REDUNDANCY BOARD

RB/RN/136/2022

ORDER

Before:	Rashid Hossen	- President
	Christ Paddia	- Member
	Saveetah Deerpaul (Ms.)	- Member
	Yashwinee Chooraman (Ms.)	- Member
	Shirine Jeetoo (Mrs.)	- Member
	Suraj Ray	- Member

Mr. Jean-Marc Péricles Law Kwang

and

Building & Civil Engineering Co. Ltd (In Provisional Liquidation)

On 29 August 2022, after obtaining leave from the Supreme Court, Mr. Jean-Marc Péricles Law Kwang, hereinafter referred to as the "Applicant", filed an application under Section 72 (8) of the Workers' Rights Act 2019, as amended, pursuant to a breach of Section 72 (1), (1A) and (5) of the Act for an Order directing his employer, hereinafter referred to as the "Respondent", to pay him severance allowance at the rate specified in Section 70 (1) of the Act.

The Applicant was represented by Mr. S. Mohamed, Counsel, assisted by Miss. H. Thug, Counsel. The Respondent was represented by Mr. R. Pursem, Senior Counsel assisted by Mr. A. Sookhoo, Counsel.

Applicant avers in his Statement of Case that he joined the Respondent, a construction company engaging, inter alia, in the construction of buildings and general contractors' activities on 25 May 1989, and his last posting was that of Foreman. He was drawing a monthly basic salary of Rs. 27,075. On 19 July 2022, he was informed by way of letter, that his employment would be terminated with effect on 22 August 2022 owing to the Respondent's financial position. He was further informed that his salary would be paid on his last day at work i.e. 22 August 2022. He averred that he had not been notified prior to receiving the letter that he would be made redundant and no negotiation was held to that effect. He further averred that in terminating his employment in the manner described above, the Respondent has breached Sections 72 (1), (1A) and (5) of the Workers' Rights Act 2019, as amended. He is therefore claiming severance allowance which he calculated to be in the sum of Rs. 2,700,731.25 representing 3 months salary per year of service.

The Respondent filed a Statement of Case containing at the outset 4 preliminary points of law:-

(a) Ex-facie the Statement of Case of the Applicant, the Respondent avers that at the date of this Statement of Defence, it is no longer in *provisional liquidation*;

(b) Ex-facie the Statement of Case of the Applicant, the Applicant has failed to obtain leave of the Bankruptcy Division of the Supreme Court before initiating the present proceedings against the Respondent;

(c) The Respondent further puts the Applicant to the proof of such leave of the Court;

(d) In view of the fact that the Respondent is in winding up (insolvent liquidation), the Redundancy Board does not have jurisdiction to entertain the present application.

On the merits, Respondent takes note of Applicant's averments regarding his conditions of work including the last payment date at work and avers:

- The impact of Covid-19 on the business of the Respondent, which led to the Respondent ceasing operations for at least three months, and a sudden decrease in the number of construction projects being awarded to the Respondent, the Respondent faced critical financial difficulties to maintain its business. In order to pre-empt insolvency proceedings, the Respondent began exploring the possibility of restructuring its business.

- A critical aspect of the Restructuring envisaged by the Respondent centered around financial assistance from the Mauritius Investment Corporation Ltd. **('MIC')**, from which the Respondent applied for financial assistance in the amount of Rs. 80 millions.

- In early July 2022, the Respondent was apprised that its application for financial assistance had not been approved by **'MIC'**.

- Hence, on 15 July 2022 at 13h 00, the directors of the Respondent resolved, *inter alia*, that:
  (a) the Respondent could not, by reason of its liabilities, continue its business;
  (b) pursuant to section 162 of the Companies Act, the Respondent had to be wound up and that the winding up should commence under section 137(1)(b) of the Insolvency Act 2009; and
  (c) Messrs Mushtaq Oosman, Anjeev Hurry and Ruben Mooneesawmy be appointed as joint provisional liquidators of the Respondent under section 137(4)(b) of the Insolvency Act.

- Further to the entry into winding up (insolvent liquidation), the Respondent had to cease to carry on its business, except in so far as the joint provisional liquidators required for the beneficial winding up of the Respondent.

- At a shareholders' meeting held on 11 August 2022 at 10h 30, the shareholders of the Company resolved that the Respondent be wound up, and at a creditors' meeting held on 11 August 2022, the creditors of the Company confirmed the appointment of Messrs Mushtaq Oosman, Anjeev Hurry and Ruben Mooneesawmy as joint liquidators.

- The Respondent further avers that the Applicant was duly informed, *inter alia*, at a meeting held on the premises of the Respondent at Bambous on 15 July 2022, that the Respondent was placed in liquidation, and that the HR department of the Respondent would contact the then employees of the Respondent during the course of the following week regarding the termination of their employment.

- The Respondent avers that:
  (a) The requirement to carry out negotiations pursuant to section 72(1) of the Workers' Rights Act 2019 is not applicable in the circumstances where the Respondent was placed in winding up (insolvent liquidation);
  (b) Further to the entry in winding up (insolvent liquidation), the reduction of workforce or closing down was unavoidable and inevitable and as such, any negotiations for the purposes of paragraphs (i) to (vi) of section 72(1) of the Workers' Rights Act, would have been futile.

- The Respondent further avers as follows:
  (a) From the commencement of its winding up (insolvent liquidation), the Respondent ceased to carry on its business, except in so far as the joint liquidators required same for the beneficial winding up of the Respondent, in accordance with the provisions of the Insolvency Act.
  (b) Further, by law, the principal duty of the joint liquidators is to realise and distribute the assets of the Respondent applying the principle of *pari passu* distribution among the creditors in satisfaction of the Respondent's *liabilities* subject to the preferences and priorities as established by the Insolvency Act.
  (c) Accordingly, the legal regime and framework set out under section 72 of the Workers' Rights Act was not intended to apply and does not find its application in the present circumstances, where the Respondent is a company placed under winding up (insolvent liquidation).
  (d) In the alternative, section 72(7) of Workers' Rights Act is a deeming provision that creates a rebuttable presumption of unjustified dismissal, reduction of workforce or closing down and this presumption has been rebutted in the circumstances,

where the Respondent is a company properly placed under winding up (insolvent liquidation) whereby the said company was balance sheet insolvent and/or cash flow insolvent and hence the Applicant's dismissal or the Respondent's reduction of workforce or closing down was justified.

(e) As from the date of entry in liquidation (insolvent liquidation), the Respondent ceased to carry on business except in so far as the joint liquidators required same for the beneficial winding up of the Respondent, and the Respondent was no longer in a position to retain its workers and pay remuneration to them as the Respondent was no longer operating.

(f) The joint liquidators had no other alternative but to terminate the employment of the Applicant (with the required statutory notice period, which was adhered to) and proceed with the realization of the assets of the Respondent.

- The Respondent therefore moves that the present application be dismissed with costs.

Testimonies

APPLICANT

The applicant deponed to the effect that he had been working at the Respondent company as Foreman since 25 May 1989. On 15 August 2022, he was informed together with other employees that there is no more work for them by one Mr. Nicholas Pougnet, the Director. They were further informed that the liquidators have taken over the administration of the company and that their employment are being terminated. He received a letter to that effect dated 19 July 2022. The last day he was on the construction site for work was on 15 July 2022. Prior to being informed of the termination of contract, no consultation had taken place. The termination of his employment contract was during the prescribed period whereby an employer was prohibited from reducing his workforce.

Applicant is asking for severance allowance in the sum of Rs. 2,700,731.25 representing 3 months salary per year of service.

RESPONDENT

Mr Ruben Mooneesawmy, the employer's liquidator testified to the effect that on the 15 July 2022, the decision was taken by the employer's directors to place the company (the employer) into voluntary winding up. The Respondent's Board was apprised that the **'MIC'** has rejected an application to provide Rs. 80 millions of funding to save the company, in particular, considering that the company was very much dependent on that loan. According to the witness, the Board felt that in line with its responsibilities as the director, it had no choice than to close down the company and appoint as liquidators, himself, one Mr. Mushtaq Oosman, and one Mr. Anjeev Hurry. The company was Cash Flow Insolvent which means that there was no solution to continue operations. In referring to the Statement of Affairs of the company, the witness explained that the Book Value is the Accounting Value in the Books of the company whereas the Market Value represents the amount the directors would expect by selling the assets on the market. The deficit as at June 2022 was Rs. 237,703,984. Further, once the provisional liquidators are appointed, there is a period which is provided by the Insolvency Act for shareholders and creditors to confirm the appointment.

At the Special Meeting of shareholders on the 11 August 2022, it was confirmed that the company would be wound up. The witness referred to the proceedings where reference is made to the company being placed on winding up by the directors on 15 July 2022 given the financial state of the company and the significant loss incurred. Reference is also made to the merger with another company in 2018 and which was not beneficial. It was decided to call for an injection of Rs. 50 millions by the shareholders and employees leaving the company were not to be replaced. The company has many shareholders but the main ones that injected money were the directors themselves, Mr. Henry Pougnet and Mr. Kiat Wong as well as the ENL Group and the Currimjee Group. The company requested for Covid loans which were provided by the Mauritius Commercial Bank and the State Bank of Mauritius in December 2021 in order to maintain its operations. A restructuring plan was drawn up as from 2022 subject to an injection of an aggregate amount of Rs. 50 million and reduction of workforce so that the company can survive. In mid May 2022, an application was made to **'MIC'** for Rs. 80 millions. The Mauritius Commercial Bank and the State Bank of Mauritius were agreeable to further help the company subject to the receipts of funds from the **'MIC'**. The company was made to understand that the investment committee of the **'MIC'** approved the request and it recommended the funding proposal to its Board. However,

in the beginning of July 2022, the company became aware that the application for funding was not approved. Furthermore, with the extension of Covid 19 regulation preventing reduction in the number of employees until December 2022, the company would have had to incur an additional expense of Rs. 60 millions or more excluding other operating costs and which the company could not afford to pay. The directors of the company had no other alternative than to place the company in liquidation on 15 July 2022.

With regard to ongoing projects on construction sites, namely 'Shandrani' and 'Paradis', they were very minor renovation to the tune of Rs. 10-15 millions which were 95% completed with a payment that was secured. The main duties of the liquidator is now to realise the assets and distribute its proceeds in accordance with the 4th Schedule of the Insolvency Act.

It was after negotiating with banks for an exceptional line of credit to avoid a social crisis that employees were paid up to August 2022. A job fair in collaboration with the Ministry of Labour, Human Resource Development and Training was organized for the benefit of the workers.

According to the witness, the prescribed period whereby an employer cannot dismiss an employee is not applicable where an application was made to the **'MIC'** and same was rejected. He stood advised that no notification to the Redundancy Board was necessary and therefore the issues of notice and negotiation were considered futile.

Submissions:

APPLICANT

The essential points raised by Counsel for Applicant in his submission are the following:

- The Applicant does not have the onus of proving that the employer is one as defined in Section 72 of the Workers' Rights Act 2019. The Board is to assume that it is so and that the presumption of jurisdiction entails that the Applicant cannot be expected to plead it in a Statement of Case and to prove it.
- There is only one document showing that the shareholders of the Respondent unanimously resolved that the Respondent's company would be wound up.
- The Applicant duly obtained the leave of the Bankruptcy Division of the Supreme Court before initiating the present proceeding.

- The letter of the termination addressed to Applicant clearly states that the Applicant was made redundant for financial reasons and therefore the present matter falls squarely within the ambit of reduction of workforce. Counsel referred to the various steps that an employer ought to take in view of reducing the number of workers in his employment or closing down the enterprise.
- There is no documentary evidence emanating from the **'MIC'** showing that the application for financial assistance had not been approved and therefore Section 72(1A) (b) (II) does not apply to the Respondent in the present matter.
- Counsel further submitted that neither the Insolvency Act 2009 nor the Company Act 2001 overrides the provisions of the Workers' Rights Act 2019. While the Insolvency Act 2009 and the Company Act 2001 are general provisions pertaining to the procedures governing the company, the Workers' Rights Act 2019 contains specific provisions in relation to workers when a company is reducing workforce or closing down.
- Counsel for the Applicant made reference to the *maxim generalia specialibus non derogant*.

RESPONDENT

Counsel for the Respondent submitted that:

- The term 'close down' under Section 72 (1) of the Workers' Rights Act 2019 and 'closure of enterprise' under Section 73 (1) of the Act (supra) do not include the winding up of a company under the Insolvency Act 2009.
- A directors resolution to voluntarily winding up a company on insolvency grounds pursuant to Section 137 (4) of the Insolvency Act indicates the inability of the company to meet its obligations and operates *de facto* as notice of dismissal of the employees.
- The decision of winding up a company being a management decision, the Redundancy Board has no jurisdiction to question the decision or interfere in any manner.
- Whilst the words 'closing down' and 'closure' have not been defined by the legislator in the Workers' Rights Act 2019, the legislator has however defined the word 'insolvent' in the Act (supra) as meaning : *" being placed into receivership under administration or in liquidation".* Counsel referred to some specific sections in the Act (supra) to the context of insolvency. It is therefore submitted that since the legislator has deliberately referred to

the concept of insolvency in various sections of the Workers' Rights Act 2019, it would have enacted likewise had it intended the Act to apply to an insolvent enterprise.

- It is further submitted that a resolution to winding up voluntarily a company operates as a dismissal of an employee.
- The Respondent has invoked the *"proviso"* under S72 (1A) (6) (II) of the Workers' Rights Act 2019, and has demonstrated that in May 2022, it had applied for financial assistance from the **'MIC'** but the said application had not been approved. Hence, the provision laid down in that particular subsection is not applicable to the Respondent at the time it terminated the employment of the Applicant.
- It is submitted that the context of the present case is one where there was no requirement to negotiate with the worker or his representative for the purposes of S72 (1) of the Workers' Rights Act 2019, the more so as the Respondent was no longer in a position to provide work and carry on paying a salary.
- It is submitted that S72 (7) dealing with the deeming provision is only aimed at sanctioning any non-compliance with S72 (1), (1A), (5) or (6) of the Workers' Rights Act 2019, with a presumption of unjustified reduction of workforce or closing down. Such presumption is subject to a rebuttal.
- On the assumption the Redundancy Board concludes that it has jurisdiction to entertain the present matter, it is submitted that the closure of the Respondent was justified and therefore the present application should be set aside.

Counsel for the Respondent (Mr. A. Sookhoo) forwarded a further written submission after the case has been closed. This may not be appropriate as it may be seen as an attempt to introduce new issues which were not addressed to during the course of the hearing. Proceedings before a Court of law, albeit a quasi judicial body, is expected to be followed in an orderly manner.

Board's Considerations

Under the sub heading "sub-part III- Reduction of Workforce and Closure of Enterprises" in the Workers' Rights Act 2019, as amended, we note that subsection (2) defines employer to be *"a*

person employing not less than 15 workers in an undertaking or an undertaking having an annual turnover of at least 25 million rupees".

The Board has to be satisfied, where reinstatement or severance allowance is sought for alleged unjustified termination of employment, that the Applicant has the necessary *locus standi* to bring such an action before the Board. It stands accordingly to reason that the onus is on the Applicant to bring sufficient proof that S72 (2) is complied with. An employee's application cannot be entertained unless he proves that the employer falls within the ambit of Section 72 (2). Indeed, the Board is bound by its limited powers and should act only within such spheres even if it implies turning down cases which it cannot adjudicate. An Applicant cannot just sit back and leave it to the Board to assume or surmise from such evidence. We have not been impressed with the argument regarding the principle of presumed jurisdiction nor do we find any direct relevance of the Indian cases cited with regard to S72 (2) of the Workers' Rights Act 2019, as amended.

Odgers on Civil Court Actions (1996), paragraph 7.06, bears some relevance:

"It is unnecessary to state in a pleading the principle of the common law, or to set forth the contents of a statute. Thus, law need not be pleaded to show that a plaintiff is entitled to sue upon a dishonoured bill of exchange so long as the necessary facts be alleged; and a defendant may plead simply, "the action is not maintainable without special damage and none is alleged". But where a particular statute is relied on as the foundation of a claim or defence, the facts necessary to bring the case within the statute should be pleaded and reference should usually be made to the section relied on".

However, considering that the Respondent has conceded that there is sufficient indication in particular in document I showing the number of employees to exceed 15, we hold that the present application meets the requirement of S72 (2).

It is not disputed that the Respondent terminated Applicant's employment contract on financial grounds during the prescribed period, notably the period starting 1st June 2020 (GN 183 of 2020) and ending on 31st December 2022 (GN 168 of 2022) whereby an employer was not to terminate the employment of any of his workers:

"Workers' Rights (Prescribed Period) Regulations 2020

GN 183/2020

Government Gazette of Mauritius No. 103 of 14 August 2020

Regulations made by the Minister under section 124

of the Workers' Rights Act 2019

1. *These regulations may be cited as the* ***Workers' Rights (Prescribed Period) Regulations 2020****.*

2. *In these regulations —*

"Act" means the Workers' Rights Act.2019.

3. *For the purpose of section 72 A) of the Act, an employer shall, during the period starting on 1 June 2020 and ending on 31 December 2022, not reduce the number of workers in his employment either temporarily or permanently or terminate the employment of any of his workers.*

Amended by [GN No. 312 of 2020]; [GN No. 126 of 2021]; [GN No. 311 of 2021]; [GN No. 168 of 2022]

4. *These regulations shall be deemed to have come into operation on 1 June 2020".*

"Workers' Rights (Prescribed Period) (Amendment) Regulations 2022

GN No. 168 of 2022

Government Gazette of Mauritius No.97 of 4 July 2022

THE WORKERS' RIGHTS ACT 2019

Regulations made by the Minister under section 124 of the Workers' Rights Act 2019

1. These regulations may be cited as the ***Workers' Rights (Prescribed Period) (Amendment) Regulations 2022.***

2. In these regulations -

"principal regulations" means the Workers' Rights (Prescribed Period) Regulations 2020.

3. Regulation 3 of the principal regulations is amended by deleting the words "30 June 2022" and replacing them by the words "31 December 2022".

Made by the Minister on 4 July 2022".

The main bone of contention is with regard to the applicability of S72 (1) of the Workers' Rights Act 2019, as amended, to situations where companies are placed under liquidation.

S72 of the Workers' Rights Act 2019 provides:

*"**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.*

(1A) (a) Subject to paragraph (b), an employer shall, during such period as may be prescribed, not reduce the number of workers in his employment either temporarily or permanently or terminate the employment of any of his workers or close down his enterprise.

(b) Paragraph (a) shall not apply to –

(i) an employer specified in section 72A; or

(ii) an employer who has applied for any of the financial assistance schemes set up by the institutions listed in the Tenth Schedule for the purpose of providing financial support to an enterprise adversely affected by the consequences of the Covid-19 virus, and his application has not been approved.

(c) In this subsection –"Covid-19 virus" means the novel Coronavirus (2019-nCov)

……

……

72A. Reduction of workforce in certain enterprises in the services sector

(1) The Minister may, by regulations, exempt an employer who provides services in the sectors specified in the Eleventh Schedule from the application of section 72.

……

……*".*

The Termination of Contracts of Service Ordinance 1963 that created the Termination of Contracts of Services Board defines the ambit of the reduction of workforce in Section 8 (2) as follows: *"consider whether there is a valid reason for such reduction of the employer's workforce having regard to the operational requirements of the undertaking, establishment of service"*. This section demarcated the concept of reduction of workforce by relating it to economically justified grounds i.e. operational requirements. With the introduction of the Labour Act 1975, this section had been removed. Such omission implied that both economical and non-economical reasons could be advanced before the Board.

At this juncture, it is appropriate to state that although the sub heading in the Labour Act 1975 refers only to *'reduction of workforce'* and Section 39 of the Act (supra) does not require any particular reason for such reduction, the Termination of Contracts of Services Board held in **Re: Louis Jimmy Tan Hoo, TCSB 253/78**

"……..Lastly, the economy and guidelines of all our labour laws promulgated since the late thirties have had for their main purpose the promotion of the interests of workers. By placing the construction suggested by counsel on the laws as it stands, great harm might be done to innocent

workers by unscrupulous employers, whereas the Board's construction entitles it to enquire into the reasons for closing down a business or concern".

This decision shows that the Board's jurisdiction is extended to cases relating to closing down of an enterprise.

With the closure of the Termination of Contracts of Services Board in 2008, and the repeal of the Labour Act 1975, the legal provision governing redundancy is to be found in Section 46 (5) (d) of the then newly enacted Employment Rights Act 2008, which reads:

"PART X – COMPENSATION

46. Payment of severance allowance

……

……

(5) Where a worker has been in continuous employment for a period of not less than 12months with an employer, the Court may, where it finds that –

(a)……..

(b)……

(c)……

(d) the grounds for the termination of agreement of a worker for economic, technological, structural or similar nature affecting the enterprise, do not constitute valid reasons, order that the worker be paid severance allowance as follows –

- *(i) for every period of 12 months of continuous employment, a sum equivalent to 3 months remuneration; and*
- *(ii) for any additional period of less than 12 months, a sum equal to one twelfth of the sum calculated under subparagraph (i) multiplied by the number of months during which the worker has been in continuous employment of the employer".*

The above provision empowered the Permanent Secretary to enter proceedings before the Court if he is of the opinion that the worker has a *bona fide* case.

An amendment was brought to the Employment Rights Act 2008 [Part VIIIA inserted by s. 19 of Act 6 of 2013 w.e.f. 11 June 2013] whereby a new institution was created to look into redundancy matters.

"PART VIIIA – REDUCTION OF WORKFORCE AND CLOSING DOWN OF ENTERPRISE

39A. Employment Promotion and Protection Division

(1) There shall be for the purposes of this Act a division of the Tribunal which shall be known as Employment Promotion and Protection Division.

……

……

39B. Reduction of workforce

(1) In this section, "employer" means an employer of not less than 20 workers.

(2) An employer who intends to reduce the number of workers in his employment either temporarily or permanently or close down his enterprise shall give written notice of his intention to the Permanent Secretary, together with a statement of the reasons for the reduction of workforce or closing down, at least 30 days before the reduction or closing down, as the case may be.

(3) Notwithstanding this section, an employer shall not reduce the number of workers in his employment either temporarily or permanently, or close down his enterprise unless he has—

(a) in consultation with the trade union recognised under section 38 of the Employment Relations Act, explored 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; or
(v) providing training for other work within the same enterprise;

(b) where redundancy has become inevitable—

(i) established the list of workers who are to be made redundant and the order of discharge on the basis of the principle of last in first out; and

(ii) given the written notice required under subsection (2).

……
……".

We note the introduction of the words *'closing down of enterprise'* both in the sub-title and in Section 39 (B) (2) of the Act.

In introducing the Workers' Rights Act 2019 after the repeal of the Employment Rights Act 2008 as amended, the Legislator retained the functions of the Termination of Contracts of Services Board and the Employment Promotion and Protection Division under the heading "Sub-Part III- Reduction of Workforce and Closure of Enterprises". The Act set up the Redundancy Board and under Section 72 (1) *"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–*

……
……".

Amendments were brought to the Act mainly due to the Covid 19 pandemic in relation to the above section where the following were introduced *'Subject to subsection (1A) and section72A'*.

"(Subsection (1) amended and subsection (10) repealed and replaced by the COVID-19 (Miscellaneous Provisions) Act 2020 – Act No. 1 of 2020 w.e.f 23 March 2020)

(Subsections (1) and (10) amended, subsection (8) repealed and replaced and new subsections (1A) and (11A) inserted by the Finance (Miscellaneous Provisions) Act 2020 – Act No. 7 of 2020 w.e.f 7 August 2020)

(Subsection (1A) amended and new subsection (5A) inserted by the Finance (Miscellaneous Provisions) Act 2021 – Act No. 15 of 2021 w.e.f 5 August 2021)

(Subsections (8) to (11) repealed and replaced by the Finance (Miscellaneous Provisions) Act 2022 – Act No. 15 of 2022 w.e.f 1 July 2022".

The wordings in Section 72 which is quite prescriptive of the procedure to follow in cases of reduction of workforce and closure of enterprise, notably *"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"* show the Legislator's intention to bring all reduction of workforce and closure of enterprise cases under one roof. There is no exception or proviso that the Legislator designed or it would have clearly demonstrated it in an express provision. We find in addition that subsection (7) in Section 73 of the Act (supra):-

"The Redundancy Board shall deal with <u>all</u> cases referred to the Board under Section 72" (underlining is ours).

There is no legal definition of the word "all". The Oxford dictionary defines it as- *'the whole number….the whole amount'.*

We are reinforced in this view by the provision laid down in Section 3 (1) the Workers' Rights Act 2019, as amended, and which provides under the sub-heading **"Application of Act":**

"(1)Subject to subsection (2) and to any provisions to the contrary in any other enactment, this Act shall apply to every agreement".

We take note also of the provisions in Section 72 (9) which reads: *"Where the Board finds that the reasons of the notification made under subsections (5) or (5A) are unjustified, the Board shall make an order for the employer not to reduce his workforce or close down his enterprise".* The word *"shall"* may be read as imperative according to Section 5 (4) (a) of the Interpretation and General Clauses Act 1974.

In a situation of liquidation, be it a voluntary winding-up or a 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 would lend primacy to Section 72 of the Workers' Rights Act 2019, as amended, in matters governing an instance of termination of employment following a closing down of business, which is the case in a winding-up situation.

Therefore, based on the above reasoning and a strict interpretation of the various provisions, we are of the view that in case of voluntary winding-up, a liquidator (including a provisional

liquidation) should comply with the provisions of Section 72 the Workers' Rights Act 2019, as amended, before terminating the employment of the workforce.

Furthermore, the Parliamentary Debates referred to us by Counsel for the Respondent clearly show that the Legislator intended that all cases of reduction of workforce or closing down of enterprise are to be enquired into and scrutinized before such reduction or closing down takes place.

"Mr Deputy Speaker, Sir, let me conclude by saying that we have two Bills before us, not much new issues in these two Bills. Some have been canvassed before, be it in the 2005 Bill, be it by the amendment. Some which were there before under the Labour Act has been reintroduced like the compensation and reintegration at the TCSB, it was in the Labour Act, it was amended. Remember, hon. Jayen Cuttarree amended, this was the first amendment we brought to the Labour law to reintroduce reintegration and three months' wages in case of unfair dismissal at the TCSB. So, we are reintroducing what was present; but, unfortunately, we are not clarifying the most important, especially when we still have meeting going on, we do not know when the law could be promulgated, what will be the exact quantum agreed by amendements proposés ayant trait aux conditions de travail de notre main-d'œuvre et la panoplie de mesures en faveur des travailleurs, pour moi, cette loi propose trois mesures phares sur lesquelles je voudrais faire certains brefs commentaires, Madame la présidente. En premier lieu, le Redundancy Board, cet organisme, comme nous le voyons tous, et ceci a été dit avant moi et pour le dire d'une autre façon, est la réincarnation du Termination of Contract Service Board introduite dans nos lois passées, le Labour Act de 1975 et qui agissait comme un garde-fou pour freiner les licenciements abusifs des patrons. Il incombait sous cette loi à l'employeur d'obtenir l'aval de cette institution avant de procéder au licenciement, au reduction of his workforce. Je ne veux pas aller dans tous les details.

But what the 2008 Enactment provided was that there was no need any more for the employer to give any valid reasons to justify the laying off or the reduction of the workforce and this opened, of course, the door to abusive, indiscriminate and massive termination of employment.

Ce fut un chèque en blanc gracieusement offert au patronat de ce pays. Et il est approprié, Madame la présidente, objectivement je le dis que the law has been amended today et que les pendules ont été remises à l'heure

……..
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So, therefore, Madam Speaker, the proposal for the setting up of this Redundancy Board will correct an injustice, a gross injustice meted out to thousands of employees who have been thrown on the pavement in these past years. And the Bill also provides that, besides in Section 73, for the imposition of negotiations with the trade union, that is, before the employer gives notice of the intention to reduce his workforce, of laying off his employees; the burden is on him to negotiate with the trade union when he intends to reduce the number of workers except in the case of force majeure and I will come to that in a few minutes. The employer has to notify and negotiate with the trade union to explore the possibility of reduction of workforce or closing down of his enterprise. This is now in the law. It is a structured provision in our law but, where no agreement has been reached, the employer is bound to give written notice to the Redundancy Board at least 30 days before the intended reduction or closing down. And if the reduction and closing down of enterprise are unjustified, the Board makes an order for the payment of compensation of three months remuneration per year of service". (6th National Assembly, Debate No.28 of 2019, sitting 13 August 2019 at pg 150 ibid pg 107 and 150).

Business closure refers to the cecassion of trading activities and business operations of a company voluntarily or by a court order. A business may be correlated with cash flow issues to run its operations and an inability to meet financial obligations. Heavy indebtedness is not the only reason which leads to the closing up of an enterprise. The business may also disappear when the employer decides on his own volition to delocalize its activities to look for a more competitive market. Relocation to another country may therefore take place. Conflict between key business partners and the demise of a key stakeholder may also lead to cecassion of activities. As per Section 2 of the Workers' Rights Act 2019, as amended, *"insolvent means being placed into receivership, under administration or in liquidation".*

From a reading of Section 72 of the Workers' Rights Act 2019, as amended, a company which is put in liquidation would be in a no different situation to a going concerned company, in the sense that it would still have to comply with all the redundancy processes and satisfy the Redundancy Board that it has no alternative but to close down, be it temporarily or permanently. Irrespective of what has caused a company to be in a state of liquidation, the employer at all times is under a duty to abide to the provisions of Section 72 of the Workers' Rights Act 2019, as amended. If the Legislator intended to treat companies in liquidation differently, it would have listed it in the Eleventh Schedule to the Workers' Rights Act 2019, as amended. This schedule relates to Section 72A (1) which provides: *"The Minister may, by regulations, exempt an employer who provides*

services in the sectors specified in the Eleventh Schedule from the application of section 72". Needless to say that the natural consequence of an enterprise closing down inevitably leads in most cases to the selling of its assets for distribution. Liquidation gets automatically on the way during such process. It is hard to imagine the Legislator discarding liquidation cases without scrutinizing its justification as far as employees are concerned when his policy has been to constantly militate in favour of workers' protection. The notification to the Redundancy Board is therefore to be given when the employer (be it in liquidation or a going concern) fully satisfied all the redundancy provisions which are catered in the Workers' Rights Act 2019, as amended, and is genuinely compliant with *inter alia*, Section 72.

The liquidation process cannot prevent the Redundancy Board from exercising its functions as per Section 74 of the Act (supra).

*"**74. Functions of Board***

(1) The Board shall –

- *(a) subject to subsection (1A), make orders in relation to the reduction of workforce or closing down of enterprise;*
- *(b) subject to subsection (1A), make such orders for requiring the attendance of any person and the production of any document as it may determine; and*
- *(c) take evidence on oath, and for that purpose administer oaths.*

(1A) (a) Where a notice is given to the Board under section 72(5) or (5A), the Board may –

- *(i) with a view to promoting a settlement; and*
- *(ii) with the consent of the parties, provide a conciliation or mediation service to the parties within the delay specified in section 75(8) or (9).*

(b) The Board may, in the course of any conciliation or mediation conducted under paragraph (a), explore the possibility of –

- *(i) the workers being reinstated by the employer or re-engaged in another enterprise;*
- *(ii) providing training at the cost of the employer to develop their employability; or*
- *(iii) 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.*

(c) (i) Where the parties reach a settlement as specified in paragraph (a), an agreement shall be drawn up in writing and signed or marked by the parties and shall be enforced in the same manner as an order of the Industrial Court.

(ii) The agreement shall have the same effect as an order of the Board.

(d) (i) Where no agreement is reached, the Board shall continue and complete its proceedings within the delay specified in section 75(8) or such longer delay as the parties may agree.

(ii) Where the Board finds that the reasons for the reduction or closing down are unjustified, the Board shall make an order in accordance with section 72(10).

(2) Any person whose attendance is required under subsection (1)(b) and who –

(a) fails to attend at the time and place specified in the order;

(b) refuses to answer faithfully any question put to him by the Board;

(c) gives any false or misleading information;

(d) refuses to produce a document required by the Board, shall commit an offence.

(Subsection (1) amended and new subsection (1A) inserted by the Finance (Miscellaneous Provisions) Act 2021 – Act No. 15 of 2021 w.e.f 5 August 2021)

(Subsection (1A)(c)(i) amended by the Finance (Miscellaneous Provisions) Act 2022 – Act No. 15 of 2022 w.e.f 1 July 2022)".

When a company is wound up voluntarily as regulated under Section 137 of the Insolvency Act 2009 as per the Sixth Schedule of the Act, the liquidator is empowered to carry on the business of the company to the extent necessary for the liquidation. Under the Companies Act 2001 and Insolvency Act 2009 respectively, there is no reference made to the status and liability of a company, which is wound up by order of the Court. However, when it concerns a company which has been voluntarily wound up, Section 138 (2) of the Insolvency Act 2009 provides that- *"the corporate status and corporate powers of the company shall, notwithstanding anything in the Constitution, continue until it is dissolved".* We therefore consider that there is no difference in the status and liability between a normal company operating its daily business activities and a company under voluntary liquidation. It therefore follows that there is nothing which prohibits an

insolvent company being amenable to the proceedings before the Redundancy Board in so far as there have been express statutory provisions in the Workers' Rights Act to cater for such category of companies to be dispensed of the process laid down under Section 72 (5) of the Act. The company under liquidation should substantiate its position on economic grounds only and comply with the provisions laid down under the Workers' Rights Act 2019, as amended.

We take note of the provisions laid down in Sections 154 and 155 of the Insolvency Act 2009 which deal with the *'effect of liquidation'* and court actions against a liquidator. These provisions address the powers of the directors and those of the liquidators whereby all are amenable to court's supervisory powers, and they all remain fully accountable for their acts and doings and they provide no derogation to the legal obligations of the company as an employer. An employee may even resort to Section 155(1) in the event he or she wishes to challenge the decision of the liquidator to close down the enterprise and which pending the determination of these proceedings could become a bar to any employer under the liquidation to trigger the redundancy process pursuant to Section 72 (5) of the Workers' Rights Act 2019, as amended. The liquidator in the present matter, Mr. Ruben Mooneesawmy, in a cavalier manner, repeatedly stressed that the Respondent going into liquidation is justified. We believe that this is fundamentally misconceived and stands from an erroneous reading of the law and is clearly fallacious. The justification to close down remains within the mandate of the Redundancy Board. Whatever duty a liquidator may have under the Insolvency Act 2009, he should not negate the duty to abide by the Workers' Rights Act 2019, as amended. When the directors' power lapses following the process of winding up, such power is in the hands of the liquidator to administer the company, which is the employer and as such acts as an agent of the company.

It has been argued that the decisions of the directors of the Respondent to proceed to the voluntary winding up on insolvency grounds is a purely management decision motivated by their duty under Section 162 of the Companies Act 2001, to forthwith call a meeting of the Board of Directors and appoint a liquidator when they believe that the Respondent is unable to pay its debt and consequently the Workers' Rights Act 2019, as amended, cannot apply as this would amount to interfering with the decision of the management of the Respondent to liquidate its concern. The Redundancy Board is not to usurp *'le pouvoir de l'employeur'* in the management of its business concern. It is only to conclude after enquiring, whether the decision to reduce the workforce or

close down the enterprise (be it in liquidation) is justified. We use the words of the Law Lords in **Coprim Ltée v Yves Ménager (2006) Privy Council Appeal No.42:** *"Any other conclusion would compromise the policy of the legislator."*

While the decision to close down remains within the province of the employer, the justification is within the mandate of the Redundancy Board. It would fly in the face of properly informed logic if the Redundancy Board were to exclude employer who proceeds with the liquidation process. The wordings of Section 72 (1) clearly illustrate the intention of the Legislator, and it is trite law that the *"legislator does not legislate in vain"* **[Curpen v The State 2008 SCJ 305]**.

We hold that S162 of the Companies Act 2001 only affords to a director protection from personal liability if he or she believes the company is unable to pay its debt. Once a director calls a meeting for the appointment of an administrator or liquidator, he or she is absolved of any personal liability, irrespective of whether the Board of Directors decides to make any such appointment or not.

Two scenarios which may arise from S162 of the Act (supra):

1. An administrator or liquidator is appointed in which case the company under administration or liquidation would still be amenable to the redundancy process or,
2. No administrator or liquidator is appointed in which case the company would still be a going concern and still be amenable to a redundancy process.

We might add, parenthetically, that although this issue has not been alluded to, it appears that the Respondent may have breached Section 7 of the Covid-19 (Miscellaneous Provisions) Act 2020 which provides at paragraph (c) *"in section 162, by adding the following new subsection –(5) This section shall not apply during the COVID-19 period and such further period, as the Registrar may determine, after the COVID-19 period lapses".* It should not have decided to wind up when Section 162 was suspended.

On a different note, various references to situations where an enterprise is insolvent are to be found in Sections 40 (2), 42, 77(b) and 101 (2) the Workers' Rights Act 2019, as amended. This shows that the Legislator is well alive to circumstances where an enterprise is considered to be insolvent. However, the Legislator chose not to exclude expressly liquidation process in the provision of

Section 72 of the Act (supra). We therefore hold a contrary view to that of Counsel for the Respondent.

It has been submitted further that we ought to have recourse to principles laid down in cases of foreign jurisdictions notably India and England and Wales. Counsel cited **Howard Engineering Co Ltd v H. Dhanasekar & anor** in which case the Madras High Court in India defines the term *'closure'*. He submitted that the word *'closure'* cannot be interpreted to include an employer going into liquidation. He further quoted **Re General Rolling Stock Co. Ltd**. (**Chapman's Case**) **L.R. 1 Eq. 316,** where the English Court held that a compulsory winding up order operates as notice of dismissal to all the employees of the company. It would be useful here to refer to what our Court had to say regarding guidance from other jurisdictions. In a decision of the Industrial Court which was reviewed by the Reviewing Authority, the latter observed that it would not be right *"to apply foreign law rather than our own law to the problem at hand and thus disregard the sovereign law making powers of our Parliament as entranched in Section 45 of our Constitution"* and more especially in the field of labour law *"where each country decides to adopt particular policies and implement them in its own law"* **[Corotex Limited (In Receivership) v. L. Boolakee & Ors 2008 SCJ 334]**. We believe that in the present matter references to foreign case law would consequently be going against the clear and unambiguous provision of Section 72 (1) of the Workers' Rights Act 2019, as amended, with a view to attempting to introduce a company's liquidation status as an exclusion in that section. The rules governing statutory interpretation provide a secondary rule used when the literal meaning of a statute is ambiguous or leads to an absurd result. However, the application of such golden rule cannot be envisaged when the language of a statute is clear and unambiguous.

With regard to the *maxim generalia specialibus non derogant*, it is submitted on behalf of the Applicant that this is applicable to the present matter. We beg to differ. We do not see conflicts among the Worker's Rights Act 2019, the Companies Act 2001 and the Insolvency Act 2009. Each one has its own specific provisions in relation to its own specific purpose. We refer to the authority of **Piarroux vs Goumany and Ors [1896 MR 50**], in which the Supreme Court held as follows: *"The question then is, whether there is really a case to which the maxim generalia specialibus non derogant applies. Before applying the maxim, we must, at least, be certain that it is a case to which the maxim applies, that is to say, as the maxim presupposes a conflict between*

two enactments, we must be satisfied that such a conflict really exists. If they can be read concurrently there is no conflict……".

Counsel for Respondent further submitted on the deeming provision in Section 72 (7) of the Workers' Rights Act 2019, as amended, which reads: *"Reduction of workforce or a closing down of an enterprise shall be deemed to be unjustified where the employer acts in breach of subsection (1),(1A), (5) or (6)".* It is submitted that this creates a rebuttal presumption of unjustified closing down and which has been successfully rebutted. We cannot subscribe to this view. The purpose of the deeming provision is to prohibit the termination of contract of employment during a specified period where there would be no point of such deeming clause if an employer simply advances financial difficulties. We should not overlook that it was imposed during the Covid-19 period and the Wage Assistance Scheme was put at the disposal of employers to assist them in payment of salaries to employees. This deeming provision was to give effect to the policy of the legislation which consisted of saving jobs. In **R v Inland Revenue Commissioners, exparte Commerzbank AG (1990) 1 WLR 1336**, the court considered a provision in the Income and Corporation Taxes Act 1988 that deemed certain payments to be income for tax purposes. The court held that the deeming provision was valid and that it was necessary to give effect to the underlying policy of the legislation.

Having ruled that Section 72 of the Workers' Rights Act 2019, as amended, would include a company that is placed in liquidation, we will now deal with the application for severance allowance. The Applicant averred that he had not been notified nor had there been any negotiation prior to receiving the letter of termination. In reply to his averments, the Respondent claimed that the Applicant was duly informed that the company was placed in liquidation and the requirement to carry out negotiations is not applicable in the circumstances.

We point out that Subsection (1) in Section 72 of the Workers' Rights Act 2019, was amended and to include *"Subject to subsection (1A)"* ……..by the COVID-19 (Miscellaneous Provisions) Act 2020 – Act No. 1 of 2020 w.e.f 23 March 2020). The Subsection (1A) refers to the prohibition of an employer to reduce his workforce or close down his enterprise during the prescribed period. It stands to reason that the Legislator could not impose a requirement of notification and negotiation when an employer is prohibited from reducing his workforce or

closing down his enterprise. These compulsory requirements in Section 72 had lapsed during that prescribed period and had therefore become otiose.

It is apposite to refer to what was stated by the Redundancy Board in **RE: Mrs. Naleenee Bissondyal and Best Graphics Ltd RB/RN/173/2020 at page 6**: *"Given that subsection (1A) above prohibits the reduction of the number of workers by an employer during a specified period which has now been extended to 30th June 2021. (Government Notice 312 of 2020), the required procedure in cases of reduction of workforce has to all intents and purposes been put on hold. Save and except in cases where an agreement has been reached in relation to termination of employment for economic, financial, structural, technological or any other similar reasons, an employer is not permitted to reduce its workforce during the prescribed period. The application of subsections (1), (5) and (6) above are therefore currently suspended. We are left with only subsection (1A). Indeed, a breach of that particular section would occur when an employer reduces or terminates the employment of a worker during the prescribed period, which in the present case is extended to 30th June 2021".*

The Respondent invoked the provisio under Section 72 (1A) (b) (ii) of the Workers' Rights Act 2019, as amended, which reads:

"(b) Paragraph (a) shall not apply to –

……

> *(ii) an employer who has applied for any of the financial assistance schemes set up by the institutions listed in the Tenth Schedule for the purpose of providing financial support to an enterprise adversely affected by the consequences of the COVID-19 virus and his application has not been approved".*

Indeed, that subsection operates as an exception to the prohibition to reduce the workforce or close down an enterprise during the prescribed time but it does not operate in the abstract. It only extends jurisdiction to the Redundancy Board to adjudicate on the justification of an employer reducing his workforce or closing down his enterprise. The Respondent had not availed itself of the provision of that subsection before the Redundancy Board. Had it done so, it would still have to comply with the redundancy procedure laid down in Section 72 (1) of the Workers' Rights Act 2019, as amended.

The Applicant averred and testified that in terminating his employment in the manner the Respondent did, the latter has breached also Section 72 (1A) of Workers' Rights Act 2019, as amended.

Pursuant to Section 72 (7) of Workers' Rights Act 2019, as amended, the Redundancy Board finds on a balance of probabilities that the Respondent has breached Section 72 (1A) of the Act (supra) in unjustifiably terminating his employment contract during the prescribed period and orders the Respondent to pay the Applicant severance allowance at the rate specified in Section 70 (1) of the Act (supra).

The computation of figures for severance allowance is not within the Redundancy Board's mandate **[Batour vs Imprimerie Ideale Ltd. And Jagai vs Others 1980 SCJ 59]**.

The Redundancy Board orders accordingly.

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Rashid Hossen

(President)

SD

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Christ Paddia

(*Member*)

SD

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Saveetah Deerpaul (Ms)

(Member)

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Yashwinee Chooraman (Ms)

(Member)

SD

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Shirine Jeetoo (Mrs)

(Member)

SD

……

Suraj Ray

(*Member*)

Date: 09th May 2023