level of the Supreme Court that cases are being referred to the Master so that an *ex-parte* application could be entertained before the Master and it is only the Master upon good cause shown, the Master would order the other party to appear before the Court for his examination on personal answers. The order and in the case of a corporate body, the list of questions shall be served upon the other party at least 5 days before the date fixed for the examination on personal answers. That is why the present Court turned down the *ex-parte* application emanating from learned Attorney appearing for the Plaintiff on two occasions as it could not entertain same being repugnant to our District, Industrial and Intermediate Court Rules 1992 but could only entertain a motion pursuant to subsection 6 of Rule 36 of the Supreme Court Rules above as no repugnancy is being caused to the District, Industrial and Intermediate Court Rules 1992 namely “ Notwithstanding paragraph (1), any party may at the hearing of a case, where the other party is present, move the Court to call the other party to be examined on his personal answers”.

For the reasons given, I take the view that learned Counsel appearing for the Plaintiff will have to make his motion in open Court and to state the purpose for his doing so in order not to debar learned Senior Counsel appearing for the Defendant the opportunity either to object or not to the motion.

The matter is accordingly fixed *proforma* to 30 August 2021 for learned Counsel appearing for the Plaintiff to take a stand.

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

23.8.2021

