

Attorney - General's Office

LOSAF

Law Officers' and State Attorneys' Forum



Editorial

We are delighted to publish the 4th issue of the Law Officers' & State Attorneys' Forum "LOSAF", and the 1st issue destined for public viewing which will henceforth be published on a quarterly basis on the website of the Attorney-General's Office.

We hope you will find this issue both enriching and entertaining. We welcome the message from the Honourable Attorney-General before we share with you our experience of the first civil hearing in Mauritius on Webex before the then Honourable Chief Justice E. Balancy before whom appeared Dinay Reetoo Principal State Counsel and Verna Nirsimloo, Chief State Attorney, for the State.

Kamlesh K. Domah, Acting Senior State Counsel has provided us with an in-depth analysis of the curfew order from a force majeure perspective.

This issue also welcomes the contribution of Ms Andrea Lapunzina Veronelli, PCA Legal Counsel and Representative in Mauritius and co-writer Avinash Poorooye, former PCA Assistant Legal Counsel in a Roadmap to the Permanent Court of Arbitration in Mauritius.

Also in this issue, an article on the award received by Mr K. A Putchay, State Counsel at the AGO.

We hope you will enjoy a short summary of judgments to keep you abreast of the developments in civil law at the Supreme Court.

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CORE VALUES

- The rule of law and the Public Interest
- A fair and just legal system
- Integrity and impartiality
- Quality and professionalism
- Independence and competence
- Solidarity, team work and co-operation





Editorial (cont'd)

We conclude this issue with some snapshots of recent events at the AGO.

We are thankful to the Deputy Solicitor General, Rajesh Ramloll SC for reigniting the **LOSAF** with this 2020 edition. His continued and unflinching support has harnessed the efforts of one and all in making this issue possible.

It is however with a saddened heart that our Office bids a last farewell to our former colleague, mentor and friend Justice Beny (Bobby) Madhub who breathed his last at the untimely age of 54 on the 4th February 2020 in office at the Supreme Court premises. An extract of the eulogy delivered by the Honourable Attorney-General in Court 1 of the Supreme Court on the 10th March is at page 17. To his wife, two children, his sisters and family, goes our heartfelt sympathy. He will be remembered with fondness.

In the past couple of months, this Office has also had to bid farewell to some of its longstanding officers, who have been appointed to the highest ranks of the Judiciary in the name of Luchmyparsad (Raaj) Aujayeb from his post of Assistant Solicitor General to Deputy Master and Registrar

and Judge in Bankruptcy on 1st June 2020 and to Puisne Judge on 1st September 2020; Prameeta (Priya) Goordyal Chittoo and Carol Green Jokhoo both former Assistant Solicitor General recently appointed as Puisne Judges of the Supreme Court. Priya has joined the Attorney-General's Office as Supernumerary State Counsel on 1st December 1998, and she was joined by Carol on the 14th June 1999.

To them and to our friends and colleagues, Purnima Dunpath, (Principal State Counsel) Rubina Vydelingum (Principal State Attorney), and Eswaree Ramdass Bundhun (Senior State Attorney), who have been promoted to the Office of the Director of Public Prosecutions as Acting Assistant Director of Public Prosecutions, Deputy Chief State Attorney and Principal State Attorney respectively and to Neela (Nilli) Ramdewor Naugah and Asha Devi Sungkur Daby both State Counsel posted as District Magistrates. We place on record their hard work at the AGO.

In the same breath we extend a warm welcome to our new colleagues who have joined our Office from the Office of the Director of Public Prosecutions and from the Magistracy.

A. Pillay Nababsing | Acting Senior State Counsel

Mission & Vision

To provide without fear or favour, hatred or ill-will to the government sound and independent legal advice and representation.

To develop into a centre of excellence for legal and Legislative drafting services.

To contribute to the development of a fair and just legal system and the promotion of the rule of law in the interest of the state and the people.

Editorial Team

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Message from the Honourable Attorney-General Maneesh Gobin



Distinguished Readers,

I am delighted and honoured to have the opportunity to address you in this issue of the Attorney-General's Office Newsletter.

Year 2020 has undeniably brought its share of challenges. The world is witnessing the need to adapt to a new normal whilst ensuring continuity. Unprecedented sanitary measures have been implemented to contain the Covid-19 Pandemic. The Attorney-General's Office ("AGO") has been instrumental in bringing up laws and regulations in difficult times. We have furthermore had to face the equally difficult times of bringing legislation in the aftermath of the FATF/EU conundrum.

In this and upcoming newsletters, we therefore endeavour to address as wide and varied a range of topical themes as we possibly can every quarterly. We also aim to keep our readers abreast of developments pertaining to latest laws, regulations and judgments.

My heartfelt appreciation to officers of the AGO for their contribution to the success of this newsletter.

We welcome your feedback and trust that you will find this newsletter to be both informative and enjoyable.

Happy Reading!

WebEx Case: Top FM v Independent Broadcasting Authority

(Heard by live video link (WebEx on 13th and 14th April 2020)

by Dinay Reetoo, Principal State Counsel
& Verna Nirsimloo, Chief State Attorney

We were privileged to have appeared in the first WebEx civil hearing in Mauritius. On 13 April 2020 at 1400 we were instructed by the Independent Broadcasting Authority in a judicial review case lodged by Top FM v against the Independent Broadcasting Corporation (“IBA”) and service of the application was waived by the IBA and both of us were present in the Office to take possession of a voluminous brief which consisted of over 200 pages. We were given until 1600 on 13 April 2020 by the then Chief Justice to take a stand on Prayer E of the Application for judicial review which related to injunctive relief pending determination of the judicial review application. Prayer E related to temporary stay of the IBA’s regulatory action pending determination of judicial review proceedings). After conferring with our client and studying the file, it was decided that Prayer E be objected to and the stand was communicated to the Court by WebEx and the case was fixed for hearing on 14 April 2020. Top FM was represented by J. Gujadhur, SA and S. Bhuckory SC, A. Domingue SC and A. Radhakissoon.

On 14 April 2020, all Counsel and both Judges (Hon Balancy CJ and Hon Toolsee J) who heard the case were robed in court attire. Written submissions and authorities in support of these submissions were exchanged by email by counsel on both sides and were provided to the Court by email. The hearing was open to members of the public and was watched by most, if not all, Judges of the Supreme Court. The hearing started at around 0945 and ended at 1430 with a speech by the then Chief Justice who stated that this was his last case. Incidentally, after the hearing of this case, the then Chief Justice proceeded to hearing another high-profile case (Sowkhee v Commissioner of Police). The hearing took longer than we expected since both parties had, despite the tight deadline imposed on the parties by the Court, provided the Court with extensive written submissions.

A judgment was delivered on 15 April 2020 whereby Prayer E (a temporary stay of the Respondent’s (IBA’s) proceedings (which arguably amounted to an interlocutory injunction), the Supreme Court. In its judgment, the Court stated that it shall spell the reasons for its decision in a subsequent judgment in line with the *cursus* adopted by our Courts in Mauritius **Marine Authority Employees Union and ors v Mauritius Marine Authority (1998 MR 194) and Bishop of Roman Catholic Diocese of Port Louis and others (Privy Council Appeal No 21 of 2003)**. On 5 May 2020, the Court spelt out the reasons for its decision.

The proceedings before the Supreme Court illustrated a number of matters which, in our view are worth highlighting:

- (a) our Courts demonstrated a flexibility in adapting their procedures during the confinement period;
- (b) the use of technology (WebEx hearings) was embraced at the level of the judiciary and the legal profession;
- (c) access to justice was available during the confinement period; and
- (d) in handling cases, especially cases where tight deadlines are given, it is imperative that Attorney and Counsel work as a team. In this present case, our teamwork helped us considerably to deal with assessing the file, the tight deadlines as well as the pressure handling such a hearing.

It has to be highlighted that this case took place in a context where there were no prescribed rules for conducting hearings by live video-link. Having had the privilege to have been part of such a hearing, we find it appropriate to highlight the following:

- (a) some jurisdictions have devised rules for advocacy for the purposes of hearing by live video-link. Examples include:
 - (i) Practice Direction 32 of the Civil Procedure Rules of the UK (see link below on Video Conferencing and its Annex 3):
https://www.justice.gov.uk/courts/procedure/rules/civil/rules/part32/pd_part32#annex3
 - (ii) Inns of Court College of Advocacy-Principles for Remote Advocacy (see link below)
<https://www.icca.ac.uk/wp-content/uploads/2020/04/Principles-for-Remote-Advocacy-1.pdf>
- (b) the opening words for the Inns of Court College of Advocacy are excellent food for thought in terms of how remote hearings ought to be conducted by all parties concerned and key issues are succinctly broached upon as follows:

“The ICCA is delighted to publish ‘Principles for Remote Advocacy’.

The COVID-19 epidemic has forced courts and advocates to adapt at pace. Fortunately, we already have some experience to draw on. In civil and criminal courts, “paperless” working has already been taking place, so that advocates have begun to learn some of its challenges. In other areas such as arbitration and international litigation, there is already experience of remote hearings and cross-examination of distant witnesses by video. Courts and advocates have been building on these experiences, and rapidly gaining experience of the skills required to deal effectively with remote hearings.

Our Principles for Remote Advocacy do not offer advice on the choice or use of different IT programs. In many cases the choice will have been imposed upon the advocate. The principal systems currently in use are Zoom and Skype for Business. Information on these programs is abundantly available.

Our guide concentrates on the way in which advocates can most efficiently deploy their professional skills in communication and persuasion in the new working environment. It aims to distil existing experience into a set of principles that we hope will enable everyone to approach a remote hearing with confidence and do their job effectively. Judges and advocates who already have experience with this practice consistently remark that effective remote advocacy depends not on new skills. It rewards the bedrock skills; a clearly articulated and logical case, supported by selective use of authority and documents, and focussed examination of witnesses. With careful preparation and attention to those core skills, it is possible to make remote hearings, in appropriate cases, highly effective. We hope these principles will help you do that.”

(c) with live video-link hearings, what is expected of the legal profession and members of the judiciary cannot, and should not be left to the discretion of the Judiciary and of the Bar. There is a need to provide for practice directions to be issued under section 201 of the Courts Act or to make rules under section 198(1) of the Courts Act; and

(d) the legislator, has been quick to react to the need for certainty in procedures before the Court in the context of the confinement in Mauritius by amending the Courts Act (through the Covid-19 (Miscellaneous Provisions) Act 2020, to provide for new sections 197G and 197H which provide as follows:

“197G. Judicial services during COVID-19 period

The Chief Justice may –

- (a) during the COVID-19 period, determine that such judicial services as he deems essential shall be provided by any Court;
- (b) during such further period, as the Chief Justice deems necessary, after the COVID-19 period lapses, determine, in addition to the judicial services referred to in paragraph (a), that such further judicial services as he deems essential shall be provided by any Court.

197H. Practice and procedure before any Court during COVID-19 period

- (1) Notwithstanding this Act and any other enactment, but without prejudice to section 201, the Chief Justice may make such rules to regulate the practice and procedure before any Court as he considers appropriate during the COVID-19 period and such further period referred to in section 197G.
- (2) The Court may, in addition to the rules made by the Chief Justice under subsection (1) –
 - (a) limit the number of persons who may be present in chambers or in a courtroom; or
 - (b) call or hear a matter remotely by means of a telephonic, an electronic or any other communication facility as the Chief Justice may approve in writing.



Dinay Reetoo, Principal State Counsel

A Roadmap To The Permanent Court Of Arbitration In Mauritius

by **Andrea Lapunzina Veronelli**
PCA Legal Counsel and Representative in Mauritius

& **Avinash Poorooye**
(former) PCA Assistant-Legal Counsel



Introduction

In July 2010, for the first time in its then 110-year history, the Permanent Court of Arbitration (“PCA”) opened an overseas office, in Mauritius. This was a major move for both Mauritius and the PCA: for Mauritius, it coincided with the launch of its ambitious International Arbitration Project (the “MIAP”); for the PCA, it marked the opening of a new era, which has most recently led to the opening of new overseas offices in Singapore (in 2018) and Argentina (in 2019).

Over the past ten years, the PCA Mauritius Office has been a steadfast support of the MIAP, assisting in the modernization of the Mauritian regulatory framework relating to international arbitration and the continued promotion of Mauritius as an arbitration hub.

The present article seeks to present the PCA Mauritius Office, its objectives, activities and future goals. Readers are encouraged to write to the PCA Mauritius Office with questions, which the PCA Representative will be happy to respond to in a later publication. The Permanent Court of ARBITRATION and Mauritius

The PCA was established by the 1899 Convention for the Pacific Settlement of International Disputes, as revised by the 1907 Convention of the same name. As such, the PCA was the first permanent intergovernmental organisation to provide a forum for the resolution of international disputes. In 2019, as described in more detail in the PCA’s Annual Report, the PCA provided registry services in 199 cases, 49 of which were initiated that year.

Mauritius has a longstanding relationship with the PCA, of which it became a Member State nearly fifty years ago, on 3 August 1970. As an active PCA Member State, Mauritius is entitled to appoint four persons of “known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of Arbitrator” as Members of the Court, for a renewable term of six years.

The PCA’s Members of the Court function as a list of potential arbitrators, and have a number of other roles, including the nomination of candidates for election to the International Court of Justice. Until 21 June 2019, the Mauritian Members of the Court were Justice A. G. Pillay GOSK, Justice D.B. Seetulsingh SC, Justice Satyabhooshan Gupt Domah and Sir Hamid Moollan QC. Mauritius has also appointed members to the Specialized Panel of Arbitrators and the Specialized Panel of Scientific Experts established pursuant to the PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment. Until 4 June 2019, the member appointed by Mauritius to these panels was Mr. Phosun Kallee. Pursuant to the Hague Conventions, Mauritius is entitled to appoint new members to all three of these lists.

The Mauritius Office of the PCA was opened in July 2010. PCA legal officers posted in Mauritius act under the direct authority of the Secretary-General of the PCA and assist him with his responsibilities under the Mauritian International Arbitration Act 2008 (the “MIAA”), while also promoting PCA services and Mauritius as a venue for arbitration throughout the African region.

Since the PCA Mauritius Office first opened ten years ago, the staff of the PCA Mauritius Office has administered over one hundred arbitration cases, including cases seated in Mauritius or in which hearings were held in Mauritius.

Mauritius and Mauritian nationals have resorted to the administrative support of the PCA in a number of cases, amongst which notably, the Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom). In this case, Mauritius instituted arbitral proceedings pursuant to Article 287 and Annex VII of the United Nations Convention on the Law of the Sea (“UNCLOS”) concerning the establishment by the United Kingdom of a Marine Protected Area around the Chagos Archipelago.

In its award, the Tribunal declared that the establishment of the Marine Protected Area surrounding the Chagos Archipelago constituted a breach of UNCLOS. The various written pleadings, procedural orders, transcripts of hearings, and final award are all available on the PCA website.

Activities of the PCA Mauritius Office

In January 2020, hitting a key milestone since its creation, the PCA Mauritius Office moved to a new location in Port Louis, which incorporates state-of-the-art hearing facilities. Moving the PCA Mauritius Office to the capital was a longstanding project intended to facilitate the PCA’s cooperation with the law practitioners and Ministry officials with whom it works on a daily basis.



Front row, from left to right: HE Mr. Hugo Siblesz, Secretary-General of the Permanent Court of Arbitration; Ms Andrea Lapunzina Veronelli, PCA Legal Counsel and present PCA Representative in Mauritius; Mr. Túlio di Giacomo Toledo, PCA Legal Counsel and former PCA Representative in Mauritius; Mr Yvan C. Jean Louis - Acting Assistant Parliamentary Counsel AGO; Mr. Brooks Daly, PCA Deputy Secretary-General and Principal Legal Counsel, at the ceremony celebrating the 10th anniversary of the Host Country Agreement.

1 Questions are to be addressed to the following address: mauritius@pca-cpa.org.

2 The PCA’s Annual Report is available on the PCA’s website (<https://docs.pca-cpa.org/2020/03/7726c41e-online-pca-annual-report-2019-final.pdf>) and was posted for download on the LinkedIn page of the PCA Mauritius Office.

3 Statute of the International Court of Justice, Article 4(1)

4 See <https://pca-cpa.org/ru/cases/11/>.

A Roadmap To The Permanent Court Of Arbitration In Mauritius (cont'd)

The new premises of the PCA Mauritius Office hosts the PCA staff and the Mauritius International Arbitration Centre (“MIAC”) in Port Louis, illustrated below. The new hearing facilities include a large and multifunctional hearing room, which can also serve as a venue for seminars or conferences, whether physically or via audio-videoconferencing. Party breakout rooms and a tribunal deliberation room complete the arbitration hearing facilities, thus enabling the PCA Mauritius Office to host hearings and deliberations in accordance with the latest standards. These facilities are available free of charge to parties and tribunals in PCA-administered proceedings. These premises carry the promise of being a major turning point for the MIAP, as the hearing facilities’ modern features are bound to become key elements of the promotion of Mauritius as an arbitration hub.

The PCA Mauritius Office today counts the PCA Representative in Mauritius, two other Legal Counsel (who also act as co-Registrars to MIAC), an Assistant Legal Counsel, a Case Manager and an Intern. Over the years, the PCA Mauritius Office has welcomed a number of young Mauritian lawyers through internships and, since 2015, it has welcomed an Assistant Legal Counsel (“ALC”) through a Fellowship sponsored by the Government of Mauritius. Three ALCs have worked at the PCA Mauritius Office, including one of this article’s co-authors. The ALC position offers recent law graduates or young legal professionals a unique opportunity to work at an intergovernmental organization and international arbitration institution. The ALC is able to gain valuable experience in the operations of the PCA’s International Bureau, including both the practical and legal aspects of international dispute resolution. The current ALC will be leaving the PCA Mauritius Office after a two-year tenure, and a call for applications was issued earlier this year.

The staff of the PCA Mauritius Office support the PCA Secretary General’s functions under the MIAA and participate in the promotion of Mauritius as an international arbitration hub. Over the past ten years, PCA Representatives have travelled to over twenty countries in Africa, participating in over fifty regional events, to promote the MIAP and PCA services in Mauritius. Members of the PCA Mauritius Office have also delivered over twenty training sessions to law students and legal practitioners on the MIAP and arbitration in general, both in Mauritius and elsewhere. Moreover, PCA Representatives have assisted the Government of Mauritius on draft legislation and regulations intended to modernize the legal framework applicable to international arbitration in Mauritius. They have also participated in the promotion of Mauritius as a venue for the conduct of dispute resolution proceedings, being key actors in casting a spotlight on Mauritius through the organization of the Mauritius International Arbitration Conferences. These three conferences were co-organised with other local and international arbitration institutions in 2010, 2012 and 2014, and the resulting conference papers were edited by the PCA. In 2016, the PCA played an important part in organising the first African edition of the ICCA Congress hosted in Mauritius.

What the future holds

Moving into the next decade of its presence in Mauritius, the PCA intends to build on its past activities. In the first half of 2020, members of the PCA Mauritius Office were scheduled to participate in five panels at major arbitration events, providing opportunities to promote Mauritius as an arbitration hub. Due to the COVID pandemic, some of these events have been postponed to next year, while others will be held online. The PCA is seeking through

online versions of these events and others to showcase the hearing facilities and technological capacities of the Mauritius Office. The PCA Mauritius Office will post in advance information about these events on its LinkedIn page, and, if and when possible, will seek to livestream them.

With 2020, and possibly 2021, marked by the COVID pandemic and a limitation of international travel, the PCA Mauritius Office will seek innovative means to continue the international promotion of Mauritius as a centre for dispute resolution services. Bolstering its presence on social media, the PCA Mauritius Office has created a dedicated LinkedIn account, which will post recent developments on the PCA Mauritius Office’s work as well as on the MIAP. The PCA Mauritius Office, while continuing to deliver in-person training in Mauritius (in compliance with all applicable safety requirements), to both students and legal practitioners, will be seeking to create new means to realize educational and promotional projects. Thus, the PCA Mauritius Office is actively working on events that could be delivered online to make them accessible to a wider audience. Likewise, the PCA Mauritius Office is working closely with Mauritian universities with a view to delivering courses in international arbitration to local students.

Conclusion

As Professor Jan Paulsson has pointed out, the success of MIAP requires “patient agriculture” and the support of the “the whole legal community” over a period of years. The PCA Mauritius Office looks forward to continuing its work in Mauritius and further developing its relationships with the Mauritian legal community, aiming for the continued success of the MIAP.



HE Mr. Hugo Siblesz, *Secretary-General of the Permanent Court of Arbitration* at the ceremony celebrating the 10th anniversary of the Host Country Agreement

- 5 The call for application was in particular published on the website of the Institute of Judicial and Legal Studies (IJLS).
- 6 These conference papers are available on the Permanent Court of Arbitration’s website (<https://pca-cpa.org/en/documents/publications/mauritius-international-arbitration-conference/>), also shared by the PCA Mauritius Office’s LinkedIn page.
- 7 You can follow the PCA Mauritius Office’s LinkedIn account by flashing the QR code accompanying this article or at <https://www.linkedin.com/company/26263612>.
- 8 Jan Paulsson, ‘Opening Remarks’, in *The Mauritius International Arbitration Conference 2010: Flaws and Presumptions: Rethinking Arbitration Law and Practice in a New Arbitral Seat*, ed. Permanent Court of Arbitration, 2010, p. 4.

The Curfew Order And Force Majeure In Mauritian Law

by Kamlesh Domah, Acting Senior State Counsel



Introduction

1 Mauritius registered its first case of Covid-19 on 18 March 2020. The Prime Minister announced, on 19 March 2020, the imposition of a confinement period of 14 days as from 20 March 2020. On 22 March 2020, by way of General Notice No. 512 of 2020, the Ministry of Health and Wellness imposed a Curfew Order for the purposes of preventing the spread of Covid-19. The Curfew Order, originally intended to lapse on 02 April 2020, was extended twice.

Summary of the Terms of the Curfew Order

2 In accordance with the terms of the Curfew Order, no person is allowed to remain outdoors in Mauritius unless he falls within a specified class of persons authorised to leave his place of residence strictly for work purposes. The right to go to work from the place of residence and, thereafter, to return to the place of residence from the place of work is conditional upon successfully applying and obtaining a permit from the Commissioner of Police. In addition, under the provisions of the Curfew Order, any person found outdoors for a purpose other than availing himself of urgent medical treatment, essential supplies, foodstuff, medicine or any other item essential for his subsistence of livelihood, commits an offence and becomes liable, on conviction, to a fine not exceeding 500 rupees and to imprisonment for a term not exceeding 6 months.

Impact of the Curfew Order

3 The impact of the Curfew Order, without putting into question the justifiability of the Curfew Order itself, on contractual obligations, is as wide-ranging as far-reaching. The physical restrictions on the freedom of movement engendered by the Curfew Order has evidently disrupted the goods and services sector with the consequence that parties to contracts find it impossible to perform their contractual obligations in accordance with the terms and conditions originally agreed upon or at all.

4 This note analyses the live issue these days as to whether the terms of the Curfew Order, imposed as a direct consequence of an outbreak of Covid-19 in Mauritius, can amount to force majeure.

Force Majeure under Mauritian Law

5 The basic rule with regard to contractual obligations is found in Article 1134 according to which contractual obligations once lawfully entered into become law as between the parties to the contract and, unless revoked by mutual consent or for reasons provided for by law, should be performed in good faith.

6 As per Article 1134, therefore, parties may well agree that "Since you have not been able to deliver and I have not been

able to pay you, we agree to terminate our contract." In this case, it is most likely that parties will negotiate a new contract taking into account the new set of circumstances resulting from the Curfew Order.

7 The problem will, however, arise where one party still insists upon the other party discharging its obligations. Can the other party plead inability to perform due to the Curfew Order? Article 1134 has also provided for the scenario of termination for reasons provided under the law i.e. "pour les causes que la loi autorise."

8. Most written contracts will contain a termination clause or a force majeure clause. Nonetheless, irrespective of whether contracts provide for them or not, Article 1147 will apply, unless specifically excluded. Article 1147 accordingly provides that –

"Le débiteur est condamné 'il y a lieu, au paiement de dommages et intérêts, soit à raison de l'inexécution de l'obligation, soit à raison du retard dans l'exécution, toutes les fois qu'il ne justifie pas que l'inexécution provient d'une cause étrangère qui ne peut lui être imputée, encore qu'il n'y ait aucune mauvaise foi de sa part."

9. Thus, a contractor who has not been able to perform his part of the bargain may plead that his inability to perform stems from a reason independent of his will which cannot be imputed to him, all the more so when there was no bad faith from his part.

10. It should be noted that the onus is double on the person who pleads the "inexécution." First, he should show that it "provient d'une cause étrangère qui ne peut lui être imputée." This would be axiomatic in that a Curfew Order cannot be imputed to him. Second, he should show that despite the Curfew Order, there was "aucune mauvaise foi de sa part."

11. In addition, Article 1148 provides as follows – "il n'y a lieu à aucun dommages et intérêts lorsque, par suite d'une force majeure ou d'un cas fortuit, le débiteur a été empêché de donner ou de faire ce à quoi il était obligé, ou a fait ce qui lui était interdit."

12. This leads us to the central question: the meaning and application of "force majeure" in our law.

13. The traditional view held under Mauritian law was that three criteria had to be fulfilled for a party to successfully invoke force majeure. First, the event would have to be unforeseeable, that is, not reasonably foreseeable by reasonably informed person at the time of the conclusion of the contract. Second, the event would have to be extraneous, that is, exterior to the parties to the contract. Third, the event would have to be "irrésistible", that is, an event that is so overwhelming in its effect that no amount of human effort could overcome or manage its consequences.

14. The test has now changed with the latest jurisprudence on this issue, that is, the decision of the Judicial Committee of the Privy Council in *General Construction Limited (Appellant) v Chue Wing & Co Ltd and another (Respondents)* [2013] UKPC 30. The successful invocation of force majeure no longer depends on the existence of all three criteria. The requirement for extraneity has been done away with, with unforeseeability and “irresistibilité” as the guiding criteria. Thus, whilst unforeseeability remains a complementary factor for force majeure, “irresistibilité” stands as the irreducible factor.
15. In other words, the Courts will first engage into an assessment of ascertaining whether the event was indeed unforeseeable –
 - (a) if unforeseeable, the Courts will then assess whether the event was irresistible. If found to be irresistible, only then would the event amount to a force majeure event. Therefore, unforeseeable events with resistible effects do not amount to force majeure events;
 - (b) if foreseeable, the event will still amount to a force majeure event, if steps taken to overcome the effects of the event were completely ineffective (that is, an event so overwhelming in its effect that no amount of human effort can overcome or manage it). Therefore, foreseeable events with irresistible effects will amount to force majeure events.
16. Having set out the law, it is now befitting to examine whether the provisions of the Curfew Order can amount to force majeure.

Can the Curfew Order Amount to a Force Majeure Event?

17. There can be only one straight answer to that question: It depends upon facts.
18. Factors, including and not limited to (a) the particular industry the person is working in, (b) the class of persons one is dealing with, (d) the timing of the obligation entered into, (e) the terms of the contract, amongst others.
19. As regards the particular industry the person is working in, evidently, measures which can be taken to counteract the restrictions imposed by the Curfew Order will necessarily vary from industry to industry and from person to person. For example, in some industries, working from home, as opposed to working from an office, could amount to a measure capable of overcoming the restrictions imposed by the Curfew Order.
20. However, for other industries, where on site attendance is imperative for the performance of contracts (construction

industry as a case in point), the measures that can be taken for overcoming the restrictions imposed by a Curfew Order seem limited. Whilst it is opined that the former will not be able to successfully invoke force majeure, the latter will, subject to the terms of the contract.

21. As regards the class of persons one is dealing with, it would be more difficult for classes of people whose freedom of movement has not been curtailed by the Curfew Order to successfully invoke force majeure to suspend the performance of their obligations.
22. As regards the timing of the obligation entered into, if a contract was entered into after the coming into force of the Curfew Order, it is less likely that any party would be able to invoke the Curfew Order as a force majeure event unless that party brings evidence of unsuccessful attempts to counteract the effects of the Curfew Order.
23. In addition, the answer depends on the terms of the contract, that is, if pandemics were expressly excluded or included as a force majeure event.
24. Hence, the rule is to assemble relevant facts in relation to the party pleading “force majeure.” The answer will depend on the circumstances of each case. One also has to bear in mind that in France, in the case of epidemics, a plea of force majeure has rarely succeeded before Courts.
25. Thus, the spread of H1N1 in 2009 (Besançon, 8 janv. 2014, no 12/0229), dengue (Nancy, 22 nov. 2010, n° 09/00003) or chikungunya (Basse-Terre, 17 déc. 2018, n° 17/00739) were not held to amount to force majeure.
26. That straight answer surely pits the discomfort of uncertainty against the reassurance that each case has to be determined on its own merits.
27. On this point, it may be worth noting that the French Government adopted Order No. 2020-306 of 25 March 2020 as supplemented by Order No. 2020-427 of 15 April 2020, which circumvents, to a certain extent, the uncertainty created by the lockdown in France with regard to the security of commercial transactions. These Orders have, amongst others, suspended penalty mechanisms for breach of contract and extended time limits related to contract termination and renewal.
28. Of particular note is that these orders are not “d’ordre public”, hence giving parties to contract the freedom to negotiate out of them to find a mutually beneficial solutions tailor-made by them and for them.

Tribute To Late Justice Oomeshwarnath Beny (Bobby) Madhub

Extract Of The Eulogy Delivered By
The Honourable Attorney-General
On 10th March 2020

So do we gather here today to pay tribute to the memory of Late Justice Madhub and to the rich and remarkable career that he has had. Late Justice Madhub was born in Flacq in 1965. He started his primary schooling at the Centre de Flacq Primary School and completed same at Baichoo Madhoo Government School, after his family moved to Quatre-Bornes. He pursued his secondary school studies at the Royal College of Curepipe.

After obtaining a Licence en Droit from the Université de Bordeaux (France), he went to study at the University of Warwick (UK), where he obtained his Bachelor of Laws degree in 1990. He was admitted to the Bar of England and Wales at the Honourable Society of the Middle Temple in 1991. Subsequently, he was Called to the Mauritian Bar in 1991 and joined the Attorney General's Office in 1992.

Late Justice Madhub also served as District Magistrate and Senior District Magistrate between 1993 and 1995, before returning to the Attorney General's Office.

Through training opportunities available to law officers, late Justice Madhub obtained a Diploma in Law and Development from the then International Development Law Institute (now known as International Development Law Organisation), Rome, Italy, in 1995. He also followed a course leading to a Postgraduate Specialisation in Intellectual Property from the University of Turin and the World Intellectual Property Organisation in 2001.

During his days at the Attorney General's Office, late Justice Madhub quickly developed a keen interest in international trade and intellectual property. He was awarded the British Chevening Scholarship which led him to study a Masters of Laws in International Economic Law at the University of Warwick in 2005, in which he obtained a distinction.

For many years, late Justice Madhub was one of the few law officers with specialised knowledge in international trade and intellectual property. He advised the Ministry of Foreign Affairs and International Trade on a number of complex legal matters and was also involved in the drafting of technical legislation in those areas.

Late Justice Madhub was head of the in-house legal team dealing with all international trade matters, including bilateral trade agreements, regional trade agreements, multilateral trade agreements and international trade agreements. I should like to place on record just a few of the salient contributions that he made

(a) firstly, his contribution in negotiation. He attended a number of negotiating sessions as Mauritian delegate or

head of the Negotiating Team, in particular in relation to the following –

- (i) bilateral negotiations with India, Pakistan, Turkey and other countries on trade matters;
- (ii) regional organisations such as COMESA, SADC, IOC;
- (iii) multilateral negotiations with the ESA, EU and the WTO;
- (iv) the bilateral investment treaty with the United States;

(b) secondly, his contribution in drafting. He participated in the drafting of numerous international documents, such as Agreements, Regulations and Amendments to Conventions for Mauritius. As part of the Mauritian delegation, he was also one of the principal drafters of the ESA-EU Negotiating text on the Renegotiation of the Trade aspects of the Cotonou Agreement. On several occasions, he acted as Chairperson of the Legal Drafting team sessions of the COMESA.

In addition to the above, as part of his assignments at the Attorney General's Office, late Justice Madhub supervised all intellectual property, ICT and competition matters. Some of his main contributions included the following –

- (a) review and drafting of legislation pertaining to intellectual property rights;
- (b) supervision of advice and conduct of cases relating to ICT, including cybercrime, cybersecurity and data protection; and
- (c) acting as the local consultant for the formulation of the COMESA Competition Policy.

Before his elevation as Puisne Judge in 2014, late Justice Madhub had been occupying the post of Deputy Solicitor General for a number of years. On several occasions, he also acted as Parliamentary Counsel, Director of Public Prosecutions and Solicitor General. During all the years he spent at the Attorney General's Office, he frequently appeared in Court in high profile and complex cases involving Government. He was a dedicated law officer and a hard worker too who, for many years, served the Attorney General's Office and Government unflinchingly and, for that, I wish to express my heartfelt appreciation for his contribution.

Late Justice Madhub served as Puisne Judge for almost 6 years. I am also informed that he acted as resource person for the Council of Europe, Cybercrime Office in training programmes in Sri Lanka and Philippines in 2016. For the past two years or so until his demise, he also handled cases before the Mediation Division of the Supreme Court. I am informed by my officers who appeared before him that his

Tribute To Late Justice Oomeshwarnath Beny (Bobby) Madhub

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fairness, sense of diplomacy and his practical approach were much appreciated by one and all and greatly contributed to the settling of cases.

I have myself had the personal privilege of knowing late Justice Madhub who was a senior law officer when I joined the Attorney General's Office in 1999. Back then, I was sharing an office with other colleagues who had joined with me and his office was directly opposite ours, on the second floor. Bobby, as we fondly called him, would always have an open door policy and would always be ever ready to guide junior law officers. Many of us, like me, will recall how he would initially put up a stern face to scare us, but would eventually turn out to be a very sympathetic and helpful colleague. He always made time to guide and advise juniors. When an officer approached him with a personal problem, he was protective, caring and almost like a father figure. Everyone who knew Bobby will remember him for his sense of practicality, organisation, discipline as well as his sense of humour.

Late Justice Madhub also always firmly believed in team spirit and frequently organised activities and events to bring law officers together, be it over a "bring and share" lunch, a dinner or a team-building activity. With Bobby in charge, two things were always guaranteed – good humour and good food.

I also have to mention the role that late Justice Madhub played in the Rotary Club, of which he was an active member. He joined the Rotary Club of Beau Bassin/Rose Hill in December 1995 and became President of the Club for the year 1999-2000. He was one of the Rotarians delegated by the Club to form the Rotary Club of Flacq, which was chartered in December 2002, together with Mr. Rajesh Bucktowansing Senior Attorney. Late Justice Madhub went on to become its President in the year 2009 – 2010. He assumed different functions at the level of the Clubs, attended a number of District Conferences and, until his demise, was actively involved in numerous activities and projects as a Rotarian.

Those who knew late Justice Madhub well would also know that he was an animal lover. During his school days, I am told, he was a great fan of Astérix, Obélix and Idéfix. He was an ardent fan of Manchester United Football Club and very few of us here present would know that, in fact, his name "Bobby" comes from his father who had always been a great fan of Sir Bobby Charlton, former Manchester United player.

There is no doubt that Late Justice Madhub was someone who left no one indifferent with his sense of wit, his sense of professionalism, his ability to make anyone at ease with his good humour and his ability to crack jokes effortlessly. We have lost a person of great affability and a great friend. He shall no doubt be greatly missed by one and all.

In the name of my office and in my own personal name, I should like to extend our sincere condolences to late Justice Madhub's spouse Ishwari, his two children Eshna and Nikhil, his two sisters and brother as well as to the whole of his family. I also wish to place on record our sincere appreciation for his positive contribution to the work of my Office and the Judiciary during all those years. He may be gone too soon, but he will be remembered and missed for very long.



Mr K. Andy Putchay, State Counsel wins Commonwealth International Cross-Border Exercise Award

Last November, the Commonwealth Secretariat invited the Attorney-General's Office (AGO) to nominate a participant to represent the Republic of Mauritius in a weeklong international cross-border exercise and award ("The Exercise") aimed at developing connections with counterparts in other Commonwealth countries and creating an international network to prosecute cross-border crime.

Participants in The Exercise had to possess the necessary specific skills for requesting and providing electronic evidence. That entailed knowledge related to the national legal framework for identifying, preserving, and seizing digital evidence; an understanding of considerations related to electronic evidence, such as forms of evidence, integrity, and chain of custody; an understanding of the strengths and limitations of digital forensic approaches; a knowledge of a range of international legal bases for cooperation.

The Exercise implemented the Commonwealth Cyber Declaration, a key outcome of the 2018 Commonwealth Heads of Government Meeting where heads of government committed "to use national contact points and other practical measures to enable cross-border access to digital evidence through mutually agreed channels to improve international cooperation to tackle cybercrime."

Being part of the AGO's International Cooperation in Legal Matters Unit and having experience in matters relating to international Mutual Legal Assistance, Mr. K. Andy Putchay, State Counsel was nominated to participate in The Exercise. Mr. Putchay attended a Regional Workshop in February 2019 on enhanced co-operation in gathering e-evidence across borders in Johannesburg.

The Exercise took place from 9th to 13th December 2019 and simulated cyber-terrorist attacks on critical infrastructures involving international criminal networks. Working remotely from their respective countries, participants were divided into small groups to work on a complex hypothetical cybercrime scenario. "The evolving, fast-moving scenarios challenged their legal expertise and their ability to communicate with colleagues across continents, jurisdictions and time zones." Over the course of that week, participants collaborated "to pursue available informal routes to preserve and secure

digital evidence, draft and execute mutual legal assistance requests, commence extradition processes and establish joint investigation teams." Participants were assessed "on their legal knowledge, drafting skills, problem solving ability, communication to advance cooperation, application of data protection obligations and effective decision making to achieve a successful outcome." The awards would be adjudicated in an objective process by an independent panel according to established criteria.

Eighteen countries took part in The Exercise representing all the regions in the Commonwealth. On 24th February 2020, the Commonwealth Secretariat informed the AGO that the review panel has selected Mr. Putchay as one of the winners. It also transpired from subsequent debriefing at Marlborough House that Mauritius had provided the most comprehensive response among all the winners which included Canada, Scotland, Fiji and Saint Vincent and the Grenadines.

Mr. Putchay was honoured at an awards ceremony at Marlborough House, London on Wednesday 4th March 2020 and was presented with his award by The Right Honourable Patricia Scotland QC the current Commonwealth Secretary-General. The Exercise was part of the Commonwealth Cyber Capability Programme funded by the UK's Foreign and Commonwealth Office.

We warmly congratulate Mr. K. Andy Putchay on his achievement in winning this international award.



Keeping In Touch With Case Law

by Ms Vidisha Sunkur, State Counsel

Les Terraces de Martello Ltee (In Receivership) v Mauritius Revenue Authority 2020 SCJ 142

Factual Background:

This case pertains to an application pursuant to section 71 of the Courts Act for the 'main levee' and/or the cancellation/reduction of a privilege inscribed by the Respondent on all the movable and immovable property of the Applicant company (in receivership), which privilege was taken after the inscription of fixed and floating charges in favour of Afrasia Bank to whom the Applicant Company is indebted and pursuant to whose instrument a Receiver/Manager was appointed.

Legal Issues:

The priority of the respective claims of the Receiver/Manager and the Respondent was a hotly contested issue during the proceedings. Statutory provisions namely that of the Code Civil Mauricien, the Insolvency Act, the Income Tax Act and the Mauritius Revenue Authority Act were referred to. Heavy emphasis was placed on the interpretation of section 204 of the Insolvency Act and preferential claims with regards to receivership.

Conclusion:

The application was made pursuant to section 71(1) of the Courts Act and was subject to the proviso under section 71(2) of the Courts Act, in relation to which the Court held that "it is now settled law that any objection raised must be a serious objection or one which prima facie has some substance and is not frivolous or vexatious" and "once the Judge in Chambers reaches the conclusion that the objection has some substance and is not frivolous, he must refer the matter to the competent court, it is not his task to probe into the merits of the case". Having found that the objections raised by the Respondent were far from being frivolous or vexatious, the Court declined the application and referred the matter to the competent Court.

Fangamar L. D. L. v The State of Mauritius & Anor 2020 SCJ 103

Factual Background:

This case is in relation to an application for conditional leave to appeal to the Judicial Committee of the Privy Council ("the JCPC") under sections 81(1)(a) and 81(1)(c) of the Constitution against an interlocutory judgment of two Judges of the Supreme Court ("the Decision") in an application for constitutional redress made by the Applicants. The

Application was resisted by the Respondents.

Legal issues raised:

1. Whether the Decision required an interpretation of the Constitution.
2. Whether the Decision was in respect of an appeal from a final decision on an action under section 17 of the Constitution.
3. Whether the Decision being an interlocutory one, was in the nature of a final decision.
4. Whether the application for leave was neither frivolous nor vexatious, irrespective of the reasons given by the trial court to set aside the Applicant's plaint with summons.

Conclusion:

- (1) The Court held that at most what had to be determined in the application for constitutional redress was whether the composition of the Court of Appeal that heard the Applicant's appeal was consistent with the constitutional provisions invoked or whether it was in breach of the applicant's right to a fair hearing, and this did not require an interpretation of any provision of the Constitution. Accordingly, as regards, section 81(1) (a) of the Constitution, the application was found to be misconceived
- (2) The Court was of the view that the interlocutory judgment debars the applicant from any further litigation on the same cause of action and therefore the Decision was a final one.
- (3) The Court found that the application for constitutional relief was "a sort of parallel proceedings" to nullify any decision of the Court of Criminal Appeal against the Applicant and "in pursuing his action after the judgment of the Court of Criminal Appeal, he engaged in what is tantamount to be a collateral attack on the judgment of the appellate court for want of a fair hearing, which judgment he had accepted by not challenging it by way of an appeal opened to him in the normal course". Such a course of conduct was held to be frivolous and vexatious and despite the 'as of right appeal from final decisions of section 17 of the Constitution', the Court held that it is their duty not to allow such frivolous and vexatious appeals before the JCPC pursuant to section 81(4) of the Constitution.

The application was accordingly set aside.

Daloo B. v Poste la Fayette & Anor 2020 SCJ 15

Factual Background:

This case relates to a dispute as to whether a plot of land alleged by the Plaintiffs to have been occupied by his late parents and himself with all the requisites of an acquisitive prescription is the same plot of land leased by the Defendants to the Plaintiff's late mother and thereafter to Plaintiff, or whether there are distinct plots of land. The Court heard witnesses from both Plaintiff and the Defendants, and also assessed the survey reports from their respective land surveyors.

Decision: The Court held that "on the basis of the pleadings, and in order for the plaintiff to succeed, the burden is on him to satisfy this Court on a balance of probabilities that (a) the two plots are distinct; and (b) he has been in occupation of the land in lite with all the requisites of acquisitive prescription". The Court applied the principles set out the legal framework of acquisitive prescription in the opinion of the Judicial Committee of the Privy Council in *Seebun v Domun & Others* [2019] UKPC 39 and held that "there is a legal presumption in favour of the plaintiff who is occupier of the land that his possession is "à titre de propriétaire but this presumption can be rebutted by proof that the possession is a precarious one". In light of the evidence before the Court including the survey reports, the Court was of the view that the Defendants had successfully displaced the said legal presumption in favour of the Plaintiff whose possession was found to be tainted with precariousness.

Case Summary & Comparative Analysis: Top Fm Ltd V The Independent Broadcasting Authority 2020 Scj 221 by Nitish Bissessur, Legal Research Officer

Key Words:

Judicial review, Claim for damages, final decisions and 'step in an on-going process'.

Procedure

This is an application for leave to apply for judicial review of two decisions taken by the respondent and conveyed to the applicant by way of letters respectively dated the 3RD April 2020(1ST decision) and the 8TH April 2020(2ND decision). Prayers A-D and findings of the Court

Prayers A & C:

After considering the affidavit and documentary evidence on record, together with the submissions of counsel on both sides, the judges were of the view that the application discloses an arguable case regarding the first decision only (3RD April 2020), and that leave should be granted with regard to prayers A and C in respect of the respondent's first decision.

Prayer B:

The Court went on to consider that the second decision (8TH April 2020) is in fact a letter requesting the applicant to show cause why it should not be sanctioned for a potential

breach of the Code of Conduct for Broadcasting Services and is therefore not a final decision.

Prayer D:

The applicant is also seeking if a claim for damages could be included in such an application for judicial review. The Court finds that it is indeed arguable in this case and grants leave in respect of prayer D in respect of the first decision only.

Analysis

(i) Leave to apply for judicial review for the 1ST & 2ND decisions: Rules and Exceptions

In this case the Court is of the view that, as a rule, judicial review lies only in respect of a final decision against which all available remedies have been exhausted, and not against "a step in an on-going process" (vide *Jogarah V. & Others v National Transport Authority* [1997 SCJ 163], and *Teeluckdharry K. v The Bar Council & Another* [2019 SCJ 50]). Nonetheless, relying on the case of *Teeluckdharry*, the applicant submits that leave for judicial review may be granted where there are exceptional circumstances and where a decision, albeit not final, is ab initio in breach of the rules of natural justice, procedurally flawed, unreasonable and unfair. A perusal of the affidavits in support of the application and of the statement of case however shows that there is no averment made in relation to the existence of exceptional circumstances or to the "second decision" being defective ab initio. In other words, the submissions made on behalf of the applicant in that regard are not borne out by the evidence on record, so that the present application does not disclose an arguable case with respect to the "second decision. Moreover, the Court considers that the applicant's challenge of the second decision is, at this stage, premature. The application in effect does not disclose any compelling reason to prevent the respondent from exercising its statutory powers and performing its statutory duties. In these circumstances, leave is refused with regard to prayer B.

(ii) Judicial Review and Claim for damages

In the light of the observations made by the Judicial Committee of the Privy Council at paragraph 22 of its Judgment in *Panday D. v The Judicial and Legal Service Commission* [2008 MR 371], and at paragraphs 39 and 40 of the Judgment in *The State of Mauritius & Another v The (Mauritius) CT Power Ltd & Others* [2019] UKPC 27(Extracts reproduced below), the Court finds that it is arguable at this juncture whether a claim for damages can also be included in such an application for judicial review. Since we have found that there is an arguable case regarding the "first decision" only, leave is granted in respect of prayer D in relation to that "first decision" only

Conclusion

The Court accordingly grants leave in respect of prayers A., C. and D. (with regard to the "first decision" of the 3RD April 2020 only), and, in the circumstances, we make no order for costs. Leave having been refused as regards prayer B., the Order issued following the grant of prayer E on the 15th April 2020 is discharged.

Recent events in pictures



From left to right:
Carol Green Jokhoo,
(Assistant Solicitor General),
Dheeren K. Dabee GOSK SC
(Solicitor General),
Mrs Hassina Bibi Lallmahomed
(Confidential Secretary),
Mrs Devmattee Mangatha
(Confidential Secretary) ,
Mrs Prameeta D. Goordyal Chittoo
(Assistant Solicitor General),
Honourable Maneesh Gobin
(Attorney General),
Mr Rajeshsharma Ramloll SC
(Deputy Solicitor General)



From left to right: Carol Green Jokhoo,
Prameeta Goordyal Chittoo, Luchmyparsad Aujayeb
with His Excellency President P. Roopun



Left to right: Rajesh Ramloll SC; Miss Bibi Fazila Maudhoo,
Confidential Secretary upon her retirement after 11 years of
service at the Attorney General's Office and 45 years in the
public sector; Dheeren K. Dabee GOSK SC (Solicitor General)
and Sunildutt Thanoo (Chief Legal Secretary)