Bhurtun Chambers

Monthly newsletter

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Introduction

Mauritius is gifted with a very rich History which has carved its legal system. After the Arabs, Portuguese and Dutch, Mauritius went through important developments at various levels by the French and subsequently by the British.

The Code Napoleon was promulgated in France in 1804 and promulgated in Mauritius in 1805. With the coming of the British in 1810, a Treaty of Capitulation allowed the continued application of the laws put in place by the French whilst the British enforced new laws.

The colonisation of Mauritius by the French and the British has led to the development of a hybrid legal system. The substantive law remains mainly French based law, for example, the Code Civil Mauricien and the Criminal Code. The laws relating to procedure was based on English principles.

Such hybrid legal system may in certain instances lead to conflicting situations which require a proper understanding of the evolution of the legal system under the French and English periods.

One example of such a situation is Article 6 of the Code Civil Mauricien which does not allow a system of case law to be followed. However, the Supreme Court, which was established under the British Era, has all the powers of the Courts of Queen's Bench and therefore can apply the system of case law.

Another example is set out in the review of interesting recent Supreme Court judgments delivered in September 2021.

This newsletter also contains a review of interesting tax decisions delivered last month.

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Decisions Delivered by the Assessment Review Committee

1. **Raja Abdool Motalleb v Director General, Mauritius Revenue Authority ARC/CUS/01-16**

The Applicant benefitted from concessions on VAT and Excise Duty based on the fact that he was considered to be a Returning Resident. One of the conditions was that the Applicant had to submit, at the end of each period of one year, for four years, evidence was he was still residing in Mauritius.

The Committee referred to the following extract from GN 107 of 2008:

> (7) Where a returning citizen has been granted concession on a motor vehicle or motorcycle, he shall, for a period of 4 years from the date of validation of the import declaration, not absent himself from Mauritius for more than 183 days in aggregate during each year or any other period unless the Director-General is satisfied that his absence is due to any just or reasonable cause.

Given that the Applicant stayed outside Mauritius for more than 183 days in all four years, the Committee upheld the decision of the Respondent to claim proportionate duty and VAT from the Applicant.

2. **Rey & Lenferna Ltd v Director General, Mauritius Revenue Authority ARC/CUS/92-18**

The Applicant imported four separate consignments and declared the goods as "CCTV systems". Different items of the CCTV system were imported separately as follows:

1	Exchangers, LCD Screen Monitors, Hard disks, Cameras, Video Balun
2	NVR, Exchangers, Hard disks, LCD Screen Monitors
3	Cameras
4	Cameras, Adapter, Hard disks, Video Balun

The Committee referred to the different applicable principles, more importantly, the principle that goods are classified "as presented" at Customs. The Committee therefore

considered that the various components have to be classified as presented and could not be classified as CCTV systems.

It was only after the said importation that the law was amended to provide for such situation, by adding section 30A to the Customs Act, as follows:

> ***30A. Entry of imported goods in multiple or split shipments***
>
> The Director-General may allow goods imported by an importer to be –
>
> (a) imported in multiple or split shipments; and
>
> (b) entered by the importer under the same classification that the goods would have been entered if they had been imported in one shipment, in such manner and on such conditions as the Director-General may determine.

This new provision was not applicable given that it was enacted after the imports. The Committee further highlighted the fact that even the new law will apply on certain conditions of the Director General. The representations were set aside.

Selected Decisions Delivered by the Supreme Court of Mauritius.

1. **Best Flour & Co. Ltd v The Director General, The Mauritius Revenue Authority 2021 SCJ 301**

The Applicant sought directions from the Supreme Court as to the rank of the following:

a) charge (fixed and floating charges in favour of the Mauritius Commercial Bank Ltd) (MCB) registered and inscribed on 17 March 2016 in Vol CH 201603/000406; or
b) privilege (in favour of the Mauritius Revenue Authority) (MRA) transcribed in Vol IV 20170/000175 on 12 October 2017.

The inscribed privilege taken by the MRA was governed by section 21L of the Income Tax Act and section 204(2) of the Insolvency Act, provided that:

> *"(2) The persons entitled to payment out of the property of a company in receivership shall be in such rank of priority as may be prescribed."*

At the material time, no rank of priority was prescribed. The Court considered that Articles 2147, 2148 and 2152 of the Code Civil applied only to uninscribed privilege.

The Supreme Court analysed the nature of the inscribed privilege including the fact that the Applicant would need the consent of the Director General to erase the inscribed privilege in order to sell the property. It concluded that the taxes due to the Director General of the MRA have to be paid first out of the proceeds of sale of the properties.

2. **Sewtohul D v Gutty K. & Ors 2021 SCJ 303**

The Applicant was seeking leave of the Supreme Court to bring a derivation action against the Respondents. A derivative action is basically an action brought by a director or shareholder in the name and on behalf of a company.

The conditions that must be satisfied was summarised by the Court as follows:

> In determining whether to grant leave to the applicant to lodge a derivative action pursuant to Section 170 of the Companies Act the Court must bear in mind the likelihood of the proceedings that may follow, the costs of the proceedings in relation to the relief likely to be obtained, any action already

taken by the company to obtain relief and above all the interests of the company in the proceedings being commenced.

Based on the facts, the Court observed that the Applicant entered the case for the benefit of his personal interests and not those of the Company. Leave was therefore not granted to the Applicant.

3. Sayed-Hossen S. A v Bablee S. G. & Ors 2021 SCJ 310

The case dealt with a procedure called as "calling a party on personal answers".

The relevant provisions of the law are as follows:

Article 324 of the Code de Procédure Civile:

> Les parties peuvent, en toutes matières et en tout état de cause, demander de se faire interroger respectivement sur faits et articles pertinents concernant seulement la matière dont est question, sans retard de l'instruction ni du jugement.

Section 167 of the Courts Act:

> **Examination on faits et articles**
> Where a party to a suit is called upon to give his unsworn personal answers, he may be examined as an adverse witness by a party calling him and afterwards examined on his own behalf, but only as to matters arising out of the examination made by the party calling him, and he may then be reexamined touching any question put to him on his behalf.

Rule 36 of Supreme Court Rules 2000:

> **36. Examination on personal answers**
>
> (1) Where a party intends to call another party to give his unsworn personal answers, he shall apply ex-parte to the Master for an order summoning to do so.
>
> (2) Where the party to be examined on personal answers is a corporate body, only a person who can legally represent the body may be summoned, and a list of questions to be put to the body shall be served upon it.

(3) The Master shall on good cause shown, order the other party to appear before the Court for his examination on personal answers.

(4) The order and in the case of a corporate body, the list of questions shall be served upon the other party at least 5 days before the date fixed for the examination on personal answers.

(5) Where the other party who has been duly summoned does not appear, his attendance may be enforced in the same way as in the case of a witness.

(6) Notwithstanding paragraph (1), any party may at the hearing of a case, where the other party is present, move the Court to call the other party to be examined on his personal answers.

(7) The party giving his personal answers shall not be required to be sworn or to take an oath when examined as a witness and Counsel may put any question which the Court considers proper and relevant to the matter in issue between the parties.

(8) The party giving his personal answers shall not, while under examination, communicate with his Counsel or attorney.

(9) After the examination on personal answers, the Court may proceed to hear the case.

The procedure of examination on personal answer is an exceptional one and the following extract from the case of **Thondrayen v The State Bank of Mauritius [2015 SCJ 414]** sheds light on the instances in which such procedure may be resorted to:

> It is first necessary to examine briefly the history of our law, which was initially borrowed from the French law on "interrogatoire sur faits et articles", but which has evolved and led to the shaping of the present law applicable to "examination on personal answers.
>
> This has been marked by the gradual introduction into our law of some important features of the English law of civil procedure. Thus with the advent of pleadings and more particularly the exchange of particulars, it was not necessary any more to resort invariably to the tedious and cumbersome procedure of "interrogatoire sur faits et articles" prescribed under Articles 325 to 335 of the French Code de Procédure Civile…… Such a

> procedure no longer had its "raison d'etre" except in one situation. Our hybrid adjectival law still had to accommodate the French law and procedure applicable to the admissibility of oral evidence as laid down in Articles 1341 to 1348 of the Civil Code, more particularly as regard the rules and procedure for laying the foundation upon which authorisation may be granted by the Court to admit oral evidence to prove the terms of a contract.

The Supreme Court therefore reached the conclusion that the right to call a party for examination on personal answers was not an absolute one and was subject to the discretion of the Court.

The Court then went on to analyse the motion of Counsel for Respondent No.3 to call the petitioner on personal answers. The Court concluded that the purpose for which such motion was made was not consistent with the principles as set out above and disallowed the motion.

4. Mohummud Siddick Chady v The State & Anor 2021 SCJ 330

The matter concerned the conviction of the Appellant by the Intermediate Court for corruption offences. This judgment is interesting for two reasons.

First, it refers to the evolution of the law under the French Colonisation and subsequently under the English Colonisation. The issue was whether a contract may be proved by oral evidence in light of Article 1341 of the Code Civil which read as follows:

> Il doit être passé acte devant notaires ou sous signatures privées de toutes choses excédant la somme ou la valeur de cinq mille roupies, même pour dépôts volontaires; et il n'est reçu aucune preuve par témoins contre et outre le contenu aux actes, ni sur ce qui serait allégué avoir été dit avant, lors ou depuis les actes, encore qu'il s'agisse d'une somme ou valeur moindre de cinq mille roupies.
>
> Le tout sans préjudice de ce qui est prescrit dans les lois relatives au commerce.

The Supreme Court referred to the case of **Sewnarain v R [1986 MR 149].** In that case, the Court considered that in light of section 162 of the Courts Act, a new system of criminal procedure was introduced that affected the rules of evidence.

The following extracts from the case is worth quoting:

Those laws, as can be seen, overhauled our whole system of criminal procedure and provided that we should follow the English pattern. It was laid down that witnesses for the Crown could be subpoenaed to appear, compelled to answer questions, and that they could be cross-examined and, if need be, re-examined. The trial Court was given the task and the duty of obtaining and taking down the oral evidence adduced in a case. Moreover, civil and criminal trials were to be quite distinct operations: the result of proceedings in a criminal suit were to have no bearing on, and no connection with, any civil cause that could arise from the same facts.

The French jurists, when they first decided to apply civil law rules of proof of contracts to criminal cases of embezzlement, did so for a very logical reason but which had to do with their procedural system. In a system where "le criminel lie le civil", where very often there is a "partie civile" who is represented at the criminal trial, and where the latter may even obtain, in the same cause, reparation for his loss, it would be ludicrous to have two sets of rules of proof: the complainant cou(sic), if that were the case, foreseeing the problem he might be faced within a civil court, simply get round it by lodging a complaint with the "juge d'instruction". But not only did we no longer have such a procedural system in force as from the early 1850's, we also had set up a totally different accusatorial method, with no possibility for the trial Court to go on anything else than the evidence ushered in before it, and our law had specifically provided for witnesses to be examined, cross-examined and re-examined. The Chief Judge therefore appears to have been perfectly right in holding that there was no longer any warrant for blindly following the case law and "doctrine" of French penal law on the issue**.**

…the foundation of our law of evidence, as set out in section 162 of the Courts Act, is that we should first look at our statute law and if, but only if, our statutes are silent, go to English law. And the Judges, as we have seen rounded things off by saying that, pursuant to section 162, once it was established that article 1341 et seq were operative on the point, that was an end of the matter. But the Court completely overlooked the point that the framers of the Penal Code in 1838 were operating within the context of a Code d'instruction Criminelle

> which had made it not only easy, but indeed logical in France, to apply the civil law rules at a criminal trial for embezzlement, and omitted to ask itself whether, precisely by reference once more to section 162 of the Courts Act, the legislator had not, in a totally new perspective, put on the statute book a number of enactments which set up a new system of criminal procedure which was bound to be held to affect the method of proof. We have seen how it was not only the Code d'Instruction Criminelle which was repealed, but also all other laws of any kind that were inconsistent with the new setup, including, incidentally arrêtés - and we know that it was an arrêté which enacted the Code Napoléon here.

The Supreme Court therefore concluded that, in criminal cases, a contract may be proved by way of oral evidence.

Secondly, the Director of Public Prosecutions may appeal to the Supreme Court in a situation where an Accused has been convicted but where the sentence is considered to be too lenient. In the present matter, the term of imprisonment of 9 months was substituted by a term of 15 momnths.

5. Etienne J. J.R & Anor v The Director General, Mauritius Revenue Authority 2021 SCJ 305

This is an interesting case on the application of repealed legislations. The matter concerned the personal liability of principal officers of companies.

The relevant provision of the VAT Act read as follows:

> **63A. Tax liability of principal officer of private company**
>
> (1) The principal officer of a private company shall –
>
> (a) be answerable for the doing of all such things as are required to be done by that company under this Act;
>
> (b) be required to retain out of any money or property of the company, so much as is sufficient to pay VAT which is or will become payable by that company; and
>
> (c) be personally liable in respect of the VAT payable by that company to the extent of any amount he has or should have retained under paragraph (b).

(2) In subsection (1) – "principal officer" means the executive director, or any other person who exercises or who is entitled to exercise or who controls or who is entitled to control, the exercise of powers which would fall to be exercised by the Board of directors.

The history of the above provision is as follows:

1. Enacted in 2011 with effect as from 15 January 2012;
2. Repealed as from 09 August 2018;
3. Re-enacted as from 25 July 2019.

The claim of the Respondent was dated 19 October 2020 for the period April 2012 to May 2013. It was therefore argued by the Applicant that the law that was applicable during that period had been repealed and that the new law, although identical, could not apply retrospectively and therefore could not be applied to impose personal liability on the Applicants for that period.

On this issue, the Supreme Court referred to section 17 of the Interpretation and General Clauses Act, which is reproduced below:

17. Effect of repeal

(3) Subject to subsection (4), the repeal of an enactment shall not –

(a) affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed enactment;

The Supreme Court therefore concluded that the liability of the Applicants arose under the law as enacted in 2012, notwithstanding its subsequent repeal. The subsequent repeal as from 09 August 2018 did not nullify such liability and therefore could not affect the claim of the Respondent, even made in 2020.

The Coming into force of Enactments

According to section 46 of the Constitution, a law will come into operation when it is published in the Government Gazette. The said law will be effective as from the expiry of the day immediately preceding the day on which the publication is done.

An enactment published in the Government Gazette may also provide that it will come into effect on a given future date or on a date to be fixed by Proclamation. Parliament may also make laws with retrospective effect.

One example of amendments brought by the Finance (Miscellaneous Provisions) Act 2021 raised a lot of questions by members of the public given that same took effect on a day prior to the publication of the Act. The amendments related to the change in conditions for a person to be eligible for VAT refund on construction of residential buildings. Whilst the Act was Gazetted on 05 August 2021, the amendments took effect as from 12 June 2021. In such a situation, it becomes highly debatable as to whether the date of the expenditure incurred or the date of the application made for the refund would be the date that would determine which law to apply.

In the absence of transitional provisions, the said amendments brought a certain degree of uncertainty in the rules applicable for such refund and may lead to an unequitable application of the rules by the Mauritius Revenue Authority.

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