
O N A P P E A L
FROM THE SUPREME COURT OF MAURITIUS

B E T W E E N :

- 1. THE MARINE WORKERS UNION
- 2. PREMANANDA PONAMBALLUM
- 3. CLEMENT MOUTOU
- 4. MAURICE PARUIT Appellants

- v -

- 10 THE MAURITIUS MARINE AUTHORITY
OF PORT LOUIS Respondent

- and -

- THE MINISTERE PUBLIC Co-Respondent

In the presence of :-

- 1. FEE SIAN YOUNG KIANG YOUNG
- 2. ROGER REQUIN Co-Respondents

A N D

- 5. THE MAURITIUS MARINE AUTHORITY
EMPLOYEES UNION
- 20 6. PERCY DEREK LINGAYA
- 7. MOOSSA IBRAHIM
- 8. NARAINSAMY VALAYDEN Appellants

- v -

- THE MAURITIUS MARINE AUTHORITY
OF PORT LOUIS Respondent

- and -

- THE MINISTERE PUBLIC Co-Respondent

In the presence of :-

- 30 1. FEE SIAN YOUNG KIANG YOUNG
- 2. ROGER REQUIN Co-Respondents

CASE FOR THE APPELLANTS

1. This is an Appeal by leave of the Supreme Court of Mauritius, from a Judgment of that Court (Sir Maurice Rault C.J. and Victor Glover J.) dated the 21st December, 1981 rejecting and/or dismissing the Appellants' application to issue an exequatur (make executory) an Award made by an Arbitration Committee by which, inter alia, the Arbitrators re-organised

RECORD

p.127

RECORD

the structure of The Mauritius Marine Authority ("MMA") and laid down new pay structures for most of the employees.

2. Several questions are raised in this Appeal, the four principal being :

(i) whether, after the Prime Minister (who was also the responsible Minister for Ports) had been instrumental in appointing arbitrators to decide the several disputes between the MMA and its employees (represented by the Unions), could and/or ought, after the Award was given, direct the MMA under Section 9 of the Ports Act, 1975, not to implement it. This will involve interpretation of, inter alia, Section 9(1) of the Ports Act 1975. Its text is reproduced below at paragraph 28. It was after the Prime Minister had given an assurance that the Award would be binding, that the Unions agreed to go to arbitration.

10

p.14
L.28-29

(ii) whether, the Mauritius Civil Procedure Amendment Act 1981 (Act 1/81) in its Section 3 was constitutional and did not constitute an interference with, or an arrogation of, judicial power by the legislature and/or the executive. Section 3 was, as conceded by the Respondents, and held by the Supreme Court, "aimed solely at the award" and at the judicial proceedings to obtain exequatur in this case. Section 3 (Article 1026-9) in short de-seized (dessaisi) the jurisdiction of the Judge in Chambers from entertaining Appellants' application upon the Ministere Public (the Attorney-General) lodging an objection "opposition" in the Registry of the Supreme Court that the Award was prejudicial to public order (de nature à porter atteinte à l'interêt public).

20

30

p.129
L.27-40

The text of Article 1026-9 is set out in the Judgment under Appeal.

(iii) whether, the direction, the law and the objection were not excessive, since they nullified entirely the whole Award because of its alleged excesses concerning the salary scale. The Award dealt also with other matters e.g. over-time, bilateral commission of workers and management, work-environment, etc. to which no objection had been formulated at all.

40

(iv) whether, by (a) of the Minister's said direction under Section 9 and (b) the objection of the Attorney-General under the said amendment of the Mauritius Civil Procedure, the Appellants were deprived of property rights under the Award and their said property was taken possession of without compensation as provided by Section 8 of the Mauritius Constitution.

3. Article 1026-9 of Act 1/81 is translated as

50

follows :-

RECORD

"The Ministere Public can object to the enforcement of any arbitral award where in his opinion it would be contrary to the public interest to give effect to the Award.

Notice of the objection shall be served on the parties by extra-judicial act making express reference to this Article.

10 A copy of the notice shall be lodged in the Registry of the Supreme Court.

The objection of the Ministere Public constitutes a bar to any application for the enforcement of the Award.

Where the objection is lodged before an application for exequatur the Judge shall have no power to entertain the application.

20 Where the objection is lodged pending the hearing of an application the Judge, or in the case of an appeal the Supreme Court, shall not proceed with the hearing of the application or appeal.

Any provision of an arbitral convention contrary to this article shall be null and void."

Part I - (Paras. 4 to 9)

The facts of the case.

Facts concerning the extent of operations of the MMA, appearing from the Award and documents cited by Arbitrator.

30 4. The activities of the MMA included taking over the activities of what was previously a branch of the Government service, the Marine Services Department.

40 The MMA was created also to cover all the maritime activities of Mauritius, including fishing. The considerable area of its many fields of activities makes it control and regulate several important activities which are greatly diverse in their technical and legal aspects. These range from rescue at sea and salvaging wrecks, to the direction of the Port of Port-Louis, the linch-pin of the external communications and of the economic activities of Mauritius.

p.6 L.33
onwards.

5. Some government servants of the former Marine Service were seconded for duty to the MMA on starting its operations in July, 1976.

p.42 L.34

RECORD

p.42 Ls.30-
34

Directions were also then given by the responsible Minister, shortly after the MMA started functioning, that salaries and conditions of service at the MMA should be as obtainable in the public service.

p.14 Ls.13-
20

6. Besides the MMA, there also operated in the Port, private bodies like the docks, stevedors and companies which provided manual labour to handle ships. A report was made for Government by a Mr. Scruttons who recommended that "plant operators" of the MMA be transferred on contract to a private company, namely - C.C.S.M.L. which was to do part of the work hitherto done by the MMA. The Unions agreed to the transfer for a year.

10

7. (a) Disputes arose between the MMA and its employees concerning, inter alia, salary scales, job evaluations, allowances, incentive schemes, conditions of service, claims for overtime, working conditions and environment, and also the ways to improve efficiency in the Port and to increase productivity.

20

(b) The workers resorted to a 'go slow' and finally a meeting was held on the 29th June, 1979 between the Government, the MMA, the Unions and workers. This was presided over by the Prime Minister who since the passing of the Ports Act was also the Minister responsible for Ports and Communications.

(c) Also present were the Minister of Labour and Industrial Relations; the Minister for Employment; the Chairman and the Director-General of the MMA and the three Unions mentioned in para.9 below.

30

8. The MMA had at the time of the dispute about 569 employees divided into five departments and 105 grades. These are listed in the Annexure 1, to this Case. The employees included manual workers, office and other specialised staff.

9. (a) The Appellant then represented 385 employees of the MMA;

40

(b) The Waterside Workers Union represented panel operators, crane drivers/mechanics, service plant operators and crane overseers;

(c) The Marine Workers Union represented mainly the employees in the 'Marine' section of the MMA and came into existence during the Arbitration. Later it dissolved itself and merged with the Appellant;

(d) Certain Government servants seconded for duty to the MMA had their case presented to the Arbitrator by the Government Servants Association.

RECORD

PART II (Paras. 10 to 17)

The events of 29th June, 1979 at the meeting chaired by the Prime Minister and leading to the setting up of the Arbitration.

p.14 et.seq.

- 10 10. The Unions in their dispute with the MMA were asking for "formal guarantees". The Minister of Labour and Industrial Relations at the meeting of the 29th June, 1979 answered back, stating that "the issue had been taken at the highest possible level (i.e. the Prime Minister's level and head of Government level) as the Union had asked for guarantees." p.15 L.13
- 20 11. At the meeting the Prime Minister said he would appoint an arbitrator, on the condition that work should resume normally at the MMA. The Appellant agreed to the proposal concerning resumption of normal work. The Prime Minister then explained the difference in nature between the duties of a "consultant" and those of an "arbitrator". He stressed the fact that once an "arbitrator" had been chosen then "both parties would have no alternative but to abide by the decision of the arbitrator". p.15 L.15
- 30 12. Government took over the responsibility for the finding of a qualified person to be the arbitrator. p.14
- 40 13. (a) It is submitted that at that meeting where agreement was reached both on arbitration and on its binding nature, those who bound themselves were:
- (i) the Government acting by the Prime Minister;
 - (ii) the Minister responsible for Ports and Communications; and
 - (iii) the MMA acting by its Chairman and its Director-General (in the presence and with the concurrence of the Prime Minister).
- (b) It is submitted that the expression "both parties" used by the Prime Minister included in any event, the responsible Minister and the MMA, as well as the workers and employees represented by the Unions.
14. The Unions, pending the final recommendation of

RECORD
p.19 L.33

the Arbitrator decided not to make any new or further demands concerning their work.

15. The MMA and the Unions collaborated in drafting the terms of reference and at every juncture the Chairman of the MMA or its Director-General sought the consent of the Government, e.g.

Annex "E"
p.18 Ls.5-6

(i) On 3rd July, 1979 when the terms of reference were agreed;

(ii) On 4th July, 1979 when the Chairman of the MMA reiterated, in regard to the reference, that "contrary to a consultant the award of the arbitrator was final" and further stated that the Arbitrator would have two Assessors (one appointed by the management and the other by the Union);

10

(iii) The Unions pressed for additional clauses, but the Director-General of the MMA stated that "management would have to seek the advice and consent of the Government before signing the agreement". He considered that management would need two weeks to finalise the matter; and

20

(iv) The Assessor appointed by management was Mr.R. Requin, a public officer of the Prime Minister's Office and it is submitted he could not have been so appointed except with the consent of his employer, the Government. Regarding the choice of Arbitrator the Chairman of the MMA stated that "management would first have to intimate the above choice to Government".

p.4 - 5

16. The first item of the terms of reference is important and it was "To undertake a job evaluation for the various posts.....having regard to the special operational requirements of the service, and taking into account internal relativities and all other related sectors in Mauritius with a view to reviewing the salary scales, introducing.....appropriate allowances," (en tenant compte des necessites de fonctionnement du service et de salaires relatifs internes, aussi bien que ceux des autres secteurs qui lui sont liés à Maurice).

30

p.7 L.5-7

40

17. It is submitted by the expression "all other related sectors in Mauritius" ("les autres secteurs qui lui sont liés à Maurice") reference was being made to the private companies operating in the Port such as docks, stevedores or cargo-handlers, i.e. the private sector enterprises in the Port.

PART III - (Paras. 18 to 24)

The Arbitration.

p.24 L.23

18. The Government after seeking the assistance of the French Ambassador and other authorities obtained the services of Mr. Francis Jean Lefebvre, a French

50

National and an International Consultant on Port Management to be the Arbitrator.

RECORD

19. On 4th July, 1980 the MMA appointed Mr. Lefebvre as Arbitrator and Messrs. Requin and Young were the Assessors appointed by the MMA and the Unions respectively. The Unions were asked to make specific proposals, and that their proposals for each grade to be on a separate sheet. p.6 L.13
p.61 L.21
- 10 20. Mr. Lefebvre arrived in Mauritius on 20th July, 1980 and the hearings lasted till end July, 1980.
21. (a) At a meeting of the Joint Negotiating Panel of the MMA on 1st August, 1980, where its Director-General was present, the employees criticised Management for maintaining the status quo in respect of salary scales. The Director-General said there was no "need for management to make any specific proposals for salary increases" before the Arbitrator. p.23 L.25
p.23 L.28
- 20 (b) The Unions thereupon drew the attention of Management to the agreement of the 13th July, 1979 where it was already specified that the findings of the Arbitrator would be binding. The Director-General confirmed that there was no change in this respect and that the findings "are binding". p.23 L.32
p.23 L.33
22. The Appellant whilst presenting its case, produced documents showing the earnings of comparable employees of the private sector enterprises in the Port. This chart is annexed to this Case as Annexure 2.
- 30 23. On 2nd August, 1980 the Arbitrator and the Assessors made their Award. The original was given to the MMA by the Arbitrator who left Mauritius thereafter.
24. The Marine Workers Union ('MWU') which had made representations to the Arbitrator has, after the judgment of the Supreme Court in this case, been dissolved and has merged with the Appellant. It also made an application to render executory the Award and by Order of the Supreme Court, its appeal and the present one were consolidated.

PART IV - (Para.25)

40

The Award.

25. The salient points of the Award were:
- (a) It reduced the grades from 109 to only 10;
 - (b) It provided a revision in salaries and changed the designation of certain posts;
 - (c) It redressed certain anomalies in the salaries and conditions of service;

RECORD

- (d) It set up a salary structure, so that in future global revision could be made as, and when, necessary;
- (e) It introduced a selective system in regard to the customary Mauritian "end of the year" bonus;
- (f) It created a 'Commission Paritaire Permanent' (a bilateral permanent committee) presided by the Chief of Personnel of the MMA with 6 members - three representing management and three representing the main Unions.

10

This Committee was to deal with classification, interpretation and to study points on which Management and Unions were not agreed. This Committee would give its views with reasons on each topic for submission to the Director-General and/or the Board.

This Committee would decide the time and stages by which the salaries at the MMA should reach the same level as in the Private Sector Enterprises of the Port - The final limit was fixed at 5 years from 1st July, 1980;

20

- (g) It froze the number of the 'personnel' (work force);
- (h) It fixed the coming into force of the Award and its duration as follows :-

1st January, 1980 as regards gross salaries;
1st July, 1980 as regards allowances, overtime, extra duties etc.;

30

The Award was to be in force for three years reckoning from 1st July, 1980.

PART V - (Paras. 26 to 38)

Judicial proceedings for enforcement of Award and the stand of the Appellant, the MMA and the Attorney-General.

26. The MMA not having implemented the Award as it was bound to do, the Appellants summoned the MMA and the two Assessors who were then in Mauritius to lodge the Award in the Registry of the Supreme Court (Grefte). The Award was so lodged on the 12th December, 1980 and on the same day Appellants applied to the Judge in Chambers for summons against the MMA and pro-forma Co-Respondents to show cause why an order should not be made, making executory the Award. This was duly supported by a detailed first affidavit of Appellants.

40

pp. 2-4

27. On the return of the summons, the MMA put in a

50

first affidavit admitting all the facts of the Appellants' affidavit, but adding "with regard to the implementation of the Award, the Minister responsible for ports has in the exercise of its powers under Section 9(i) of the Ports Act directed the Authority (MMA) not to implement the Award". It stated that it was bound by the direction.

10 28. Section 9(1) of the Ports Act 1975 reads as follows :-

"The Minister may, in relation to the exercise of the powers of the Authority under this Act, after consultation with the Authority, give such specific and general directions to the Authority, not inconsistent with the provisions of this Act, as he considers necessary in the public interest and the Authority shall comply with those directions."

29. In their second affidavit, Appellants stated:

20 (a) That the Minister had expressly and tacitly concurred in setting up the Arbitration. He had himself decided the appointment and had authorised the MMA to do so. He had said that the Award was binding and he could not, after the Award was given, give directions not to implement it;

p.10 L.10
et. seq.

(b) He could not direct the committing of a breach of contract and his directions could not affect 'acquired or vested civil rights' of parties like the Appellants;

30 (c) The direction did not comply with the requirements of Section 9(1) of the Ports Act. It was in excess of, and inconsistent with, Section 9, and was unfair, unreasonable, made for a collateral purpose and in furtherance of an illegal purpose; and

(d) The direction was outside the laws of arbitration - Article 1028 of the Code de Procedure Civile, and it came too late to be operative.

40 30. In the second affidavit the MMA stated, broadly, that it accepted the responsible Minister had concurred in setting up the Arbitration but, he was not a party to the actual terms of reference and the agreement of the 13th July, 1979. His explanation concerning "consultant" and "arbitrator" did not prevent his exercise of powers under Section 9 and, he was not estopped from acting under Section 9(1) as he had never given an undertaking that any award would be implemented. The avowed policy of Government was to align salaries in para-statal bodies (statutory corporations are so known in Mauritius) to those of

50

p.16

RECORD

the public service. The Arbitrator had overruled alignment on the public service though the MMA raised the point before him.

There was no estoppel.

The MMA moved that the matters be referred to Court for hearing.

- p.12 L.6 31. It is submitted that the assertions of the Appellants in their second affidavit namely, that the direction of the Minister did not comply with Section 9, remained unrebutted. Appellants' assertion that the direction was made for a collateral purpose and in furtherance of an unlawful purpose was also not rebutted. 10
- pp.24-27 32. The Appellants put in a third affidavit in answer to the MMA's second affidavit. This affidavit remained unrebutted and it was averred therein, inter alia :-
- p.24 L.34 (a) That Government was a party and/or privy to the terms of reference...at every relevant moment the MMA stated it had obtained the agreement of the Minister...that the MMA acted throughout with the concurrence of the Minister and Government....The Government had approved and agreed, by conduct and acts, to the terms of reference and to the Arbitration proceedings; 20
- p.25 L.32
- p.25 Ll.22-24 (b) The MMA, the Minister and Government favoured alignment of salaries on the public service, the Unions contended to the contrary...by referring the conditions of service of its employees to Arbitration, with the concurrence of the Minister, the MMA and it is submitted, the Government, were bound by its result; 30
- p.26 L.30 (c) In the premises, the MMA clearly knew that the Arbitration Committee might follow rates applicable in the public service or they might not; and on the admission of the MMA the Arbitration Committee did consider its contentions but overruled them for the reasons given in para.8 of the Award; and 40
- p.27 L.2 (d) That the objection of the MMA was not bona fide.
- p.28 L.20 33. The MMA has accepted that the directions under Section 9 were made by the Minister after the Award was given and it was so conceded in argument by Counsel for the MMA.
- p.52 Ll.17-20 34. The matter was argued on 3rd April, 1981 before the Judge in Chambers (V. Glover, J) and it is convenient to set out what the contentions of the MMA in argument were, namely :-

- (a) that the Arbitration Agreement was subject to an overriding discretion to make a contrary order under Section 9 of the Ports Act;
- (b) the Minister had never intimated that he would not exercise his discretion under Section 9;
- (c) the Minister had not foregone the exercise of the power;
- 10 (d) the charge of estoppel by conduct was gratuitous;
- (e) the Minister could not have legally agreed -
 - (i) to exercise his discretion in favour of implementing the Award;
 - (ii) not to exercise his discretion before the very event on which the exercise of the discretion depended, would arise;
- (f) although the prayer for exequatur is not immediately concerned with enforcement, yet enforcement could not be ignored as the exequatur was the sine qua non of enforcement;
- 20 (g) the exequatur cannot issue unless the discretion is struck down as illegal, or unreasonable;
- (h) the reasonableness of the Award could not be tried before the Judge in Chambers; and
- (i) Parliament by necessary implication had amended the Code de Procedure Civile by giving the Minister the power to give directions in the public interest. p.33 L.27

On behalf of the Applicants, it was argued that:-

- 30 (a) the contract to submit to Arbitration was within the powers of the MMA (Vide Interpretation and General Clauses Act, 1974) (set out at para.39 below); pp. 28-30
- (b) the MMA agreed to be bound by the result, this was also within its powers; and p.29 L.34
- (c) there could be an appeal from an award (Art. 1033 of the Code de Procedure Civile) but, in the circumstances an appeal on this point was not competent as the MMA had agreed to the finality of the Award.
- 40
- 35. The Appellants also urged that :-
- (a) there had been no allegations of any violation of natural justice or 'droit de defense'; p.29 L.10
- (b) the Government, the Minister and the MMA made a contract, neither they nor any of them could be heard to say in proceedings brought to enforce the contract, that they were

RECORD

unwilling to carry out and bear the consequences flowing from the making of the contract;

(c) the Appellants pointedly drew attention to the fact that it was not being urged by the MMA that :-

p.29 L.22

(i) it had no funds to meet the commitment to implement; and

p.29 L.34

(ii) the Minister had been kept in the dark on any issue or point.

10

36. (a) It is therefore submitted that when the Minister in June, 1979 concurred in the Arbitration and its terms of reference, he was releasing the MMA from any constraints of his directions of July, 1976 (para.5 above) and give it full power to urge its point of view; he was also allowing it to submit to Arbitration and to take the chance to lose or win. It cannot be said that the MMA had power to submit to the consequences of Arbitration, only if the Award accepted the views of the Government, the Minister and the MMA. The Arbitrators were appointed in good faith with plenary powers to decide on the issues canvassed by Government, the Minister and the MMA, i.e. whether salaries, where possible be aligned to the Civil Service;

20

(b) It is further submitted that if the Arbitrators were bound to accept only the views of the MMA and the Minister, it would have been impermissible, illegal and an improper exercise of powers by the MMA for the Minister and the Government to have urged the Union and the employees to agree to an Arbitration on the issues. If this was so, the Union was being misled into believing and acting to its detriment, by the implied and/or express representation made by Government, the Minister and the MMA, that the Arbitrators would have full power and jurisdiction to consider the Union's point of view and to reject the contrary view urged by the Government, the Minister and the MMA. This, it is submitted, was not what the Prime Minister said and was understood as saying when he emphasised that the parties would be bound by the Arbitration.

30

40

50

p.42 L.21

37. In the MMA's third affidavit filed later in the Supreme Court, it was expressly stated that, on the instructions of the Minister, it had submitted

to the Arbitrators that salaries be aligned to those of the public service. The MMA's point of view was over-ruled. The Appellants submit that the Arbitrators also did not agree with the point of view of the Union for immediate re-alignment, holding (in its Chapter 9(v)), that salaries should be aligned to those of the private sectors in the Port over five years.

10 38. It is submitted that there were several categories of employees of the MMA who, as a fact, did not have a counter-part or comparative post in the civil service and, as such it was impossible for all salaries to be aligned on those of the Civil Service. These categories are listed in Annexure 3 to this Case.

PART VI - (Para. 39)

Can the MMA be bound by its contract of Arbitration?

20 39. It is submitted that it can as a statutory corporation, like the MMA, have all the rights of a natural person, Section 37(1) (c) of the Interpretation and General Clauses Act provides:-

"Every statutory corporation shall -
(c) have the right of a natural person;
....."

PART VII -(Paras. 40 to 52)

Nature and ambit of power of the Minister under Section 9 of the Ports Act.

30 40. It is useful to survey here the set up of the MMA.

The Ports Act vests the administration and control of the affairs of the MMA in the Marine Board, ('the Board').

With the exception of the Director-General, the Board is entirely appointed by the Minister.

40 Besides the Chairman and three (sometimes six) other members, the Minister has a representative of his own on the Board under Section 21(b) of the Act. The Director-General is appointed by the Board, subject to the Minister's approval. The Board cannot delegate its powers to borrow money, to make investments, to enter into any transaction involving more than Rs.20.000 as capital expenditure under Section 8(1).

The MMA is under a duty to apply its revenue in the payment principally of :-

RECORD

- (a) Loans, salaries, working expenses and expenses chargeable to revenue, etc.; and
- (b) creating a general reserve(s) or a capital fund out of the balance as it thinks fit.

41. It is submitted that there are only two limited fields where the MMA requires authority expressly to bind itself :-

- (i) under Section 15, it needs the approval of the Minister of Finance to raise funds; and 10
- (ii) the approval of its responsible Minister, to invest moneys in securities or loans and to realise securities or loans to finance its operations or for reinvestments (Section 15).

42. The MMA has to furnish such information relating to its activities as the Minister may require. The Director-General under Section 9(3) has to furnish him returns or copies of documents, including minutes of proceedings of the Board and the accounts of the MMA upon his request. 20

43. Section 13 sets out the principles of financial management of the MMA. The section reads as follows:-

"The Authority shall conduct its business according to commercial principles and perform its functions in such a manner as to ensure that, taking one year with another, its revenue is sufficient to meet its outgoings which are properly chargeable to revenue account, including proper allocations to the general reserve and provision in respect of depreciation of capital assets, pension liabilities and interest on and the repayment of loans." 30

44. It is submitted that, except for raising funds and investing moneys, where it requires ministerial approval, the MMA has plenary powers of administration and it is under a further express duty to pay salaries and remuneration from its revenues (Section 14(1)(c)). 40

45. The MMA has mandatorily to conduct its business according to commercial principles and must ensure that its yearly revenue is sufficient to meet its commitments (Section 14).

46. It is submitted that it does not need the approval of the Minister beforehand to enter into any agreement in regard to payment of salaries

and remunerations of employees or any other contract, especially of Arbitration.

RECORD

47. It is further submitted that under Section 9, the Minister's power to give directions are circumscribed by four imperatives :-

- 10 (i) he must first consult the MMA (it is submitted that the MMA has not proved that in giving directions not to implement the Award, the Minister has consulted the MMA);
- N.B. The Appellants had pointedly, at para.7(2) of their second affidavit, asserted that the requirements of Section 9 had not been met.
- (ii) the directions, specific or general, must be in the public interest (the onus, it is submitted, is on the Minister or the MMA to show that they are in the public interest);
- 20 (iii) they must be in relation to the lawful exercise of the powers of the MMA; and
- (iv) they must be within the ambit of the MMA's powers.

48. It is submitted that the ambit of powers of the Minister under Section 9, is no larger than the power possessed by the MMA itself; and that, therefore, by a direction the Minister cannot enlarge the ambit of powers of the MMA.

30 49. Further it is submitted that for a direction to be binding on the MMA, the Minister must give these directions before the MMA can exercise its powers in relation to a particular matter, like the one 'in Lite'.

50. (a) The MMA has no power to commit a breach of contract, it cannot, in any event, do so without being liable to compensate the party whose contractual right is breached or affected;
- 40 (b) The Minister has no power under Section 9 to order the MMA :-
- (i) to commit a breach of contract;
- (ii) to act unlawfully; or
- (iii) to act illegally, without at the same time accepting liability to pay compensation to the party whose contractual rights are being breached, or affected, or frustrated.

RECORD

51. Once the MMA has done a juridical act or incurred a liability, the Minister under Section 9 has no power, to undo the juridical act. He has no power, it is submitted, to relieve the MMA from a liability imposed by a properly made contract.

p.31 L.11

N.B. Different considerations may well apply in regard to the Minister's power under Section 9 if the MMA's Board or Director-General acts fraudulently as 'fraus omnia corrumpi'. This is not the case here. No fraud is alleged, nor is it anybody's case that the MMA, in submitting to Arbitration, acted fraudulently, without the knowledge of the Minister.

10

52. The Minister, as a consequence, had no power to issue a direction to the MMA not to implement the Award in this case. Even if the Minister had the power, the MMA is not relieved of the liability to pay compensation to those who are deprived of contractual rights, e.g. the Appellants.

20

PART VIII - (Paras. 53 and 54)

Propriety of the exercise of the power under Section 9 and the onus to substantiate the exercise of the power.

53. (a) Assuming that the Minister has the power to direct the MMA not to implement, this direction is invalid and should not be upheld because: it is improper, unreasonable, and contrary to the high standard of dealings expected of a state agent or statutory corporation 'L'Etat est un honnete homme' (the State is an honest person). Further reasons are stated in the Appellants' affidavits and Case.

30

(b) The Minister or the MMA has not discharged the onus which was on them to show actively which particular salary, or part of the Award, was not in 'the interet publique' (public interest).

40

(c) Any onus which may have been on the Appellant in these matters has been discharged.

(d) It cannot be in the public interest :-

(i) that the Head of Government and the Prime Minister or the Responsible Minister be made, by a direction, to appear as a person whose publicly given word should not be acted upon

50

or believed in; and that the Government or Minister appear not to be honest and worthy of credence;

- 10 (ii) that workers in the Port sector lose faith in legality and be encouraged to go on strike or take other unlawful means e.g. rebellion or threats to overthrow the Government, in order to hold the Government and the MMA to their bargain and their pledged word.

54. It is submitted that, in the circumstances, the Minister's direction, especially as he has given no reasons, (save in argument that salaries be aligned on the civil service) is to be struck down as further being illegal, unreasonable and excessive.

20

PART IX - (Para. 55)

Assuming the direction could be given under Section 9.

55. Such a direction, it is submitted, was no reason for the Judge in Chambers, or the Court, to refuse exequatur. Exequatur should have been given and the MMA left to pursue such legal remedy for relief as it believed it had. Defences concerning merits (le fond) are not for the 'juge de L'exequatur', Dalloz 1971, Sommaire p.177.

30

PART X - (Paras. 56 to 67)

The making of "objection" by the Attorney-General and the hearing by the Supreme Court.

56. On 9th April, 1981, the Principal Crown Attorney and attorney for the Attorney-General (Sir Harold Walter) "objected" to the execution of the Arbitral Award on the ground that the execution of the Award was, in the opinion of the Ministere Public, contrary to public interest ("de nature a porter atteinte a l'interet public").

p.34 L.14

40

57. This "objection" was notified to Appellants and lodged in the Registry of the Supreme Court.

p.34 L.32

Justice Glover sitting at Chambers, ordered the matter to be called on 22nd April, 1981 in view of the objection. Mr. Matadeen, Crown Counsel, was appearing for the Respondent.

Justice Glover drew the attention of Mr. Matadeen to the fact that there should have been someone to represent the Ministere Public "as the latter is now a party to this application".

RECORD

58. The matter was adjourned to 5th May, 1981 when Appellants filed their fourth affidavit. On 7th May, 1981 the Attorney-General and the MMA appeared through different Crown Counsel.

p.p.35-38

59. The Appellants raised several objections to the "objection" of the Attorney-General. They reiterate these before the Privy Council.

60. On the 13th May, 1981 the Judge in Chambers referred the matter to Court under Section 84 of the Constitution, and on 18th May, 1981 the matter was fixed for hearing in Court on 20th and 22nd October, 1981. 10

p.41

61. On 19th October, 1981, the Appellants filed a fifth affidavit stating in short that before making his objection the Attorney-General never gave the Appellants an opportunity to be heard :-

- (a) that from 1st January, 1981 to 9th April, 1981 there was no other application for exequatur on the rolls of the Supreme Court, save the two filed in this case by the Appellants and the MWU; and 20
- (b) that the amended Section of the law was aimed only at, and to defeat, those applications for exequatur of the Award.

62. Chief Justice (Sir Maurice Rault) and Justice Glover heard arguments on 20th and 22nd October, 1981.

p.105 L.18
et.seq.
p.42 L.10

63. On the last day a third draft affidavit by the MMA was put in during the course of argument by Counsel Ramsewak, without objection from the Appellants. 30

This affidavit in short stated that the alignment on the public service was in fact raised before the Arbitrator on the instruction of the Minister responsible for Ports and Communications, but it was over-ruled.

64. During the course of the hearing, it appeared that much inconvenience would arise if the Supreme Court was to decide only the constitutional validity of the law and of the objection by the Attorney-General. Therefore it was agreed that the Supreme Court should decide also on the validity of the direction given under Section 9 of the Ports Act by the Minister not to implement the Award. 40

p.108 Ls.15-18

65. In argument Counsel for the Attorney-General

stated "we concede that Section 3 of the Act is aimed solely at the Award which is the subject-matter in dispute".

RECORD

10 66. (a) Crown Counsel for the MMA had on Friday, 3rd April, 1981 argued before the Judge in Chambers finally that the exequatur should not issue for another reason, to wit: Parliament must be taken to have by necessary implication amended the Code of Civil Procedure by giving to the Minister the power to give directions in the public interest. p.32 L.23

20 (b) The very next day, Saturday 4th April, 1981, was published the Bill, The Code of Civil Procedure (Amendment) Bill, for early introduction in the Legislative Assembly. On Tuesday 7th April, 1981 a new session of Parliament opened and Sir Harold Walter, as Acting Attorney-General, moved the Bill to which a certificate of urgency had been given by the Prime Minister. The Standing Orders of the Assembly were suspended at the instance of the Attorney-General and the Bill passed through all its stages. The Government members supported the Bill and the opposition voted against. p.36 L.18

30 67. It is submitted that the special legislation, especially Section 3, was a mere device and legislative plan by the executive and the legislature to usurp and interfere with pending judicial proceedings. It provided, in pursuance of its plan, for the nullification of the Award. This special legislation infringed the constitution of Mauritius.

PART XI - (Paras. 68-69)

The findings of the Supreme Court.

- 40 68. The findings were substantially as follows :-
- (a) under the Constitution, the executive cannot repudiate a contract if it merely turns out to be more onerous, but the executive cannot surrender its power to place the public interest before private appetite; p.131 L.36-38
 - (b) there is a paramount public interest that the Prime Minister's word be as good as gold; p.131 L.8-10
 - (c) under the old Code, the MMA could resist if the Award was "hors les termes du compromis" (outside the agreed terms of reference). Therefore, the Minister could give the direction not to implement under Section 9 p.131. L.21 and 30
- 50

RECORD

- p.132 L.4-5 and L. 10-11 (d) and ask the MMA to raise the objection; the MMA can enter into contracts, the Minister can ratify or annul the contracts, but to annul he must act promptly;
- p.132 L.12 et. seq. (e) the MMA had limited contractual authority. The Appellants knew this and also that the Minister may make any award unenforceable, if he considered it necessary in the public interest;
- p.132 L.18-21 (f) the employees obtained no vested right so long as the Minister could order the MMA not to implement. Therefore, there was no deprivation of property; 10
- p.132 L.31 et. seq. to 37 (g) the salaries of typists, clerical officers, etc. bear no relation to the salaries of employees in the Civil Service. The Director-General of the MMA was to draw 9,000 Rupees p.m., whilst a Permanent Secretary in the Civil Service drew 7,780 Rupees p.m.; 20
- p.132 L.1 et. seq. (h) the Minister was justified in apprehending an explosion of claims from related sectors to align salaries on the MMA and there was sufficient public interest at stake to justify the directions, which were intra vires;
- p.133 L.33 et. seq. (i) though it was beyond dispute that the law was passed specifically to nullify the Award, yet it was no usurpation of judicial power and it was a real law and not a legislative judgment, plan or device, like the one which had been struck down by the Privy Council in *Liyanage v. R.* (1967) 1 A.C. 259 (a Ceylon case); 30
- p.136 Ls.4-5 (j) the Attorney-General's objection merely placed a restriction on a party's right to have an Award made out of Court declared executory. It did not deny a party the right to have a trial in Court;
- p.134. L.7 et. seq. (k) the Attorney-General's power is a fettered power and his subjective satisfaction is not enough. But the Appellants had failed to show that the objection did not conform to the 'objective norms' which render it legitimate. The objection was legitimate for the same reasons given by the Court concerning the Minister's direction; 40
- p.135 L.33 (l) as the proceedings were lengthened and complicated by a Statute, passed after the action was entered, no costs were allowed. 50
- p.136 L.37
- p.136 L.8-10
69. The Supreme Court, therefore, on 21st December,

1981, finally disposed of the matter by making the orders which it held the Judge in Chambers could have made.

It ruled finally that (a) the Award could not have been made executory in view of the Minister's direction; and (b) the jurisdiction of the Judge in Chambers had been ousted by the opposition of the Ministere Public (the Attorney-General).

10 70. That being aggrieved and dissatisfied with the aforesaid judgment and those findings which negatived the case of the Appellants, the Appellants moved for leave to appeal to Her Majesty's Privy Council and this was finally granted on 28th June, 1982.

71. Appellants state that those parts of the findings, reasoning and judgment of the Supreme Court should be set aside, modified and reversed with costs for the following, amongst other,

R E A S O N S

- 20 1. Because the Court's ruling that, after the MMA had entered into a contract, like the one in Lite, the Minister could still intervene to annul it, is contrary to Articles 1134 and 1135 of the Civil Code which provide that "Agreements lawfully concluded shall have the force of law for those who have entered into them.....they shall not be revoked except by mutual consent or for causes which the law authorises. They shall be performed
- 30 in good faith.....Agreements shall be binding not only in respect of what is expressed therein but also in respect of all the consequences which fairness, ("équité"); practice or the law implies into the obligation in accordance with its nature".
- 40 2. The Court erred in holding that such contract entered into by the MMA required ratification of the Minister to be effective, and further that the MMA was a party of limited capacity in relation to such a contract.
- 3. The Court ought to have held that, in the circumstances of the case, the Minister having suggested and agreed to the Arbitration and having, inter alia, made the MMA take a chance of success before the Arbitrators, had no power to give, and he was estopped from giving, directions not to implement. The Court erred in holding that the pledge of the Minister was conditional.

RECORD

4. In view of the assurances of the Minister, the Prime Minister and the Government at the meeting of the 29th June, 1979 and subsequently, as set out in Appellants' affidavits and the documents produced (vide para.11 of this Case), the Court erred in holding that :-
- (a) the Appellants knew that the Minister could still direct the MMA not to implement; and 10
- (b) the Minister could do so.
5. Having held that it was of paramount public interest that the word of the Prime Minister should be as good as gold, the Court erred in holding that, the Minister, the Executive and/or the Government could yet go against such word and refuse to accept the Award or prevent its implementation.
6. The Court misconstrued the expression "les autres secteurs qui lui sont liés" (all other related sectors) in the terms of reference as being restricted to a single sector, i.e. the public service; those words meant "the private sector enterprises in the port". In so doing, the Court misdirected itself. It further misdirected itself when considering the relativities of the salaries awarded for the Director-General, typists, etc. Having further held that in a number of cases the new scheme of salaries was not too far in excess of comparable salaries in other services, it erred in not upholding the Award at least in these parts. It should have struck down in part the direction of the Minister and the objection of the Attorney-General. 20 30
7. The Court erred in holding that the Arbitrators had acted 'hors les termes du compromis' (outside the terms of reference) when the MMA had not taken any such objection at any time. 40
8. The Court ought to have held that the Minister had no power left to direct the MMA not to implement the Award and, therefore, the Award was not subject to "ratification" by the Minister and in any event, that the Minister had foregone the exercise of any such power.
9. The Court erred in holding that :-
- (a) the Minister's direction did not deprive 50

the Appellants of any acquired or vested right;

- 10 (b) the Appellants had not obtained any rights by the making of the Award. There is unanimity among commentators on the Code de Procedure Civile who have, as a rule, refused to accept conflicting decisions of the case law, and who have maintained that finality ("autorité") is acquired without reservation by the Award from the very moment it is rendered (Jean Robert in "Arbitrage" page 273-274). The authors relied upon are cited at page 73 lines 10 to 13 of the Record.
10. The Court ought to have held that the MMA and the Minister had given up before hand any right to appeal from the Award.
- 20 11. (a) The Court lost sight of the fact that salaries at the MMA at the time of the dispute had already been aligned on those obtaining in the public service (vide Sidambaram awards mentioned at page 3 line 12 of the Award).
- 30 (b) The Court thus erred in holding in effect that the Arbitrator's Award on the salary structure could have gone only one way i.e., to align on the salary structure obtainable in the public service; this meant that the Arbitration was a fore-ordained exercise; this reasoning of the Court was patently erroneous.
12. The "terms of reference" in the first paragraph were clear that the existing salaries had to be reviewed by the Arbitrators, taking into account the relativities of the other sectors to which the MMA was "lié" (linked) and this meant the private sector enterprises in the Port.
- 40 13. The Court erred in applying the test of comparable salaries in the public service as the parties had not stipulated this criterium in their terms of reference.
- 50 14. (a) The Court erred in founding its judgment on para.8 of the MMA's third affidavit and holding that giving salary scales not according to the public service "would have serious repercussion on the public and private sectors". p.32 L.24
- This averment was a belated one, raised after

RECORD

the arguments heard on behalf of the Appellants in the afternoon of the 22nd October, 1981. The first affidavit of the MMA was sworn on 4th February, 1981, eight months earlier, and contained no such expression of fear.

(b) The Court should have considered that there were other parts of the Award e.g. reclassification, overtime, bilateral commission, work environment etc., to which no objection had been taken, and the direction of the Minister to nullify them also was excessive and illegal.

10

15. That, in the circumstances of the case and the timing of the introduction of the special law, i.e. Section 3, and the admission of Counsel for the Attorney-General that the special law was aimed solely at the present Award, the Court ought to have held that :-

20

(a) the law (Section 3) came within the purview of an unacceptable "ad hominem and ad-hoc" law, meant to prevent the operation of an Award, regularly and loyally obtained;

(b) Section 3 was in effect a vehicle for the taking over of the judicial process by the legislature and executive merely to prevent judgment against the MMA. This law, therefore, was a legislative plan or device to interfere with and encroach upon the judicial power and process, contrary to the Constitution.

30

(c) the opposition of the Attorney-General was bad for the reasons contained in ground 14(b).

16. (a) The special law (Section 8) was designed to make the Attorney-General (a Minister of the Crown and its principal legal adviser) the person to decide finally whether the Court, or the Judge in Chambers, could proceed with the hearing of the present case. It further merely tried to buttress and render beyond challenge the direction of the Minister under Section 9.

40

(b) The Court should have held that from the way the special legislation (Section 8) was couched, that the legislature's clear intention was to make the subjective satisfaction of the Attorney-General final and beyond attack; it was

50

to 'dessaisir' the Judge and render the application non-receivable. Implicitly, the Supreme Court held that the objection of the Attorney-General was dependent on his own subjective satisfaction by the terms of the law. The Court, by interpretation, re-read the Section to mean that the objection of the Attorney-General was to be by objective norms.

10

(c) This was not a case of an innocent law which was capable of two interpretations, one making it constitutional and the other unconstitutional. The design, purpose and frame of the special law (Section 3) was clearly expressed: it was to make the matter dependent upon the subjective satisfaction, unattackable and to prevent the trial of the matter by the Judiciary. The Court erred in upholding such a law (Section 3) which should have been struck down as unconstitutional and, the Court itself should have held, as a necessary consequence, that the objection was unconstitutional and not legitimate. The very aim ("but") of the special law (Section 3) was unconstitutional.

20

30 17. (a) When the Attorney-General made his objection, it was obvious that he, at that time, considered his power to be unfettered and subjective, and he was also legally biased.

(b) The Attorney-General at no time gave to the Court the reasons, or the grounds and facts, on which his objection was made. As such, the objection should have been struck down.

40 18. The Court should have held that this special law (Section 3) allowed the Attorney-General to deprive the Appellants of their right to a hearing by a judge and of a judicial decision without imposing upon the Attorney-General the duty to (i) act fairly, (ii) to allow due representation to be made to him against any action he proposed to make to the detriment of the Appellants, and their acquired rights, and (iii) to communicate to the Appellants the grounds for such proposed action. Such a law should have been held to be unconstitutional and not reasonably justifiable in a democratic society.

50

RECORD

19. In the circumstances of this case, it ought to have been held that the State of Mauritius, whether in its executive or ordinary legislative capacity, was bound by the finality of the Award.
20. The Court erred in finding that the onus was on the Appellants to show that the objection of the Attorney-General did not conform with objective norms. The Appellants had discharged whatever onus was on them. 10
21. The Court ought to have held that, by the special law and the objection of the Attorney-General, no real, effective, free forum or Court was left to the Appellants; the Industrial Relations Act makes no provision for unfettered rights of bringing a dispute before the Permanent Arbitration Tribunal.

I certify that the above are good grounds, in my opinion, for appeal to Her Majesty's Privy Council and I undertake to support them at the hearing. 20

M. GUJADHUR, Q.C.

J. MOONOOSARY.

IN THE PRIVY COUNCIL

O N A P P E A L
FROM THE SUPREME COURT OF MAURITIUS

B E T W E E N:

1. THE MARINE WORKERS UNION
2. PREMANANDA PONAMBALLUM
3. CLEMENT MOUTOU
4. MAURICE PARUIT Appellants

- v -

THE MAURITIUS MARINE AUTHORITY
OF PORT LOUIS Respondent

- and -

THE MINISTERE PUBLIC Co-
Respondent

In the presence of:

1. FEE SIAN YOUNG KIANG YOUNG Co-
Respondents
2. ROGER REQUIN

A N D

5. THE MAURITIUS MARINE AUTHORITY
EMPLOYEES UNION
6. PERCY DEREK LINGAYA
7. MOOSSA IBRAHIM
8. NARAINSAMY VALAYDEN Appellants

- v -

THE MAURITIUS MARINE AUTHORITY
OF PORT LOUIS Respondent

- and -

THE MINISTERE PUBLIC Co-
Respondent

In the presence of:-

1. FEE SIAN YOUNG KIANG YOUNG Co-
Respondents
2. ROGER REQUIN

CASE FOR THE APPELLANTS

SLAUGHTER AND MAY
35, Basinghall Street,
London EC2V 5DB

Solicitors for the Appellants
