REDUNDANCY BOARD

RB/RN/7/2023

ORDER

Before:	Rashid Hossen	- President
	Christ Paddia	- Member
	Saveetah Deerpaul (Ms.)	- Member
	Shirine Jeetoo (Mrs.)	- Member
	Feroze Acharauz	- Member

MTC Sports & Leisure Ltd (In Liquidation)

On 20th April 2023, MTC Sports & Leisure Ltd (in liquidation), hereinafter referred to as the "Employer" notified the Redundancy Board hereinafter referred to as the "Board" of its intention to close down its enterprise.

The reasons for the closing down are to be found in paragraphs:

A- In its written Notice and Statement to the Board, the employer refers to the circumstances that have led the enterprise to be placed into liquidation while inviting the Board to rule on whether it has jurisdiction to entertain such matter, and

B- To the procedure of Notification and Negotiation.

The Board will deal with the issue of notification and negotiation first for reasons that will appear clear.

Mr. R. Pursem, Senior Counsel, Mr. A. Sookhoo, Counsel and Mr. D. Dodin, Counsel appeared for the Employer. Mr. T. Dabycharun, Counsel appeared for the Unionised Employees and Mr. R. Rutnah, Counsel appeared for the Non-Unionised Employees.

We begin by making a general observation which is pertinent to this case in that the Board is seized of the present matter by way of a notification and not an application.

For ease of reference we are reproducing the Statements of Case of parties:-

Employer

1. The present Application is being made pursuant to section 72(5) of Workers' Rights Act.

2. The Applicant, is a public limited company, which was incorporated on 13 January 2017 and started to operate in 2021 as a horse racing organiser ("HRO").

3. The Applicant is wholly-owned by the Mauritius Turf Club ("MTC"), which is an association set up in 1812 with a view to promote horse-related sports and activities. It is registered under the Registrar of Associations Act 1978.

4. On 03 April 2023, the Board of Directors of the Applicant, pursuant to section 137(4) of Insolvency Act 2009 ("Insolvency Act") resolved to appoint Messrs Anjeev Hurry and Ruben Mooneesawmy as joint provisional liquidators of the Applicant (hereinafter collectively referred to as the "Joint Provisional Liquidators"). The meeting of shareholders and creditors required to be held under section 142(5) of Insolvency Act and the First Schedule of Insolvency Act has been set for 02 May 2023.

5. As at 07 April 2023, the Applicant was employing 186 employees ("Employees"), the great majority of which are members of the Federation of Progressive Unions ("FPU") (the "Unionised Employees"), with the remainder not being Unionised (the "Non-Unionised Employees").

6. As a result of the Applicant being placed in liquidation, the Joint Provisional Liquidators intend to terminate the contracts of employment of the Employees.

Preliminary Issue: jurisdiction of the Redundancy Board

7. The Joint Provisional Liquidators have taken cognisance of the Order of the Redundancy Board in the case of P. Jeewoonarain & Others v Health Contact Center (RB/RN/172/2020). Ltd RB/RN/172/2020 wherein the Board opined that "Section 72 of the Workers Rights' Act (supra) makes provisions for the procedure to be adopted even in cases of closure of enterprises. Indeed, such closure, be it for voluntary or compulsory liquidation, entails reduction to nil of the workforce. "

8. Whilst the Joint Provisional Liquidators agree with the Board's finding in P. Jeewoonarain & Others v Health Contact Center Ltd RB/RN/172/2020 that section 72 of workers' Rights Act finds its application in the context of a company's administration, the Joint Provisional Liquidators respectfully beg to differ with the Board's obiter statement to the effect that section 72 of Workers' Rights Act would extend to a company in liquidation.

9. Hence the Applicant invites the Board to determine whether it has jurisdiction to entertain the present matter in as much as the Applicant has been placed in provisional liquidation on insolvency grounds pursuant to section 162 of Companies Act 2001 and section 137 of Insolvent Act. Accordingly, the Applicant at the outset moves that the Board rules on the issue of its jurisdiction in the case where a company is placed in voluntary liquidation on grounds of insolvency.

<u>On the merits</u>

10. In the event that the Board rules that it has jurisdiction (which the Applicant respectfully maintains that it does not), the Applicant avers that the intended termination of the contracts of employment of the Employees and closing down of the Applicant is with cause and is justified.

11. The draft accounts of the Applicant as at 31 December 2022, clearly shows that the continued operations of the Applicant are no longer economically viable on account of its financial situation. Further as at 03 April 2023, the Applicant has liabilities of Rs 50 million.

12. Further the Horse Racing Organiser licence of the Applicant which expired on 31 December 2022 was not renewed for the 2023 season because, inter alia, the Applicant was unable to secure the lease for the race track of the Champ de Mars nor was it able to negotiate an agreement with the present leaseholder of the race track.

13. Until 03 April 2023, the Applicant had been able to continue its operations because of the financial support of its shareholder, the MTC.

14. Accordingly, and in light of the above considerations, the Board of Directors of the Applicant referred to its shareholder, the MTC, the decision of whether it would or not continue to support the Applicant financially given the dire financial, contractual and regulatory circumstances.

15. An assembly of the members of MTC was held to this effect on 03 March 2023 at which the Board of Directors of the Applicant and the Board of Administrators of the MTC explained the current circumstances, by way of a Powerpoint Presentation and expressed their views on the future of the Applicant.

16. A vote was taken on whether the MTC should continue to support the Applicant financially and the members voted, almost unanimously, to cease to support the Applicant financially, and, for all the reasons given above, the Applicant is of the view that no other decision was possible in the circumstances.

17. Following the decision of the MTC to cease supporting the Applicant financially, the Applicant became de facto insolvent as it would not be able to pay its debts as they fall due.

18. Accordingly, the Board of Directors of the Applicant resolved on 06 March 2023 to close down as there was no purpose for it to continue to be in existence as there would be no longer any revenue stream stemming from its only business activity.

19. The Applicant then immediately initiated the statutory process for the reduction of workforce prescribed by section 72(1) of the Workers' Rights Act.

20. Pursuant to section 162 of the Companies Act 2001 (as amended), the Board of Directors of the Applicant then called a meeting of the Board as the Applicant was unable to pay its debts as they fell due and to consider appointing provisional liquidators.

21. The meeting was held on 03 April 2023 and at this meeting, the Board of Directors of the Applicant resolved to appoint Messrs Anjeev Hurry and Ruben Mooneesawmy as joint provisional liquidators of the Applicant.

22. The Applicant avers that it could not delay the appointment of the Joint Provisional Liquidators any longer given that it had statutory obligations to make the said appointment under the Companies Act 2001 and under the Insolvency Act.

23. Further, any delay in completing the liquidation would not be in the best interests of the employees and any other creditor of the Applicant as it would inevitably increase the costs of the liquidation, the more so that these costs take precedence over any other claim under the rules of distribution found in the Fourth Schedule (Preferential Claims) of the Insolvency Act (as amended) and an increase in such costs would lead to a decrease in the assets available for distribution, which can only be detrimental to the employees with the passage of time. Moreover, continuing with the employment of the current employees would give to the employees the misleading belief that the Applicant will be able to pay them their remuneration when this is not the case. Termination would allow employees to integrate another employer quicker or in the alternative, to apply for the workfare programme.

24. Subject to paragraphs 7 to 8 (inclusive) of the written notice and statement, the Applicant is now applying to the Redundancy Board for an order to terminate the employment of its whole workforce on the ground of closing down for economic reasons.

B. <u>The Procedure of Notification & Negotiation under Section 72(1) of the Workers' Rights Act</u>

25. Section 72(1) of the Workers' Rights Act provides that an employer is under a statutory obligation to notify and negotiate with the trade union, and/or any workers' representatives, when it intends to close down its enterprise.

26. By way of a letter dated 09 March 2023, the Applicant notified the Unionised Employees through the FPU of its intention to close down the company, which would result in the Unionised Employees being made redundant, and convened the FPU for a meeting on 14 March 2023 to negotiate any alternative so as to avoid the closing down, if at all possible - see letter of 09 March 2023.

27. By way of another letter, dated 09 March 2023, the Applicant notified individually the Non-Unionised Employees of its intention to close down the company. The letter further invited them to elect representatives, who would negotiate on their behalf, pursuant to section 72(1) of the Workers' Rights Act, at a meeting scheduled for 14 March 2023.

28. By way of a letter dated 13 March 2023, purportedly sent on behalf of the Non-Unionised Employees, a further delay was asked for the said employees to elect their representatives and a postponement of the meeting of 14 March 2023 was requested, which the Applicant acceded to.

29. By way of letter dated 15 March 2023, the Non-Unionised Employees informed the Applicant that they had elected Messrs. Leckram Doyal and Prithiviraj Pabaroo as their representatives to negotiate with the Applicant with a view to finding a solution in relation to the closing down — see letter of 15 March 2023.

30. On 14 March 2023, a meeting, pursuant to section 72(1) of the Workers' Rights Act, was held with the FPU in order to explore any alternative to the closing down or find any other solution — see minutes of meeting of 14 March 2023.

31. During the said meeting, both parties explored the various statutory alternatives prescribed in section 72(1) of the Workers' Rights Act, and it was explained why the Applicant held the view that there could not be any alternative solution to the closing down of the company for the following reasons:

(a) restrictions on recruitment — section 72(1)(i) of the Workers' Rights Act;

It was explained that this option could not be applicable in the case of a closing down of the company as the Applicant had not been recruiting any additional workers and would not be recruiting any as it intended to close down.

(b) retirement of workers who are beyond the retirement age — section 72(1)(ii) of the Workers' Rights Act.

The workers of the Applicant are covered by a private pension scheme, which is administered by Swan Life Ltd. They are, therefore, eligible to take their pension and retirement benefits under the said private pension scheme as from the age of 50. Therefore, this option cannot be an alternative to the closing down.

(c) reduction in overtime — section 72(1)(iii) of the Workers' Rights Act.

This alternative could not be of application in the case of the closing down of the company as no foreseeable overtime could be contemplated.

(d) shorter working hours to cover temporary fluctuations in manpower needs — section 72(1)(iv) of the Workers' Rights Act.

This alternative could not be of application in the case of the closing down of the company as the working hours are being reduced to zero.

(e) providing training for other work within the same undertaking— section 72(1)(v) of the Workers' Rights Act.

This alternative could not be a feasible option as in case of the closing down of the company.

(f) redeployment of workers where the undertaking forms part of a holding company — section 72(1)(vi) of the Workers' Rights Act.

It was stated that the Applicant had considered the possibility of redeploying some of its workers to the MTC, which is its sole shareholder. However, with the MTC having lost the right to organise races, the workers of the Applicant being employed for the purpose of organising horse races, could not be redeployed at the MTC as there would be no work available for them.

(g) compensation — section 72(3) of the Workers' Rights Act.

32. The Applicant did not have the sufficient funds required to make an offer for financial compensation to the employees. The representative of the Applicant also invited the FPU to suggest any other alternatives, as in the absence of any other viable alternative, the closing down would be inevitable.

33. Therefore, the following offer was made to the FPU for the Unionised Employees:

(a) the payment of one (1) month's wages in lieu of notice;
(b) a pro-rated refund of any untaken annual leaves for the year 2023;
(c) a pro-rated payment of the end of year bonus for the year 2023; and
(d) the refund of the 3% pension contribution, which had been deducted from the workers' salaries, with interest, it being understood that such refund would take place upon the termination of the employment of the workers.

34. It was understood that acceptance of the said offer would guarantee that the workers would be paid their dues according to law before any insolvency as, otherwise, once the Applicant would be placed in liquidation, there was no guarantee that the workers would be paid those items of remuneration inasmuch as the rules of distribution in case of liquidation would apply as per the Fourth Schedule to the Insolvency Act (as amended).

35. The FPU asked for some time to consider the proposal, which would have to be put to the vote of the workers at a general assembly.

36. By way of a letter dated 23 March 2023, the FPU informed the Applicant that a vote concerning the said offer would be taken on 29 March 2023.

37. By way of a letter dated 29 March 2023, the FPU informed the Applicant that the offer had been rejected by a large majority of the Unionised Employees.

38. By way of a letter dated 3 April 2023, the Applicant informed the FPU that in light of the rejection of the offer, it considered that there has been no agreement reached pursuant to section 72(3) of the Workers' Rights Act.

39. In the same letter, it further informed the FPU that it would proceed with the appointment of a provisional liquidator, as this decision could not be postponed any further, and also that an application would be made to the Redundancy Board pursuant to section 72(5) of the Workers' Rights Act for an order to terminate the employment of all employees of the Applicant, including the Unionised Employees.

40. On 23 March 2023, a meeting, similar to the one held with the FPU, was held with the representatives of the Non-Unionised Employees, Messrs. Leckram Doyal and Prithiviraj Pabaroo, who were accompanied by Mr. Ravi Rutnah, in his capacity as Counsel, such meeting being pursuant to section 72(1) of the Workers' Rights Act — see minutes of meeting of 23 March 2023.

41. During the said meeting, the representative of the Applicant gave the same explanations as he did with the FPU in relation to the rationale behind the closing down of the company and he also explained how the statutory alternatives to the closing down, prescribed in section 72(1) of the Workers' Rights Act, could not apply.

42. The same offer made to the Unionised Employees through the FPU was made to the representatives of the Non-Unionised Employees, and they asked for some time to consider same.

43. Further, they also asked for some information regarding the private pension plan, which the representative of the Applicant stated he would liaise with the pension administrator in order to make the said information available.

44. By way of a letter dated 03 April 2023, the Applicant informed the representatives of the Non-Unionised Employees that it considered that there had been no agreement reached pursuant to section 72(3) of the Workers' Rights Act, and that it would proceed with the appointment of a provisional liquidator, as this decision could not be postponed any further, and that an application would be made to the Redundancy Board pursuant to section 72(5) of the Workers' Rights Act for an order to terminate the employment of all employees of the Applicant.

45. In light of the above, the Applicant avers that it has complied with its obligations under section 72(1) and (5) of the Workers' Rights Act.

C. Prayer

46. In light of the above, and for all other reasons that may be given in due course, subject to paragraphs 7 to 9 (inclusive) of this written notice and statement, the Applicant prays the Redundancy Board for an order to allow it to terminate the employment of its workforce (as listed in Annex 13) under section 72 of the WORKERS' RIGHTS ACT based on the ground that the intended closing down of the business is justified on economic grounds.

Unionised employees

l. The GRA

The Gambling Regulatory Authority (GRA) is a body corporate established in 2007 which now operates under the aegis of the Ministry of Finance, Economic & Planning and Development. The Authority is administered and managed by a Garnbling Regulatory Board with a view to controlling the game activity in different sectors so far as involvement of money is concerned.

The provisions for horse racing are:

l) The horse race which includes the conduct or presentation of any form of racing in which horses participate.

2) The horse racing organizer which means a Public limited Company set up with the object of organizing horse races in Mauritius.

2. The MTC

The Mauritius Turf Club has organized horse racing in Mauritius for more than 200 years as the sole organizer.

With the introduction of the Gambling Regulatory Authority, the Mauritius Turf Club (MTC), as a club, could not proceed further with the organization of horse racing and to promote such activity. It was compelled to set up a company with a license for horse racing delivered by the Gambling Regulatory Authority (GRA).

3. The MTCSL

The Mauritius Turf Club therefore set up the MTCSL, a "subsidiary" of the Mauritius Turf Club.

4. The People's Turf PLC

By the same time another competitor in the People's Turf PLC was incorporated before the Registrar of Companies to act as a horse racing organizer and therefore was made a competitor to the MTCSL at the Champ de Mars.

5. The membership of the MTC and the MTCSL

It is worth mentioning that the President of the MTC attended a meeting at the PMO where an agreement (kept secret) was reached. The then President left the MTC for the People's Turf PLC. Refer the message of Mr. Kamal Taposeea published in the annual Report of 2019. It has to be underlined here that Mr. Kamal Taposeea was the President of the MTC. His name does not appear on the MTC membership. However, it appears as Office Bearer of the People's Turf PLC.

6. At one point in time, the MTCSL was in control of the Champ de Mars and horse racing days were "shared" between the two. Then there came a Government decision which transferred the control from the MTCSL to the People's Turf PLC.

7. At the end of the day, the two horse racing organisers could not cohabitate as the Champ de Mars was removed from the MTC and transferred to the People's Turf PLC.

8. A letter was sent to the Minister of Labour dated 14 April 2023 in which 5 propositions were made to proceed with horse racing in the Champ de Mars.

9. Another document dated 10 April 2023 was remitted to the MTC at a meeting held at the MOL which shall be referred to before the Redundancy Board.

I. Motion

l) That the MTC be made a party to the application resting before the Redundancy Board as the MTCSL has no assets, in the light of 2 above.

2) That a tripartite committee be held to settle the issue of repartition of expenses and income between the MTCSL and the People's Turf PLC. The MTCSL has apparently no funds at all, but the MTC and the MTCSL cannot be dissociated. There is no reason at all for the MTCSL to lay off its employees and for the MTC to keep its staff. The conciliation between the two parties be held to see as to why the MTC has decided to put MTCSL under receivership.

3) That the points raised in the statement of the MTCSL as follows be considered by the Board.

8. Whilst the Joint Provisional Liquidators agree with the Board's finding in P. Jeewoonarain Others v Health Contact Center Ltd RB/RN/172/2020 that section 72 of Workers' Rights Act finds its application in the context of a company's administration, the Joint Provisional Liquidators respectfully beg to differ with the Board's obiter statement to the effect that section 72 of Workers' Rights Act would extend to a company in liquidation.

9. Hence the Applicant invites the Board to determine whether it has jurisdiction to entertain the present matter in as much as the Applicant has been placed in provisional liquidation on insolvency grounds pursuant to section 162 of Companies Act 2001 and section 137 of Insolvency Act. Accordingly, the Applicant will at the outset move that the Board rules on the issue of its jurisdiction in the case where a company is placed in voluntary liquidation on grounds of insolvency.

If left unattended, these issues may be raised at Supreme Court for both their content and the neglect of the Board.

4) Stand of the Union

This is clearly laid down in Annex 6. The aim of the Union is first to protect employment through the five proposals made to the Government. In case this is not possible to award, that the employees be paid severance allowance as per the provisions of law.

1. "The employer paying to the workers a compensation of not less than 15 days' remuneration for every period of 12 months of continuous employment, where the reduction is considered to be justified.

2. Where the Board finds that the termination of employment referred to in subsection (8) is unjustified or where the employer has failed to comply with an order of the Board under subsection (9), the Board shall —

(a) with the consent of the worker, order the employer to reinstate the worker in his former employment, with payment of remuneration from the date of termination to the date of his reinstatement; or

(b) subject to paragraph (b), order the employer to pay the worker severance allowance at rate specified in section 70(1).",

In the latter case the Employees should be paid all mandatory dues and allowed either to retire or to transfer their pension rights to another pension fund, as per law.

5) Stand of the FPU on the statement of MTCSL.

Non-Unionised employees

1. The present Application for an order to allow the Applicant to terminate the employment of its workforce under section 72 of the Workers' Rights Act purportedly based on the ground that the intended closing down of the business is justified on economic grounds is resisted for the following reasons:

(a) the ground that Mauritius Turf Club, the holding company, to import the term used in section 72(1)(iv) Workers' Rights Act, albeit that MTC is an association, is a viable going concern with assets sufficient enough to adequately compensate the employees of MTCSL whether Unionised or Non-Unionised;

(b) the present purported economic situation of MTCSL has been brought about by engineering a well-planned and well executed strategy in that they deliberately did not renew their lease agreement of the race track which inevitably led to their exclusion from organizing horse racing;

(c) there has been misuse of funds of the MTCSL.

On the Preliminary Issue: Jurisdiction of the Redundancy Board.

2. The Employees are of the view that the Order of the Redundancy Board in the case of P. Jeewoonarain & others v. Health Contact Centre Ltd RB/RN/172/202 is good law and is extended to the kind of situation in hand. Therefore, it submitted that the Board has jurisdiction and after all the Applicant has voluntarily submitted to the jurisdiction of the Board.

Background

1812-2020: HORSE RACING ORGANISED BY THE MAURITIUS TURF CLUB

3. The MTC Sports and Leisure Limited (MTCSL) is wholly-owned by the Mauritius Turf Club ("MTC"), which is an association set up in 1812 with a view to promote horse-related sports and activities. It is registered under the Registrar of Associations Act 1978. The MTCSL is 100% owned by the MTC.

4. The MTCSL, is a public limited company, which was incorporated on 13 January 2017 and started to operate in 2021 as a horse racing organiser ("HRO"). The MTCSL was created with only Rs 15 M limited by shares.

5. The MTC had been organising race meetings in Mauritius from June 1812 to 2020. According to wikipedia.org, the Mauritius Turf Club is the oldest horse-racing club in the Southern Hemisphere and the second oldest in the world.

6. After the Commission Inquiry on Horse Racing in Mauritius in 2015, the authorities had to act. As mentioned in the budget speech of 2016/2017 by Hon. Pravind Jugnauth, Minister of Finance and Economic Development at paragraph 265 "The Gambling Regulatory Authority (GRA) will be further restructured to enable it to effectively play its role as a fully-fledged licensing and regulatory Authority."

7. The MTC has been operating as the sole HRO in Mauritius since 1812 and has been generating revenues for the Horse Racing Industry for the last 208 years. (1812-2020).

8. The MTC being an association registered under the Registrar of Association claims to be a non-profit organisation and all profits were injected back into the horse racing industry mainly through prize money and subsidies

YEAR	RACE MEETINGS	TURNOVER	ANNEX
2019	38	RS 371 M	03 - Financial Report - Dec 2020 Turnover
2020	32	Rs 285 M	03 - Financial Report - Dec 2020 Turnover

Automatic System Ltd (ASL) being one among other operators responsible for the running of a totaliser system (Tote) of betting on races in Mauritius organised by the Mauritius Turf Club (MTC) branded under Supertote specifies on its official website (https://automaticsystemsltd.mu/) that they (Tote) have contributed more than Rs 1 Billion to the racing industry in the last 29 years (1991-2020).

2020: THE COVID-19 PANDEMIC BREAKOUT THROUGH THE WORLD

9. The racing season was delayed due to the lockdown period between March and June 2020.

10. Due to the constraint of the Covid-19 pandemic affecting the whole world and our nation in 2020, the authorities gave assistance to the MTC in the form of the Wage Assistance Scheme to all eligible employees of the MTC.

11. As the lockdown delayed the start of the racing season for 2020, and while waiting for stables to prepare their horses to race and with only 27 weeks left to organise race meetings which included two public holidays falling on Saturdays of the remaining period, the authorities scheduled the season to start on 20th June 2020 and to end on 20th December 2020 just one week before Christmas. The authorities have been very helpful in granting the MTC 32 race meetings for such a short period of time. The first four race meetings of the 2020 season were held 'in-camera' due to sanitary restrictions on public gathering.

12. The President of the MTC, in his message in the Annual Report 2020, expressed his special thanks to the Senior Management staff who accepted a reduction in salary, the Government for their financial assistance through the Wage Assistance Scheme and the two Totes and SMS Pariaz for their willingness to increase the percentage paid to the MTC during the "in-camera meetings".

13. The MTC also obtained a working capital loan of Rs 33 M as non-temporary facilities under Bank of Mauritius COVID-19 Support Programme. As at December 31, 2020, the Club had Rs 9,817,254 loan approved but not disbursed.

2021: THE MTCSL AS A SOLE HORSE RACING ORGANISER

14. With amendments in legislation namely the Anti-Money Laundering and Combating of Terrorism (Miscellaneous Provisions) Act 2020, it was now only a public limited company that would be eligible to apply for a HRO licence.

15. In July 2020, the MTC was aware that to comply with the new provisions of the law, it had to operate its HRO business as a public limited company. The MTC was well prepared for this new legislation as it had incorporated a subsidiary named the MTCSL as a public limited company three years before on 13 January 2017 to act initially as a Tote organiser.

16. In the Annual Report of 2020, the President of the MTC stated that the process required by law to obtain a horse-racing organiser licence had been completed through the MTCSL a fully owned subsidiary of the MTC.

17. On 20th January 2021, in reply to a request by MTC, the authority granted 39 race meetings for the racing season 2021 and even allowed to split races to 9 during a meeting in case there were a high number of horses nominated.

18. However, with the nomination of the new board in 2021, the MTC started a tug of war with the authorities concerning the prerogatives that the MTC would be losing with the amendments brought to the GRA Act. This caused much more delays in the start of the racing season.

19. The season in 2021 was due to start on 20th March 2021. The MTCSL board was still not properly constituted before the second lockdown. Due to the delays at MTC/MTCSL level, a licence could not be delivered.

20. With the new MTC board constituted with Mr. Jean-Michel Giraud as President, the MTC chose not to transfer the assets and tools required to allow the MTCSL to operate as an HRO in 2021 but instead created several lease agreements with the MTCSL for it to be compliant for an HRO licence application for the 2021 racing season.

21. Recently on 17 March 2023, Mr. Giraud made a bold statement on a live radio broadcast where he stated that he did not transfer the MTC assets to the MTCSL Ref: Top Fm and Top Tv Mauritius Radar Lepep: "*Assistons-nous a la fin de nos courses.*"

22. In so doing, the MTC then remained the landlord of all the assets while the MTCSL incurred additional direct expenses as compared to when the MTC was acting as HRO. The very act of creating a landlord/tenant relation breaches the provision of section 9(3) of the Registration of Associations Act 1978.

Lease Agreement for the 2021 racing season

LEASE	AMOUNT(Rs)	RD / MONTHLY	TOTAL
RACE DAY	241,800	38	9,188,400
STABLING (PL)	269, 104	8	2,152,832
EQUIPMENT	360,000	8	2,880,000
OFFICE	115,603	8	924,824
STABLING (FL)	274,500	8	2,196,000
VEHICLE	700,500	8	5,604,000
GRAND TOTAL			22,946,056

MTC Vehicle Lease Agreement 2021

All the lease agreements initially for a period of 20 months ending at the end of 2022 were amended to terminate at the end of 2021 racing season.

23. Moreover, the MTC transferred almost all of its employees to the MTCSL whilst keeping certain employees who were in the maintenance department and it was the MTCSL's responsibility to ensure maintenance of the assets under the lease agreement. From reliable sources, it is understood that there is a GRA correspondence requesting MTC to transfer employees of "certain functions' to be able to organise races. The MTCSL mentioned in a letter to the GRA that it had issued a letter to all management staff that needed to be transferred to the company in order to organise race meetings.

24. MTC transferred almost all its employees to its fully owned subsidiary, the MTCSL

Employees were verbally told if they do not accept this transfer, they will lose their job. The reasoning of the MTC and MTCSL behind these several lease agreements and transferring the majority of employees still remain unclear.

25. Due to the restrictions prevailing in the country because of the Covid-19 pandemic, races were to be done 'in-camera' for the whole 2021 season. As revenues were expected to drop without public attendance, the MTCSL negotiated for an increase in royalties with the betting companies that were authorised to operate.

26. The MTCSL managed to negotiate that all three betting operators, namely ASL, GSL and SMS Pariaz to pay royalties of 7% instead of 5%.

27. The GRA board approved the issue of a horse-racing organiser licence to the MTCSL on 21st April 2021 with the conditions that the MTCSL Board is constituted in accordance with the GRA Act and the Companies Act 2001.

28. The Horse Owners Association expressed concern on the possibility that the MTC/MTCSL were holding the racing industry hostage to satisfy their personal ego and were not capable of complying with the law.

29. After the Board of the MTCSL was properly constituted, the HRO licence was obtained on the 3rd May 2021.

30. Below are figures from ASL Ltd official website, one among the betting operators while the MTC/MTCSL were acting as sole HRO.

AUTOMATIC SYSTEMS LTD - ANNUAL REPORT			
ASL LTD - TOTE	2021	2020	2019
	Rs (Million)	Rs (Million)	(Million)
RACE MEETINGS	38	32	38
TURNOVER	1 ,047.5	928.5	1057.0
INCOME	309.6	258.1	281.7
COMMISSION TO MTCSL	62.0	48.1	55.1

31. All three betting operators continued with this agreement until the MTC and the MTCSL decided in September 2021 that only one operator would continue to pay the 7% while the other two namely ASL and GSL would have their royalties reduced to 5%.

32. A document called a Statement of Financial Position of 31st December 2021 suggests that receivable from Subsidiary company of Rs 65,617,778 in MTC balance sheet. This sum is strongly believed to be funds that have emanated from MTCSL as at the relevant period MTC had no other subsidiary company. 2022: MTCSL creates its own competitor.

33. In the government strategy to reform the gambling sector, Hon. Pravind Jugnauth, Minister of Finance and Economic Development announced in his budget speech 2016-2017 at paragraph 266 stated: "Moreover, a Horse-Racing Division and an Integrity and Intelligence Unit are being set up within the Gambling Regulatory Authority."

34. The Horse Racing Division (HRD) was created in January 2022 following amendments to the GRA Act through changes in legislation in the Finance Act 2021.

35. The setting up the HRD also meant that the HRD will absorb various costs which was in the past incurred by the HRO, such as:

(a) Setting up panels of racing stewards for inquiry;
(b) Employ racecourse officials (Stipendiary Stewards, Clerk of the race, Licensed Veterinarian, and other managerial staffing);
(c) Laboratory services for testing of equine blood, urine and other samples.

36. These expenses estimated at Rs 30-40 M per racing season would no longer have to be borne by the MTCSL as sole HRO for the year 2022.

37. Prior to the start of the racing season, another tug of war with the authorities which again delayed the racing calendar.

38. On 25th March 2022, the MTCSL was still not in compliance with the regulations and was reminded by the GRA.

39. The MTC still not having transferred its assets to the MTCSL, another lease agreement was required and had to be made.

Lease Agreement for the 2022 racing season

LEASE	AMOUNT(Rs)	RD / MONTHLY	TOTAL
RACE DAY	300,000	18	5,400,000
STABLING (PL)	711,000	12	8,532,000
EQUIPMENT	360.000	12	4,320,000
OFFICE	200,000	12	2,400,000
STABLING (FL)	550.000	12	6,600,000
GRAND TOTAL			27,252,000

40. A comparison of lease agreement for 2021 and 2022 shows an increase of 18.76% in the direct expenses of the MTCSL over the lease agreements made by the main shareholder to its subsidiary.

Race meetings in 2021 was 38 whereas in 2022 was reduced to 18 race meetings.

LEASE	AMOUNT 2021	AMOUNT 2022	TOTAL 2021	TOTAL 2022
RACE DAY	241,800	300,000	9,188,400	
STABLING	269, 104	711,000	2,152,832	8,532.0
EQUIPMENT	360,000	360,000	2,880,000	
OFFICE	115,603	200,000	924,824	
STABLING (FL)	274,500	550,000	2,196,000	6.60000
VEHICLE	700,500		5.604,000	
GRAND TOTAL			22,946,056	

41. While still being the only body to organise races in Mauritius, the lease agreement made by the MTC and MTCSL was ONLY for January 2022 to June 2022 whilst the racing season normally ends in December 2022. This was again reminded by the GRA on 29th March 2022. Amendments had to be again brought to the lease agreement between MTC and the MTCSL

42. An unsecured shareholder loan agreement of Rs 120M was made on 6 April 2022 by the MTC to the MTCSL to provide financial support for the 2022 horse racing season. The agreement was amended two times to be in compliance. The MTCSL had also benefited Rs 20 M from the Covid-19 Support Scheme.

43. On the 15th April 2022, a HRO licence was granted and subject to conditions by the GRA (Annex 029 - GRA HRO Licence). A press communique was also issued by the GRA on 15 April 2022.

44. The racing season was due to start on Saturday 23rd April 2022 with the MTCSL being the sole racing organiser. On 22 April 2022, a press conference was orchestrated by the MTC and MTCSL held at the MTC premises.

Mr. Giraud stated:

"Un rapide.... Coup d'oeil sur les conditions qui sont imposé par la HRD...(il rectifie) la GRA sont justes inacceptable,. ..donc on va pas accepter,...on va pas prendre notre licence.. ' ,

Following a journalist question:

„Pas de courses demain alors.. ? "

Mr. Giraud replied:

"Ouis... Ouis... pas de courses demain... mais pire, je crois qu'il n'y aura de courses après demain..., ni après après demain non plus. ',

45. The MTC/MTCSL was not agreeable to the conditions attached for obtaining an HRO licence. Conditions 4/10/25.

46. On 27 April 2022, the GRA informed the MTCSL that it considers that the MTCSL having refused to accept the legal conditions attached to the licence and therefore the GRA deems that the MTCSL is not willing to accept the HRO licence and to organise race meetings for the 2022 season. MTCSL was no longer considered as a potential HRO for the season by the authority.

47. Meanwhile, the People's Turf Public Limited Company (PTP), a newly formed company had shown interest in organising races. On 28 April 2022, while the MTC had lost its rights on the Champ de Mars the day before on 27 April 2022, the MTC informed the Municipality of Port Louis that the MTCSL Board had resolved to accept the conditions attached to the HRO licence.

48. The Cote D'or International Racecourse and Entertainment Complex Limited (COIREC), a company fully owned by the state, was granted the right to control and manage the Champ de

Mars race track. The COIREC published a press communique to ask parties interested to apply for use of the Champs de Mars.

49. In May/June 2022, MTCSL cadres met with Mr. Benoit Halbwachs, Secretary of the MTC and Mr. Hurshit Woomchurn in the capacity of Director of the MTCSL respectively and proposed to sublet the premises and facilities available at the MTC on alternate weeks to the other HRO (PTP) against a fair and reasonable fee for a right of use. The services of the experienced employees of the MTCSL to be offered against a service fee to the PTP was also proposed. Cadres of the MTCSL even proposed to act as negotiators and sought approval from the MTCSL Board through Mr. Hurshit Woomchurn. It is to be noted that Ms Diya Dabee, Human Resource Manager of the MTCSL was also present during the meeting. However, such authorisation was never granted and it was clear by following events that occurred later that the MTCSL was NOT willing to enter into such negotiation.

50. Meanwhile, the MTCSL accepted the conditions of the GRA and applied again for an HRO licence and also to the COIREC for rights to use the race track of the Champ de Mars.

51. However, PTP was also a HRO licensee and had also applied to the COIREC for 'use the Champ de Mars race track'. The right of use for the Champ de Mars lease agreement was made between the COIREC and the MTCSL on 1 June 2022 to be used on an alternative basis as there were two HRO subject to fixtures list and race meeting calendar of the HRD division of the GRA. Moreover, the maintenance of the track was to be done by each HRO on alternate weeks thus reducing the cost for the MTCSL.

52. The lease agreement with the COIREC stipulated in section 2.5 that the Lessee (MTCSL) should notify the lessor (COIREC) in writing three months before the expiry date of the Agreement.

53. On 7 June 2022, the MTCSL was granted an HRO licence. The MTCSL was no longer the sole HRO, Mr. Giraud's refusal to renew the MTCSL HRO licence had led to another player in the game, the sharing of the racetrack and the racing fixtures being equally divided into the MTCSL and the PTP.

2023: MTCSL - IN LIQUIDATION

54. The Champ de Mars lease Agreement was not renewed by the MTCSL three months before its expiry on 18 September 2022 as the last race meeting by the MTCSL was held on 18 December 2022. The MTCSL was duly informed on 19 December 2022 by the COIREC.

55. As the MTCSL was unable to secure the lease for the race track of the Champ de Mars with the COIREC nor with the PTP being the leaseholder of the race track, it was unable to renew its HRO licence for the racing season 2023.

56. On the other hand, the competitor PTP had renewed its lease for the race track and was subsequently granted the exclusive right of use for the Champ de Mars race track for the 2023 racing season on 30 December 2022 and was eventually granted an HRO licence for the 2023 racing season.

57. On 23 January 2023, the MTCSL made a fresh application to the COIREC for a subletting agreement for the 2023 racing season. On 3 February 2023, a new sub-letting agreement duly approved by the Board of the COIREC was submitted to the MTCSL

58. However, the PTP being the sole HRO had already been granted the exclusive responsibility for the maintenance and upkeep of the Champ de Mars race track, training track during the off season and for the whole of the 2023 racing season. The MTCSL had to make a cost sharing agreement with the PTP prior to signing the sub-letting agreement of the COIREC.

59. On 27 February 2023, the MTCSL received a copy of the proposed 'Cost Sharing Agreement'' from the PTP. There has been no communication that was released in the press or on the MTCSL official website from the MTCSL to show that there were ongoing discussions between MTCSL and PTP about the proposed 'Cost sharing agreement', nor any arbitration was sought to find a workable solution.

60. On 3 March 2023, the MTCSL called for a shareholders meeting with the MTC members where it was voted that the MTC would no longer support the MTCSL for the 2023 racing season. The said meeting was in fact a general assembly under 'Section 14(1) of the Status of the MTC and under section 14.3 (b) which required a quorum of 25 members whereas around 100 members were present out of 637 (338 only have power to vote). It was not an Extraordinary meeting as communicated by the MTC.

61. The MTCSL judged the proposal from the new leaseholder of the race track (PTP) to be unnacceptable and informed the COIREC on 9 March 2023. However the MTCSL represented by Mr. Stephane de Chalain, Executive Director and Mrs. Anne-Sophie Jullienne, Director and also Chairperson in a letter dated 7 December 2022 claimed that the MTCSL had to maintain the track between January and May 2022 which represented an amount Rs 634,953 per month for that off-season period.

62. On 23 March 2023, a meeting, pursuant to section 72(1) of the Workers' Rights Act was held with Messrs. Leckram Doyal and Prithiviraj Pabaroo representatives of the Non-Unionised employees who were accompanied by Mr. Ravi Rutnah, in his capacity as Counsel with the representatives of the MTCSL being:

Ms. DABEE Diya - HR Manager of MTCSL

Mr. SUKAI Manoj - HR Officer of MTCSL

Mr. HALBWACHS Jean Marc - Operations Manager of MTCSL

Me. DODIN Didier - Legal Counsel of MTCSL

63. The following offer was made to the representatives of the Non-Unionised employees:

(a) The payment of one (1) month's wages in lieu of notice;

(b) A pro-rated refund of any untaken annual leaves for the year 2023;

(c) A pro-rated payment of the end of year bonus for the year 2023; and

(d) The refund of the 3% pension contribution, which had been deducted from the workers' salaries, with interest.

64. In relation to the pension plan, during the meeting request was made to the MTCSL to provide us with the pension projection values of each staff, including their years of service and the amount contributed since their start date so that we could suggest that employees of 50+ agree to an early retirement. And that the amount representing the 3% pension contribution refund could be communicated so as he could suggest this amount to the Non-Unionised employees so that a decision could be made.

65. The representatives of the MTCSL assured that they will provide the requested information at the earliest possible. However, this information has not been forthcoming and in the interim MTCSL was put into liquidation and the present application before the Board. There are reasons to believe that the said pension plan although deducted from the employee's salary was never the subject of any contribution to any pension plan whatsoever.

66. On 1st pril 2023, the employees were informed that the MTCSL considered that no agreement had been reached following the meeting with the Non-Unionised representatives on the 23rd March 2023 and the MTCSL will proceed with the appointment of a provisional liquidator and that an application would be made to the Redundancy Board. The 1st April 2023, being a Saturday, the said letter was handed to employees on Monday 3rd April 2023

67. On the 3rd April 2023, a letter similar to the one sent to employees, informed the representatives of the same matter in breach of section 72(1), whereas negotiation was interrupted by the MTCSL without informing the Non-Unionised employees' representatives prior to issuing the letter to the employees.

68. On 14th April 2023, the MTCSL- In Liquidation informed employees to remain at home until further notice.

69. From the facts set out in the foregoing paragraphs there is strong evidence to suggest that there have been irregularities in the overall management of MTCSL. The directors of MTCSL have been negligent and this is a well planned and well executed scheme to try and wriggle out of MTCSL's obligations to pay the workers their dues. The obligation to pay the workers their dues, in the circumstances of this case, is not limited to MTCSL but when applying a wider margin of appreciation in so far as the conduct of the directors of MTCSL and MTC are concerned in the whole affair, the obligation to pay the workers their dues is also extended to MTC bearing in mind that MTC is a viable going concern with enough assets to pay the workers.

70. For all intents and purposes the present application is a sham and it is urged upon the Board to act cautiously and judiciously so that the workers are not penalised unnecessarily.

Submissions

Trade Union

The Union submits on the Order of P. Jeewoonarain & Others and Health Contact Center Ltd (RB/RN/172/2020) in that provisions of section 225(3) of the Insolvency Act 2009 as amended do not override the provisions of the Workers' Rights Act 2019 as amended inasmuch as those provisions are '*notwithstanding*' those of the Workers' Rights Act (*Supra*). It is further submitted that Mrs. Julienne clearly stated that MTCSL employed more than 15 workers with a turnover of more that Rs 25M and as such the Employer falls squarely within the provisions of section 72 of the Workers' Rights Act (*Supra*).

As regard the closing down, Counsel invites the Board to assess whether a downfall of the MTCSL is not due to its own fault and that whether there has not been any collusion between the MTC and the MTCSL whereby the MTCSL is obligated to go into voluntary administration.

Non-Unionised Employees

It is submitted that the MTC being the holding company is a viable going concern with assets sufficient enough to adequately compensate all the employees. The Employer did not deliberately renew its lease agreement of the race track which inevitably precluded the Employer from organizing Horse Racing. It is also submitted that there has been misuse of funds of the MTCSL.

On the issue of jurisdiction, Counsel submitted that the Order in the case of P. Jeewoonarain & Others and Health Contact Center Ltd (RB/RN/172/2020) is good law and should be extended to the present case. Reference is also made to the case of Mr. Jean-Marc Péricles Law Kwang and Building & Civil Engineering Co. Ltd (In Provisional Liquidation) (RB/RN/136/2022) in which a similar point was raised and the Board considered it has jurisdiction.

Employer

While disagreeing partly with the Order issued in P. Jeewoonarain & Others and Health Contact Center Ltd (RB/RN/172/2020), Counsel invites the Board to determine whether it has jurisdiction to entertain the present matter inasmuch as the Employer has been placed in provisional liquidation on Insolvency grounds. The whole tenor of Counsel's submission is on the non-applicability of reduction of workforce and closure of enterprise provisions in the Worker's Rights Act 2019, amended, in cases of winding-up on insolvency grounds. Emphasis is being laid on the power of management to proceed into liquidation.

Testimonies

We will not recite *seriatim* the whole tenor of the testimony of each witness but rather refer to their relevant parts as and when necessary.

The Employer called its Director, Mrs. A. S. Julienne who first made an *exposé* of the history of the Mauritius Turf Club (MTC) and the creation of the MTC Sports and Leisure Limited (the Employer) before explaining the circumstances that have led the Employer company to proceed towards closure.

Mr. R. Mooneesawmy, one of the appointed Joint Liquidators of the Employer deponed as to the procedure that is to be followed when liquidation is being triggered. The state of affairs of the company is that it is in deficit and is not in a position to continue operating.

The Non-Unionised employees were represented by Mr. P. Pabaroo, who confirmed the contents of their Statement of Case, laying emphasis on the mismanagement of the company.

The Unions' representative, Mr J.C. Noel, while confirming the contents of Statement of Case, he demarcated in his approach by inviting the authorities to assist towards a settlement.

Board's Considerations

Jurisdiction

The point of jurisdiction was canvassed in the case of Mr. Jean-Marc Péricles Law Kwang and

Building & Civil Engineering Co. Ltd (In Provisional Liquidation) (RB/RN/136/2022), in which the Board ruled that it has jurisdiction to adjudicate even in cases where the Employer is in liquidation.

The Employer, while laying emphasis on the words "*winding-up*" is advancing similar points raised in the matter of Mr. Jean-Marc Péricles Law Kwang and Building & Civil Engineering Co. Ltd (In Provisional Liquidation) (RB/RN/136/2022). The Board ruled that section 72 of the Workers' Rights Act 2019 as amended covers all situations, irrespective of a company being in operation or has ceased trading activities:

"*In a situation of liquidation, be it voluntary winding-up or court-ordered one, there is nothing contrary to Section 72 of the Workers' Rights Act 2019 as amended, which is contained in the Insolvency Act 2009 (as amended) or in any other enactment, which will lend primacy to Section 72 of the Workers' Rights Act 2019, as amended, in matters governing and instance of termination of employment following a closing down of business, which is the case in a winding-up situation*".

All these boil down to one issue, the closing down of an enterprise.

We do not see any novelty point raised in Counsel for the Employer's submission that call upon us to ponder further. The rest of the submission repeats the averments of the Employer's statement of case and it is interesting to note Counsel reiterating that the Employer could not apply the statutory provision in Section 72 (1) of the Workers' Rights Act (*Supra)* to avoid the possibility of closing down, in a situation of closing down.

Negotiation

In the Statement of Case, signed by both liquidators Messrs Anjeev Hurry and Ruben Mooneesawmy, mention is made from paragraphs 31-41 regarding the non-applicability of the statutory obligation to negotiate on issues prescribed in Section 72 (1) of the Workers' Rights Act 2019, as amended.

*"**72. Reduction of workforce***

(1) Subject to subsection (1A) and section 72A, an employer who intends to reduce the number of workers in his employment, either temporarily or permanently, or close down his enterprise, shall notify and negotiate with–

(a) the trade union, where there is a recognised trade union;

(b) the trade union having a representational status, where there is no recognised trade union; or

(c) the workers' representatives, elected by the workers where there is no recognised trade union or a trade union having representational status,

to explore the possibility of avoiding the reduction of workforce or closing down by means of–

(i) restrictions on recruitment;

(ii) retirement of workers who are beyond the retirement age;

(iii) reduction in overtime;

(iv) shorter working hours to cover temporary fluctuations in manpower needs;

(v) providing training for other work within the same undertaking; or

(vi) redeployment of workers where the undertaking forms part of a holding company".

We have perused the minutes of meetings for negotiations pursuant to Section 72 (1) of the Act (*Supra*), held on the 14th March 2023 between the Employer and the Union representing the Unionised employees, and on 23rd Match 2023 between the Employer and the representatives of the Non-Unionised employees.

What transpired during the meeting of the 14th March 2023 is that the representatives of the workers were informed:

(i) of the financial situation of the employer company;

(ii) the company has no alternative but to proceed with a closing down;

(iii) the company was being put into liquidation forthwith and warning to the workers of a serious risk of a no guarantee payment to them and their claims would be subject to the distribution provided in the Fourth Schedule of the Insolvency Act 2009.

Although reference is made to Me. Dodin exploring with the union of the possibilities available under the law so as to avoid the closing down, the option of recruitment was considered not applicable because the company was closing down. As regard retirement of workers, the latter were referred to a pension plan. Considerations concerning shorter working hours and providing training for the other work within the same entity could not be given as the company was closing down. Redeployment could not also be considered as the Mauritius Turf Club lost the right to organize races. There was talk about compensation and an offer was made to the workers forming part of the bargaining unit. The union requested a postponement of the decision to go into liquidation and to be allowed a 3 week moratorium before taking any such decision.

The meeting of the 23rd March 2023 with the representative of the Non-Unionised employees was very much in the same nature as the one of the 14th March 2023. The employer's representatives explained the financial situation that has led the company to move into liquidation and to close down. They were informed of the non application of the statutory obligations under Section 72 (1) of the Workers' Rights Act 2019, as amended, in view of the closing down. An offer was made to the employees. The latter's representative drew the attention of the employer that they (the employees) were not given much choice. They were either to accept the proposal that was made or face the risk of losing all the years of service.

The striking feature of these two meetings actually points to a lack of meaningful consultation and negotiation of the prescriptive requirements of Section 72 (1) of the Workers' Rights Act 2019, as amended. The Legislator would have legislated in vain if the Board were to accept that sufficient weight has been given to the issue of negotiation in the present matter. Negotiation is sacrosanct and cannot be compromised. The duty to notify and negotiate is a mandatory two-fold exercise. Notification itself will not be sufficient if proper negotiation does not take place in order to be compliant with section 72(1) of the Workers' Rights Act 2019.

Witness Mrs A. S. Julienne referred to the employer's invitation to the employees "*to negotiate and see if a solution could be found*". She referred to the minutes of proceedings of the meetings held with the Union and Non-Unionised employees respectively. She hardly touched on each and specific statutory requirement provided in section 72(1). We understand that she was not present at those meetings and was only referring to minutes of proceedings.

The Liquidator, witness Mr R. Mooneesawmy also paid lip service to the issue of negotiation during the course of his testimony. This is probably explained by the fact that being a Liquidator, he believes his concerns are more to attend to the duties under the Insolvency Act. In a cavalier approach and in an attempt to influence the decision of the Ministry of Labour, Human Resource Development and Training, he wrote to the Ministry on 21st April 2023 informing that a previous decision of the Board is not correct in law.

According to witness Mr P Pabaroo, negotiations were interrupted by the Employer without informing the Non-Unionised employees' representative prior to issuing the letter dated 3rd April 2023, informing the latter that the Employer will proceed with the appointment of a provisional Liquidator.

Witness Mr J.C. Noel hardly mentioned anything about negotiation in his confirmed statement of case.

The requirement of consultation and negotiation was broadly analyzed in **RE: Impact Production Ltd RB/RN/18/2020:** *"In matters of reduction of workforce, it was very much appropriate for the Employment Relations Tribunal to determine if the employer had engaged in consultations as required pursuant to section 39B (3)(a) of the Employment Rights Act 2008 (as amended). Indeed, the legislator introduced in the Act an obligation on the Employer to communicate with the workers. It should be noted that in Barclays Bank Mauritius Ltd v The Employment Relations Tribunal [2018 SCJ 145], the Supreme Court held that the Tribunal acted in accordance with the law in enquiring into whether there were consultations.*

……

The word 'consultation' is very much pertinent in the aforesaid provision. This has been defined in the Concise Oxford English Dictionary, 11th edition (revised) as 'the action or process of formally consulting or discussing'. Moreover, in ***King and others v Eaton Ltd [1996] IRLR 199****, it is apposite to note what was held by the Inner House of the Scottish Court of Session:*

Although the consultation required of an employer before dismissing on grounds of redundancy may be directly with the employees concerned or with their representatives, such consultation must be fair and proper. The definition set out by Lord Justice Glidewell in R v British Coal Corporation ex parte Price, that "fair consultation means (a) consultation when the proposals are still at a formative stage; (b) adequate information on which to respond; (c) adequate time in which to respond; and (d) conscientious consideration by an authority of a response to consultation" would be adopted.

In the present case, there was no fair and proper consultation with the employees' trade union. Such discussions as there were took place after the employers' proposals had been formulated, and there was no indication that the union was given adequate time within which to respond or that the employers were prepared to give any real consideration to any response.

……

*The Supreme Court in the case of **R. Mohun R & Ors v The Ministry of Public Infrastructure & ors, 2003 SCJ 253** had the opportunity to consider the requirements of "consultation". That case was in relation to a decision taken by a public authority which touched on the livelihood of the applicants in that case and the principles highlighted for an entity to satisfy its statutory duty to consult are very helpful. The Court thus had this to say:*

Authorities entrusted to take decisions in a democratic society should not assume that the exercise of their power includes power to override people's legitimate interests and acquired and settled ways of life unilaterally. The obligation to seek the views of parties that will suffer the consequences of public actions has become such a general feature in Administrative Law that where the law actually imposes a specific duty to consult, it is regarded as a statutory guarantee of the general rule rather than an exception to a contrary rule. As has been stated –

"Administrative authorities are frequently under a statutory duty to consult before taking certain specified action. They will often wish to consult, even if not so required; but a statutory requirement is intended as a guarantee that they will do so."

In Administrative Law, it is an extension of the duty to be fair evolved from the oft-quoted Rules of Natural Justice. Consultation constituting as it does a process of civic education for all is an exercise in mutual self-learning as it affords both people sensitization and public body sensitization. For one, the community educates itself on the problems facing the public body. For another, the public body educates itself on the problems facing the public. On the whole, it enhances the democratic process:
"The purpose of consultation is to give those affected by a proposed action an opportunity to put their case; or where they have some special knowledge, experience or expertise, to ensure that it is put at the disposal of the authority; or both. It should ensure that the authority does not overlook matters it ought to have regard to."

……

*A question might arise as to whether the authorities may not plead urgency as in this present matter? In **R v Secretary of State for the Environment, ex p Association of Municipal***

***Authorities [1986] 1 All ER 164**, consultation did take place but on the account of urgency, it was rushed and inadequate. The court ruled that, as the regulations were about a scheme that was to be administered by local authorities because of their expertise in the particular matter, it was essential ('mandatory') that they be consulted. The defendant sought to justify the inadequate consultation on the ground of urgency. The court said that urgency could not absolve the authorities from the duty of adequate consultation and urgency, on the facts, was no excuse.*

*….consultation in all cases clearly requires that the opinions and views expressed be considered. If it could be shown, as in **Wood v Ealing London Borough (1967) Ch. 364**, that those consulted were presented with a 'fait accompli,' there would be a failure to consult."*

*In **UK Coal Mining Ltd v NUM (Northumberland Area) & another EAT/0397/06 & EAT/0141/07**, the Employment Appeal Tribunal (EAT) has held that an employer was obliged to consult with appropriate representatives about the reasons for the closure of the workplace, which was the reason for the redundancies.*

UK Coal Mining Ltd decided to close Ellington Colliery following flooding in January 2005. The DTI was notified on 21 January that the employer was due to announce the closure. On 27 January the union asked the employer to comply with its 90-day consultation obligation but was told the employer would proceed. A written notification gave the reason for the proposed redundancies as safety issues resulting from the flooding. More than 100 employees were made redundant on 26 February 2005.

……

The employment tribunal found that the employer had failed to comply with its requirement to consult and awarded maximum compensation of 90 days' pay under the protective award. …..The two unions cross-appealed the tribunal's finding that there was no obligation to consult the unions about the reason for the closure.

The EAT dismissed the employer's appeal. …….The employer had failed to consult in accordance with the requirements……..

With regard to the unions' cross appeal, … the EAT agreed with the unions that if there was no obligation to discuss the decision to close the workplace then this made a mockery of the obligation to consult about ways of avoiding dismissals. Further, given the broad requirement under the Information and Consultation of.

*In **Stokes v City Link, ET1800595/2015**, an employment tribunal held that the company knew in November 2014 that it would potentially have to make large-scale redundancies or face insolvency. The consultation should, therefore, have begun then because this was the "proposal" to dismiss. In fact, many of the employees of the courier company learned of their redundancies some weeks later from television news bulletins over Christmas 2014. The tribunal awarded the maximum protective award, finding no mitigating circumstances. It considered that there was a "conscious decision" not to inform employees of the company's financial problems and also not to undertake redundancy consultation……*

The word 'negotiation' has been defined in the Concise Oxford English Dictionary 11th Edition (Revised) as "discussion aimed at reaching an agreement". We have seen that in the repealed

Employment Rights Act 2008, 'consultation' under section 39 B was compulsory and failure to observe same rendered the process of reduction of workforce unjustified. Under the new Workers' Rights Act 2019 (as amended), 'negotiation' under section 72 (1) has not been reduced to a lesser prominence. On the contrary, we view consultation to be an exercise of a lesser degree than that of negotiation, although both carry the same objective, i.e. they should take place with a view to explore the possibility of avoiding the reduction of workforce or closing down by means of-

(i) "restrictions on recruitment;

(ii) retirement of workers who are beyond the retirement age;

(iii) reduction in overtime;

(iv) shorter working hours to cover temporary fluctuations in manpower needs;

(v) providing training for other work within the same undertaking; or

(vi) redeployment of workers where the undertaking forms part of a holding company.

……

(2) Where the intended reduction of workforce or closure is the subject of negotiation under subsection (1), the recognised trade union, the trade union having representational status or the workers' representatives may agree with the employer on any of the possibilities specified in subsection (1) or on any alternative solution or on the payment of a compensation by way of a settlement."

……..

"The negotiation process will be considered defective if insufficient weight is given to it …….."

We consider that in the present matter, the meeting under the allure of negotiation, was more a meeting of '*fait accompli*'. The Employer had already decided that he was unable to apply the statutory obligations due to the closing down and has to proceed hastily towards liquidation. The meeting could have been of informative value to the workers, but totally falling short of a proper negotiation exercise. It should not be a mere "procedural ritual". We do not see much that have been deliberated upon in exploring the possibility of avoiding the closing down of the enterprise. It was a duty on the employer to adduce sufficient evidence to show that all avenues have been exhausted. It is not for the employer to decide on the applicability of the statutory requirements. They are meant to be applied and considered. We do not expect all negotiations to be fruitful.

But the duty to apply and consider the statutory obligations are to be complied with as it would otherwise defeat the purpose of the legislation. We do not think that the meetings held were on a level playing field. Negotiations must be meaningful and not just a formality. The request of Mr. J. Bizlall, a seasoned Trade Unionist, for a 3 week moratorium to find a solution does not appear unreasonable.

It is unacceptable that an Employer who intends to close down, decides to put the company in liquidation and then claims that the statutory requirements regarding the possibility to avoid closure cannot be appliied. An Employer who considers closing down his enterprise, must negotiate with the employees as soon as possible and at latest at the time when the decision to close is taken. The whole purpose is to give employees a chance to express their concerns and to consider alternatives to closure. This should take place when the proposal to close down is still at a formative stage and the Employer should provide sufficient information to enable the employees to respond meaningfully. The Employer, through its liquidator cannot say that negotiations with employees regarding statutory requirements to avoid such closure are not possible due to the very closure of the company; he still has a legal obligation to follow the applicable laws covering closure of enterprise, including negotiations with employees.

Even if the Board were to reach the ultimate conclusion that the Employer is in dire financial straits as per the unaudited account produced and the testimony of the Liquidator, the duty to engage in meaningful negotiation cannot be overlooked. In that particular context when we look at the issues referred to during the course of the meetings with employees in particular, those concerning the statutory requirements under section 72(1) of the Workers' Rights Act 2019, as amended, we cannot help opining that the Employer was probably laboring under the misconception of the law to the effect that those statutory obligations are not applicable in the case of closure of an enterprise and that they were applicable only to cases of reduction of workforce. We say so respectfully.

We note the blame game between the parties regarding the current situation of the Employer. The Board cannot and will not consider motives or allegations of mismanagement. This is not within its province as aptly stated in **Re: Société The Glen, TSCB 379/81**:

"....even if there is gross mismanagement, as appears to be the case here, such mismanagement cannot 'faire l'objet de censure judiciaire' to warrant the punitive award provided by the Labour Act".

CONCLUSION

Failure on the part of the Employer to engage in meaningful negotiations goes to the root of the matter. The Board considers that the reasons showing cause for the intended closing down are unjustified. The Board therefore orders the Employer not to close down its enterprise.

On a final and different note, we need to point out that the parties did not agree for an extension of time to allow the Board to complete its proceedings within 30 days. This has caused unjust heavy burden on our administration. We respectfully urge the authorities to legislate in extending the statutory time limitation for the Board to function efficiently and effectively.

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Rashid Hossen
(President)

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Christ Paddia
(*Member*)

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Saveetah Deerpaul (Ms)
(Member)

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Shirine Jeetoo (Mrs)
(Member)

SD

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Feroze Acharauz
(*Member*)

Date: 19th May 2023