IN THE INDUSTRIAL COURT OF MAURITIUS

(CIVIL DIVISION)

IN THE MATTER OF:

Joseph André Christian Rouger Lagane

Plaintiff

v.

Rey & Lenferna Ltd.

Defendant

CN: 329/ 2010

JUDGMENT

The plaintiff is claiming from the defendant the sum of RS 3,304,545 representing severance allowance at the punitive rate (sic) (RS 3,247,230) together with indemnity in lieu of notice (RS 57,315) together with interests as from the date of the plaint with costs.

Plaintiff avers that he was employed as Managing Director and General Manager of Diesel Pro Ltd since 20 November 1996 which was taken over by the defendant on 29 December 2004, about 8 years later but there was continuation of service with the defendant. He was employed as Managing Director and was drawing a terminal monthly salary of RS 57,315. He was also provided with two company vehicles, one for himself and one for his wife which he values at the rate of RS 10,00 each per month. He avers that on 02 February 2010 the defendant terminated his employment without justification and notice.

In his Answer to Particulars plaintiff stated that he considered that the defendant had unjustifiably terminated his employment as the reasons given for the termination namely using company vehicle 3090MY08 for illegal hunting were not true and were unfounded.

Defendant admits that there had been continuity of employment of the plaintiff since 20 November 1996 following the taking over of Diesel Pro Ltd. It is admitted that Plaintiff was employed as Managing Director drawing a monthly terminal salary of RS 57,315 and was provided with the use of two company vehicles. It however denies that the use and/or benefit of the vehicles amounted to RS 20,000 monthly. Defendant avers that it could not in good faith take any other course of action than to terminate the plaintiff's employment in the light of the findings of the disciplinary committee which came to the conclusion that the charge levelled against him to have been proved.

The charge which the plaintiff had to answer is to be found in Doc. C to the effect that he had been involved in illegal hunting and in doing so he used company vehicle 3090MY08 and on he was summarily dismissed for misconduct by letter dated 02 February 2010.

Plaintiff's case

Plaintiff deposed that he was general manager of Diesel Pro Ltd since 20 November 1996 which was taken over by the defendant on 29 December 2004. He was in Defendant's continuous employment up to 02 Feb 2010 and his monthly terminal salary was RS 57,315 (Doc. B). He was given the use of two cars: one for his wife and the second one for himself. The monetary value of the use of those two cars is estimated to be worth RS 20,000 monthly. During his employment, he was not given any warning and no disciplinary action was taken against him. By letter dated 18 January 2010 (Doc. C) he was convened to appear before a disciplinary committee to be held on 29 January 2010 on a charge of having been

involved in illegal hunting whilst using a company vehicle 3090MY08. The incident took place on 08 January 2010 on an agricultural land, outside company premises, outside office hours and whilst he was on leave. The defendant is involved in repairs of pumps, sale of solar water heater but not involved in the field of hunting or doe or boar rearing. On 8 January 2010, he was invited by a friend, Mr. Yvon Charoux and was told that he was going to gift a doe and a boar to the Morne Anglers Club and that he had the required authorization to hunt the animals on his own lands. They were joined in by a watchman. He accompanied both of them and heard gunshots. He was informed that a doe and a boar had been killed. He only heard gunshots but did not see his friend firing at the animal. He was provisionally charged before Bambous District Court but the case was struck out and was given back his passport. No case has been lodged anew. He was on leave from 30 December 2009 to 11 January 2010. On 8 January 2010, he was on leave. The vehicle, a 4x4 bearing number 3090MY08, was originally rented by the defendant up to 31 December 2009 and he rented the vehicle as from 31 Dec 2009 for 15 days as per receipt (Doc. E). In fact, the owner had come to fetch his vehicle on 31 December 2009 but he would be provided with another vehicle only when the defendant would resume business so that he would be left without any vehicle. In a letter dated 04 February 2010 the defendant only requested him to return back the Citroën Saxo and his mobile phone as the defendant had already requested the owner to take back vehicle 3090MY08. Hence the vehicle was under his custody. He was neither involved in illegal hunting nor had he made use of defendant's vehicle. In any case the activities of the defendant had not been affected.

In cross-examination, the plaintiff confirmed that when the defendant took over Diesel Pro Ltd he was offered the post of Manager of a new department and his continuity of service was also taken over by the defendant. He had to report to his son who is also a manager. He agreed that the declared value of the car benefits would be RS 17,000 and not RS 20,000. Vehicle 3090MY08 is a private van which was under his custody since 20 December 2008 and all rental charges and the fuel expenses had been paid by the defendant up to December 2009. Defendant provided him with a Shell Card no. 36747. In January 2010, he made use of his Shell Card to purchase fuel for the vehicle. He would not be aware of an email (Doc. H5) sent by Mr. Azad Nazeerally requesting payment for as rental for the vehicle for month of January 2010. He would also not be aware that the defendant had processed and approved the bill and payment was made by a voucher of the defendant company (Doc. H6). In order to rent the vehicle, he had paid the sum of RS 11,000 in cash to one Mr. Sameer Nazeerally, son of Mr. Azad Nazeerally. He did not agree that the defendant had no intention to put an end to the contract for the rental of the vehicles as Defendant had purchased several vehicles. All the leased vehicles had been returned to Mr. Nazeerally. During the hearing of the disciplinary committee, Mrs. Bundhoo took down minutes of proceedings and he conceded that before the disciplinary committee he did not make any reference to the receipt dated 31 December 2009. He did not find it important at that time. He has been charged for illegal hunting at night and had given a statement in which he related what took place (Doc. K). He is aware that it is not allowed to hunt at night. The Police also examined the vehicle and took pictures and he showed to the police where the boar and the doe had been killed. An alleged case of poaching was reported in the press and in Le Mauricien both his name and the number of the vehicle had been cited. He agreed having been dismissed by the defendant but did not agree that his conduct had tarnished the defendant's reputation. He had been told to collect a letter even before the start of the disciplinary committee so that according to him the case had already been prejudged.

In re-examination, the plaintiff explained that Mr. Charoux sent a rejoinder to the newspaper concerned in order to explain that there had been no poaching. Mr. Nazeerally did not collect his cheque and he did not say anything about him having paid to rent the vehicle as he was not asked any question on that matter before the disciplinary committee.

Defendant's case

PS Coco produced two statements which he recorded from the plaintiff under warning. He confirmed that in the second statement the plaintiff stated that there were 4 legs which were his share and that of Mr. Chauroux. Police attended the locus and the plaintiff showed the various spots and identified private van 3090MY08 as being the van he was driving at the material time. It is not allowed to hunt at night. Police draughtsman and photographer attended the case. The plaintiff is on bail actually and his premises had been searched by the police. His firearms had been secured for enquiry.

In cross-examination PS Coco confirmed that the provisional charge against the plaintiff has been struck out and there is no main case lodged as to date.

Mr. Louis Dupont, former Managing Director of the defendant, deposed that on 29 January 2010 he was witness for defendant in the course of disciplinary proceedings against the plaintiff. On 11 January 2010, he came across an article in Le Mauricien Newspaper (Doc. L) to which he referred in the course of the disciplinary proceedings as well as the provisional charge lodged against the plaintiff (Doc. A). He spoke to the plaintiff about the matter during a committee meeting. Vehicle 3090MY08 belongs to an individual but was on rental by the defendant. It was assigned to plaintiff for his work as part of his conditions of service to attend work but also to visit clients on site. At no time was the plaintiff asked to return the vehicle it was only after the event that he was asked to do so. He maintained that he had never requested the plaintiff to return the vehicle to the service provider nor had he taken away the vehicle from him. He was informed by the service provider that the car was returned by the plaintiff on 27 January 2010. It is viewed as a serious matter for an employee to be involved in an illegal act as that is damaging to the reputation of the defendant and is not good for its image. Before the disciplinary committee the plaintiff did say that he paid for the vehicle from 1 January 2010 to 15 January 2010 but he did not produce any receipt. Defendant was responsible for the payment of the rental and an invoice was raised by the car provider which was dealt with by the finance section. He maintained that it is a standard knowledge that employees of contracting departments and sales should not make an abuse of Company vehicles. They should not tamper with the vehicle or carry too much load but it is also implied that they should not put the vehicle to illegal use.

In cross-examination, Mr. Dupont he stated that one of the factors which led to the plaintiff's dismissal was the article in Le Mauricien. That is how he came to know about the case. The more important factor was that plaintiff was using the company vehicle for doing illegal things. At the time of the dismissal he did not know that plaintiff would be charged with an offence. To him both poaching and hunting wildlife by night are illegal. He would not be aware whether the land was a hunting ground or on an morcellement but he only heard that it was on Maingard's property. At some point in time it was decided to purchase vehicles for the employees instead of hiring same but it was a gradual process. Defendant had imported some vehicles 40 vehicles and most probably the plaintiff was going to be allocated one. He agreed that in the month of January a cheque was prepared and signed but was not collected by Mr. Nazeerally. He would not be aware that the lease of the vehicle came to an end on 31 December 2009. The conditions concerning the use of company vehicles are not in writing especially since the plaintiff is an experienced person. During his term of office as Managing Director for 5 years he has never given any warning to the plaintiff. Defendant is not involved in deer rearing or deer hunting. He agreed that the incident took place outside working hours and that deer hunting is outside the defendant's business activities. He maintained that the plaintiff was dismissed because he used the company vehicle to do something illegal. Plaintiff would not have been dismissed for a minor contravention but if he was involved in repeated speeding offences or involved in two or more accidents he would have considered same as serious. He maintained that the plaintiff had not paid for the use of the vehicle as the defendant was sent an invoice by the supplier.

In re-examination, Mr. Dupont stated that the provisional charge which was preferred against the plaintiff was that of illegal hunting and in doing so he used the Company vehicle 3090MY08 (Doc. C). He further maintained that defendant had no other option than to terminate plaintiff's employment.

Mrs. Gureebun, a Head of Accounts Payable Officer, identified Doc. H6 as a payment voucher for the rental of vehicle 3090MY08 for period 31 January 2010 in the sum of RS 22,000. An invoice was received and processed and payment was authorised both by the Assistant Financial Controller and the Financial Controller. The cheque and its remittance advice were prepared but were cancelled after a year as no one came to collect the said cheque. Doc. H8 is a fax received from Farzana Naseerally-Fowdar, daughter of Mr. Sheikh Azad Nazeerally of S.A.Naseerally Rental services received on 18 May 2012 and payment was made as per payment voucher (Doc. P) dated 9 August 2012. The payment was authorised by the Financial Controller and the Managing Director. Remittance advice had been duly signed (Doc. P1). Referring to Doc. H5 she confirmed that the defendant did not send any notice of termination of rental. Doc. H3 concerned VAT invoices of Shell Mauritius in respect of card no 36747 which was allocated to the plaintiff by defendant in order to purchase fuel. It was the defendant who paid both for the vehicle and for fuel.

In cross-examination, Mrs. Gureebun confirmed that Mr. Nazeerally or his representative used to collect the cheques on a monthly basis. It was the first time that Mr. Nazeerally did not collect his cheque.

Mr. Langrah deposed that on 9 January 2010 he was working as watchman and he gave a declaration at Black River Police Station. On 8 January 2010 at 20:30hrs he was on duty when 2 persons came. They were accompanied by another watchman called Deoduth Choytun and his step son, one Sonne Nimaye. They told him that they were going *pou rode ene carri.* It is a hunting ground (*Chassé*) belonging to Mr. Maingard and there are boars and deer. At 10 p.m. he saw a van, a 4x4, driven by the plaintiff coming out of the *Chassé*. He noticed that there was blood in the vehicle and asked the plaintiff to stop. He did not stop. He reported the matter to Mrs. Mayer who told him to report the matter to the police.

In cross-examination, Mr. Langrah explained that the place is known as Morcellement Bhugaloo and Mr. Charoux is also a co-owner of the morcellement. He did not see Mr. Charoux on that day but later learnt that he was there. The sun had already set at 20:30 hrs and it was a bit dark.

Analysis

The termination of plaintiff's employment having taken place on 02 February 2010, the relevant applicable legislation is the Employment Rights Act 2008 [ERA] and Section 38(2)(a)(i)- (v) of the ERA provides as follows:

No employer shall terminate a worker's agreement –

(a) for reasons related to the worker's misconduct, unless –

(i) he cannot in good faith take any other course of action;

(ii) the worker has been afforded an opportunity to answer any charge made against him in relation to his misconduct;

(iii) he has within, 10 days of the day on which he becomes aware of the misconduct, notified the worker of the charge made against the worker;

(iv) the worker has been given at least 5 working days' notice to answer any charge made against him; and

(v) the termination is effected not later than 7 days after the worker has answered the charge made against him, or where the charge is subject of an oral hearing, after the completion of such hearing;

The wordings of Section 38 of the ERA is more or less similar as its predecessor Section 32(1) (b) of the repealed Labour Act 1975 in that no employer shall dismiss a worker for alleged misconduct unless he cannot in good faith take any other course. Hence it is trite law that in an action for summary dismissal on grounds of misconduct the burden lies on the employer to establish justification, that is the acts and doings of his employee amount to misconduct **and** that the misconduct is such that he cannot in good faith take any other course of action than to terminate his employment. Such a situation will only exist if that misconduct is tantamount to ***faute grave*** or ***faute lourde*** justifying the worker's dismissal from his employment without the payment of severance allowance. In the case of **Médine Sugar Estate Co Ltd v. Wodally [1993 SCJ 173]**, that proof of gross misconduct is a necessary prerequisite to dismissal.

In an decision of the *Chambre Sociale* of the *Cour de cassation* (***Soc. 26 février 1991, 88-44.908, Bulletin 1991 V N° 97 p. 60***) *faute grave* was defined as *une faute résultant d'un fait ou d'un ensemble de faits imputable au salarié, constituant une violation des obligations du contrat de travail ou des relations de travail, d'une importance telle qu'elle rend impossible le maintien du salarié dans l'entreprise pendant la durée du préavis.*

In **G. Planteau De Maroussem v. Dupou [2009 SCJ 287]**, the Supreme Court held that the question whether an employee has been unjustifiably dismissed was a matter for the court and not the employer's disciplinary committee. The court said:
"The aim of a disciplinary committee... is merely to afford the employee an opportunity to give his version of the facts before a decision relating to his future employment is reached by his employer. It is no substitute for a court of law, nor has it got its attributes. Furthermore, the employer is not bound by the recommendations of the disciplinary committee and is free to reach its own decision in relation to the future employment of his employee, subject to the sanction of the Industrial Court."

It is common ground that the plaintiff was in the defendant's employment since 20 November 1996 although from 1996 to 2004 he was working for Diesel Pro Ltd. But which was taken over by the defendant. He was employed as Managing Director and was drawing a monthly terminal salary of RS 57,315. He was also provided with the use of two company vehicles. It is also admitted that the plaintiff was arrested by the Police, was provisionally charged before the District Court of Bambous for the offence of illegal hunting at night and was released on bail after having furnished security in the sum of RS 5,000. It is not for this Court to make any determination as to whether the plaintiff has committed the offence or not but there is evidence that he has denied the charge. It stood unchallenged that the alleged offence of illegal hunting at night was committed outside the defendant's premises (on a private agricultural land or morcellement Bhugaloo of which Mr. Charoux, one of the co-accused is the co-owner), outside office hours and whilst he was on leave. Hence the alleged criminal offence would be *un fait tiré de la vie privée du salarié* and committed *hors des temps et lieu de travail* at a time when the employee is no longer bound by the *lien de subordination juridique* towards his employer. The relationship between an employer and an employee is contractual and such contract does not give to an employer an absolute right of control and supervision on the behaviour of his employees outside work. The *lien de subordination juridique* does not extend to the employee's private life and his right to dismiss for misconduct is limited to instances where the employee has committed ***a faute grave***.

In the case of **Deep River Beau Champ Ltd. V. B. Beegoo [1988 SCJ 432]** it was made clear by the Supreme Court that not any criminal conviction amounts to misconduct. The Supreme Court approved of the approach taken by the lower court that not every misconduct justifies summary dismissal and conviction on a criminal charge does not operate to give the employer an automatic licence to dismiss an employee summarily on the ground of misconduct. It must be established that the misconduct would have a bearing on the employer-employee relationship to the extent that the worker brings about *un trouble profond*

dans le fonctionnement et la marche de l'entreprise (***Jurisclasseur Travail, Fasc 30, note 163***).

This is better explained in the following extract of ***Précis Dalloz, Droit du travail, 26e édition, J. Pélissier, G. Auzero et E. Dockès, p. 741, note 720*** which reads as follows:

Les obligations contractées par le salarié relèvent de sa vie professionnelle. ***Un fait relatif à sa vie personnelle ne peut donc pas être qualifié de faute disciplinaire, y compris lorsqu'il est constitutif d'infractions pénales*** *et a conduit le salarié à être placé en détention provisoire. Cette protection va au-delà de la seule protection de la vie privée stricto sensu. Elle protège tout ce qui est extérieur à la sphère contractuelle, et inclut outre la vie privée, la vie publique, politique, militante ou associative...*

Thus, it is an established principle that:

Des faits relevant de la vie privée ne peuvent constituer un motif de licenciement que si ceux-ci engendrent un trouble objectif au sein de l'entreprise : Also **CA Paris, 11 sept. 2012, n° 10-09919; CA Douai, 28 sept. 2012, n° 12-00195** and re-affirmed by a decision by the *Chambre mixte*, of the French *Cour de cassation* on 18 May 2007 (***Ch. Mixte 18 mai 2007, no 05-40803)*** and confirmed by another decision of the *Chambre Sociale* of the *Cour de cassation* on 16 September 2009 (***Cass. soc., 16 sept. 2009, n° 08-41837***).

French doctrine have also approved of the decision of the French Courts and qualified such a stand as a logical one. For instance in ***Droit du travail, 12ème édition, Rivero et Savatier, p. 511 :***

Il faut observer que même pendant ses heures de liberté, le travailleur est tenu à certaines obligations envers l'employeur. S'il est libre en principe d'entreprendre alors des activités lucratives, il doit cependant s'abstenir de concurrencer son employeur. Il est tenu également d'un devoir de discrétion sur les faits qu'il a appris à l'occasion de son travail, spécialement sur les secrets de fabrique. Mais son employeur ne parait pouvoir tenir compte de l'inconduite privée du salarié pour le congédier que si le scandale en rejaillit sur l'entreprise ou si cette inconduite entraine une inaptitude à l'emploi...

In ***Précis Dalloz, Droit du travail, 26e édition, J. Pélissier, G. Auzero et E. Dockès, p. 741, note 720 :***

La faute extra-professionnelle, commise hors des temps et lieu de travail, échappe totalement au pouvoir disciplinaire de l'employeur. Si elle constitue un trouble caractérisé dans l'entreprise, ***elle ne peut justifier qu'un licenciement pour motif personnel non disciplinaire...cette solution logique*** *a été adoptée définitivement dans un arrêt de chambre mixte, par la Cour de cassation, le 18 mai 2007 [****Ch. Mixte 18 mai 2007, no 05-40803****]... au motif qu'un trouble objectif ne saurait permettre en lui-même de fonder une sanction disciplinaire à l'encontre du salarié, en l'absence de* ***"manquement aux obligations résultant de son contrat****. Un "trouble objectif" causé par le salarié à l'entreprise par la commission d'un fait relevant de sa vie personnelle peut être une cause réelle de licenciement, si le trouble est suffisamment important. Mais il ne pourra pas s'agir d'un licenciement disciplinaire, ni, a fortiori, d'un licenciement pour faute grave.*

Also in ***Droit du Travail Droit Vivant, édition 2007/2008, 16ème édition, Jean Emmanuel Ray, p. 312, La vie privée du citoyen ne peut fonder le licenciement disciplinaire du salarié.***

La vie privée ne concernant pas l'exécution du contrat de travail, l'employeur ne peut exercer son pouvoir disciplinaire à l'égard d'un collaborateur dont les actes de la vie personnelle lui déplaisent, voire lui posent un réel problème dans notre société de l'image. Comme l'a donc

relevé la Chambre Mixte le 18 mai 2007 à propos du chauffeur d'un PDG s'étant fait adresser dans l'entreprise des revues hards : « Un trouble objectif dans le fonctionnement de l'entreprise ne permet pas en lui-même de prononcer une sanction disciplinaire à l'encontre de celui par lequel il est survenu [cf. Ph. Waquet : » Trouble objectif : retour à la case départ, S.S.Lamy du 4 juin 2007, p. 5]...Même raisonnement de la Chambre Sociale le 23 mai 2007 [R. Vatinet, JCP(S), 3 juillet 2007, no 1510]...il est en principe exclu de mettre en œuvre une procédure disciplinaire lorsqu'il s'agit de faits relevant de la vie privée : » Une sanction de cette nature n'est possible que si le salaré a commis une faute, i.e. ***un fait objectif imputable au collaborateur et constituant une faute au regard des obligations qui pèsent sur lui****. » Mais la rupture- forcement non disciplinaire- demeure possible pour trouble objectif (et non subjectif : Le seul désagrément que peut causer à l'employeur le comportement du salarie] ; c'est-à-dire non pour faute réelle et sérieuse ou grave, mais pour simple cause réelle et sérieuse, bref avec les indemnités de rupture et donc le préavis. »*

Additionally in ***Jurisclasseur Travail, Fasc. 30-30 : Licenciement pour motif personnel notes 14, 15*** :

14. Interdiction d'un motif lié à la vie privée □

La vie personnelle du salarié ne peut, en principe, constituer une faute susceptible de justifier son licenciement, sauf si le comportement du salarié, compte tenu de la nature de ses fonctions et de la finalité propre de l'entreprise, a créé un trouble caractérisé au sein de l'entreprise. Il ne peut être procédé à un licenciement pour une cause tirée de la vie privée du salarié que si le comportement de celui-ci a créé un trouble objectif caractérisé au sein de l'entreprise (Cass. soc., 16 sept. 2009: JurisData n° 2009-049525; JCP S 2009, 1508).

15. Limite

□

S'il ne peut être en principe procédé à un licenciement pour un fait tiré de la vie privée du salarié il en va autrement lorsque le comportement crée un trouble caractérisé dans l'entreprise (Cass.soc., 9 juill. 2002: RJS 2002, n° 1212. □ Cass. ch. mixte, 18 mai 2007, n° 05-40803: JurisData n° 2007-038898. □ Cass. soc., 11 avr. 2012, n° 10-25.764: JurisData n° 2012-007156).

Therefore, in order to be justified in dismissing an employee allegedly involved in a criminal offence outside working hours, outside office premises and in his private and personal time, the employer has to establish that that alleged criminal act has caused *un trouble objectif et caractérisé au sein de l'entreprise* but with payment of *indemnités de rupture et donc le préavis* as explained by **Jean Emmanuel Ray** in his book **Droit du Travail Droit Vivant, édition 2007/2008, 16ème édition, p. 312** to which I had already referred to above. The employer would also be justified to summarily dismiss the employee for misconduct in the exercise of his disciplinary powers only if the acts and doings committed by the worker in his private life would be tantamount to ***manquements aux obligations résultant de son contrat or un fait objectif imputable au collaborateur et constituant une faute au regard des obligations qui pèsent sur lui.***

On that score, the defendant relied on the fact that the alleged offence was committed whilst using the Company vehicle bearing number 3090MY08 put at the disposal of the plaintiff and it is normal for the employer to require that the said Company vehicle put at the disposal of employees should not be put to any illegal use whether such a condition is express or implied. It is common ground that the vehicle 3090MY08 was on rental from S.A. Nazeerally Rental Services [Nazeerally] but it is the plaintiff's case that at the time of the alleged offence, whilst he was on leave, the rental of the vehicle had come to term and he was renting the said vehicle on a personal basis from 01 January 2010 to 15 January 2010.

It is admitted by the defendant's witness, Mr. Dupont, that the plaintiff did raise such a defence in the course of the disciplinary proceedings that is that he had paid for the vehicle from 01 January 2010 to 15 January 2010 for his private use out of his own pockets but no receipt was produced. This is conceded by the plaintiff who produced a receipt purported to emanate from Mr. Sameer Nazeerally (Doc. E), the son of the owner of the vehicle in order to support his defence. His explanation is that at the time of the disciplinary committee he did not find it material to have that receipt produced so that the receipt is being adduced as part of the plaintiff's case for the first time in Court. It is however trite law that when making a determination as to whether the employer was justified in terminating the worker's employment, the Court should place itself at the material time and new evidence should not be considered. In support, I would refer to the case of **The Northern Transport Co Ltd v Radhakisson [1975 SCJ 223]** in which the Supreme Court held as follows:

"The Magistrate in finding for the respondent accepted the version given in Court by the respondent which is contrary to the one he gave to his employer on the day of the occurrence and which led to his dismissal. In so doing the Magistrate made a wrong approach to the problem posed to him as the issue he has to decide was whether the appellant was justified, **on the facts before him at the time**, to dismiss the respondent."

A similar stand had been taken by the Court in the case of **Mauritius Co-operative Savings and Credit League Ltd v Khulshid Banon Muhomud [2012 SCJ 107]**.

The above decisions have been approved by the Judicial Committee of the Privy Council in the case of **Smegh (Ile Maurice) Ltée v. Dharmendra Persad [2012] UKPC 23 at paragraph 23**, and their lordships wrote the following:

23. ...The question whether an employer justifiably dismisses a worker must be judged **on the basis of the material of which the employer is or ought reasonably to be aware at the time of the dismissal**. If the dismissal is justified on that material, it is not open to the worker to complain on the basis that there was other material of which the employer was not, and could not reasonably have been, aware which, if taken into account, would have rendered the dismissal unjustified.

Therefore, in the light of the above decisions it would not be proper for this court to consider that document which was not placed before the disciplinary committee. In any event Mr. Sameer Nazeerally has not been called to testify as to the truth of its contents, particularly when such an issue is contested by the defendant. Similarly, the Court cannot take into consideration two pieces of evidence, one in favour of the plaintiff and one in favour of the defendant respectively as they were available well after the disciplinary committee and after the employer had taken its decision. Evidence was adduced that in addition support of plaintiff's defence that he had rented vehicle 3090MY08 on a private and personal basis, the vehicle service provider, S.A. Nazeerally Rental Services did not have the cheque in the sum of RS 22,000 collected even after having submitted a claim to that effect for the month ending 31 January 2010. As for the defendant evidence was adduced that S.A. Nazeerally Rental Services submitted a fresh claim in respect of the rental for the month of January 2010 in 2012 and payment was duly made by way of a cheque in August 2012. As those elements were not available at the time the employer took his decision, it would not be in order for this Court to take into account those two matters in order to assess whether the employer was justified to take the decision it did.

On the other hand, there was evidence that S.A. Nazeerally Rental Services did submit a claim for the rental of the vehicle for the month ending 31 January 2010. Furthermore, S.A. Nazeerally Rental Services confirmed in an email dated 29 January 2010 (Doc. H5) the plaintiff returned his van yesterday (that is on 28 January 2010) and that since it had not received any termination of rental from the Transport Department an invoice for the month of January 2010 would be sent to the defendant. S.A. Nazeerally Rental Services pointed out

that only verbal confirmation was received from the plaintiff. That email would tend to confirm what Mr. Dupont stated that at no point in time had he requested the plaintiff to return the vehicle to the vehicle service provider nor had he taken away the vehicle from the plaintiff. Hence the plaintiff's version of him having he rented the vehicle out of his own funds from 01 January 2010 to 15 January 2010 is doubtful as there is no explanation why even after the expiry of his rental, after 15 January 2010 he kept it in his custody until 28 January 2010 when he returned it to S.A. Nazeerally Rental Services.

In addition to the above, the plaintiff was provided with a Shell Card bearing number 36747 by the defendant for refueling purposes and from the invoice emanating from Shell Mauritius Limited (Doc. H4) it is clear that the plaintiff made use of his employer's shell card no. 36747 on 04, 08 and 14 January 2010 for a total amount of RS 4,840 at a time when the vehicle was supposedly being rented by him on a private basis.

For the above reasons, I find that the preponderance of the evidence lies in favour of the defendant to the effect that vehicle 3090MY was still on rental by it and was assigned to the plaintiff for his private and professional use but certainly not for making an *usage abusif* as using the vehicle in the commission of a criminal offence.

On that latter issue, there was sufficient elements available to the defendant at the material time to reasonably suspect that vehicle 3090MY08 which was on rental by the defendant and for which fuel had been paid by it and assigned to plaintiff was used for the commission of a criminal offence. Plaintiff has admitted that he was arrested by the Police and was provisionally charged before the District Court of Bambous for the offence of illegal hunting at night so that there was reasonable suspicion of his involvement in a criminal activity whilst making use of vehicle 3090MY08. He admitted that he was driving the said vehicle to proceed to the spot where the doe and the boar were killed at night. The vehicle was also used to carry the hunted animals. It can be said that there were ample elements for the employer to conclude that the plaintiff participated, either as an accomplice or a co-author, in the commission of an alleged offence of illegal hunting at night.

Furthermore, there was a press article making reference to such incident and identifying clearly vehicle 3090MY08 as the vehicle which was used for the commission of the alleged offence and to carry the deer illegally killed (Doc.L). The rejoinder sent by Mr. Charoux (Doc. L1) did not add anything in favour of the plaintiff as it only denied that there had been any poaching. He also confirmed that a doe and a boar had been killed and there was no denial that the vehicle 3090MY08 was not used to carry the animals or that there was hunting of wild animals at night.

In the case of **Soobrayen v. Cie Sucrière de Mont Choisy Ltée [1975 SCJ 79]** the employee had savagely assaulted the company's accountant in the village near a shop and in the case of **Jugut v. Cie Sucrière de Bel Ombre Ltée [1983 SCJ 11]** the employee was a superior officer who held a position of trust and who had brutally assaulted a worker during a wedding party. In both cases, although the incidents occurred outside working hours, there was nevertheless a connection with the employer inasmuch as the protagonists were employed by the same employer: the former case being that a worker had assaulted his employer's accountant and in the latter case it was a superior officer who had assaulted a fellow employee.

In the case of **Harel Frères Ltd v Veerasamy [1968 MR 218]** and which was quoted with approval by their lordships of the Privy Council in the case of **Saint Aubin Limitée v Doger de Spéville [2011 UKPC 42]**, it was held that:

"termination would only be unjustified **where the employer has no valid reason at all** to discontinue employing a worker, and that, in circumstances where an employer had failed to prove misconduct in the form of sabotage, the Magistrate ought to have gone on to consider

...ther the employees' actions had been suspicious and had, therefore, given the employer valid reason for terminating their employment (albeit subject to payment of ordinary severance allowance, and presumably also due contractual notice)"

In view of all the above and the fact that the plaintiff had made use of the Company vehicle 3090MY08 to participate in the commission of the offence of illegal hunting at night, the defendant, as an employer, was entitled to take disciplinary action for the misuse of its vehicle and there had been *manquements aux obligations résultant de son contrat* by the plaintiff and those acts and doings complained of by the defendant are tantamount to gross misconduct or *faute grave au regard des obligations qui pèsent sur lui.* I find that the plaintiff has failed to prove his case against the defendant on the balance of probabilities in that the employer has discharged his burden by showing that the plaintiff's summary dismissal was justified in that he had been guilty of gross misconduct and that in good faith it had no other alternative than to terminate plaintiff's employment.

I therefore dismiss the present plaint with no order as to costs.

P.M.T.Kam Sing
August 29, 2017