TEMPLE LAW

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TEMPLE JOURNAL

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A collection of articles by Temple Law analysing important aspects of the legal field.

Editorial Note

Dear Readers,

With enthusiasm and a clear vision, we introduce Temple Journal, an innovative initiative by Temple Law - the first law firm registered in the Republic of Mauritius. Founded and led by a Senior Counsel with nearly 40 years' experience at the Mauritian bar, and now enriched by the insights of a former Director of Public Prosecutions and Senior Counsel, our firm brings expertise and a steadfast commitment to the legal profession.

The Journal's concept is crafted to make a modest contribution to the ocean of legal scholarship, offering a unique and comprehensive platform for the critical analysis and academic exploration of Mauritian law. We focus on profound, thoughtful critique and identifying grey areas in our legal framework that may necessitate reform, potentially prompting the requisite intervention for resolution.

Our mission is twofold: to provide a platform for scholarly debate and to advocate for legal reforms that reflect the evolving needs of our society.

Certainly, our contributors' perspectives may not always align with every reader's views on specific topics, highlighting therefore the beauty and essence of critical legal thinking. In short, all sides of an argument are to be rigorously explored until resolved by the appropriate forum.

In this inaugural edition, we explore a diverse array of critical issues within our legal system. One article reviews the reviewability of presidential decisions advised by the Commission on the Prerogative of Mercy, highlighting the balance between executive discretion and judicial oversight. Another interesting piece scrutinizes statutory time limits and their judicial implications.

Mauritian succession law complexities, especially for foreign residents and investors are dissected. The scope of the Employment Relations Tribunal regarding severance allowance is also examined, proposing solutions for clearer legal interpretations. We further explore the right to asylum in Mauritius and address workplace violence, questioning the adequacy of current legal measures. Timeliness in judicial review applications, is another key topic.

Finally, we provide practical insights into the role of practice managers in law firms, sharing strategies for effective practice management in today's evolving legal landscape.

These articles aim to inform, are thought-provoking, and showcase the critical analysis we promote through this Journal. We encourage readers to engage, share insights, and join this vital conversation, helping us uphold high standards of legal scholarship and effect meaningful change. Thank you for your support as we advocate for the law in a new way!

Warm regards,

Faarzaad Soreefan & Anuja Ghoorah

July 2024

Editorial Committee

Contributors

Urmila Boolell – Senior Counsel & Head of Chambers, Temple Law
Satyajit Boolell – Senior Counsel & Chairman, Temple Group
Willem Jansen van Rensburg – Foreign Lawyer & Director of Operations, Temple Law
Nikhil Boolell – Barrister & Partner, Temple Law
Faarzaad Soreefan – Barrister & Senior Associate, Temple Law
Anuja Ghoorah – Barrister & Senior Associate, Temple Law
Jageshwarsingh Lukeeram - Attorney, Temple Law
Zakariyya Seekdaur – Barrister, Temple Law
Hanshini Shiksha Jalim – Barrister, Temple Law
Sarojini Naidoo – Practice Manager, Temple Law

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Statutory time limits – a moving goalpost

ARTICLE WRITTEN BY
URMILA BOOLELL SC
ZAKARIYYA SEEKDAUR

Statutory time limits serve to bring a sense of order in the litigation process. Firstly, they determine the time line within which an aggrieved person may seize the court, they also put pressure on certain parties *e.g* employers, to act decisively within a fixed delay, they provide a guideline for the judicial and legal procedures and they generally ensure that actions involving legal responsibility are conducted within reasonable time limits. As a general rule, it would be fair to say that it is highly desirable for a functional justice system to apply statutory time limits strictly.

There are however penalties usually attached to the non-respect of statutory deadlines – the harshest of which is the inability to pursue a judicial redress. In such cases, the aggrieved party – no matter how strong his case may be – will be debarred from being heard by the Court on account of having delayed beyond the statutory deadlines. The implication of this "all or nothing" approach has the effect of imposing a threshold test and puts a high onus on the courts in determining how to interpret statutory time limits.

Whilst it would probably be sensible to expect that all statutory provisions containing time limits should be applied with the same rigour, the reality is different. A body of law is being

developed whereby there is a substantial disparity in the treatment of statutory delays applicable in various circumstances. As a result, it is becoming increasingly challenging to ascertain whether statutory delays still play their role of procedural watchdog or whether they are in some areas, becoming irrelevant.

The Courts have been consistent in adopting a hard-line approach in applying statutory deadlines strictly in employment cases. Being no doubt influenced by the rights of workers as understood by the International Labour Organisation, and the various international conventions signed by Mauritius in this regard, our Courts have applied the statutory time delays regarding the phases leading up to the termination of employment of a worker. In particular, the delay of 7 days from the end of the hearing within which the employer must notify the worker of the outcome of such hearing has been very rigidly interpreted. The Privy Council has also upheld this approach – which seems to have been put to rest with the case of **Mauvilac Industries Ltd v Ragoobeer [2007] UKPC 43**.

Likewise, the Courts have been strict in the application of delays in procedural matters. The statutory delay of 21 days for the lodging of an appeal is applied with sledgehammer ruthlessness. This stretches to applications for new trials made outside delay – vide **Appasamy & Anor v. The Mauritius Commercial Bank Ltd [2005 SCJ 81]** and to applications to appeal to the Privy Council outside delay – *vide* **Sewraz Freres Ltd (in receivership) v British American Tobacco 2013 SCJ 400.**

The same principle seems to apply to statutory demands made outside delay under the Insolvency Act. In the case of **Compagnie Sucrière de Bel Ombre Ltd v Alliance Building Contractors Ltd [2016 SCJ 131]**, the trial judge refused an application for a statutory demand on the ground that it was made outside the mandatory delay imposed by section 181(6)(a) of the Insolvency Act. On appeal, the Court (K.P. Matadeen C.J. & Chui Yew Cheong J.) dismissed the appeal and referred to sections

181(2) and (3) of the Insolvency Act, holding as follows:

"A reading of the two subsections leaves no doubt that the statutory delay of 14 days is mandatory and should be strictly observed. Non observance of the delay will result in the inability of the Court to entertain the application together with the reasons invoked in the application to set aside the demand. In other words, the application is deemed not to have been made.
The learned Judge accordingly cannot be faulted for refusing to entertain the application on the ground that it was made outside the statutory delay and also for not considering the question of ouster of jurisdiction in favour of arbitration invoked in the application."

The same reasoning seems to stretch to incidental applications for the stay of sale by licitation proceedings. In the case of **Narrainen Y. S v Narrainen S. S & Anor 2017 SCJ 271**, the appellate Court (Caunhye Ag S.P.J. & Kwok Yin Siong J.) was called upon to consider the ruling of the Master who set aside an incidental application under sections 102 and 105 of the Sale of Immovable Act, for not having complied with the time limit provided therein. When upholding the Master's decision, the Court quoted with approval the following dictum in **Nuthay v Lallmohamed & Anor [2003 SCJ 33]**:

"If such matters were to be considered the whole system governing judicial sales would come to a standstill where defendants choose at the last minute to flood the Master with loads of documents to support any objection they may wish to present against the sale. That is why statutory provisions exist to regulate the conditions, including the timing, which must be satisfied with regard to the taking of objections to judicial sales – vide Sections 102, 86 and 87 of the Sale of Immoveable Property Act (the Act). The Deputy Master & Registrar was therefore justified in refusing to postpone the sale considering that the objection to the sale was not in compliance with the statutory requirements"

In all these cases, the invocation of exceptional circumstances displays the existence of a judicial discretion – which is however very sparsely exercised. In the case of **Malloo v/s The State 2010 SCJ 13**, the appellate Court (Caunhye & Devat JJ.) considered a case where an application for the filing of additional grounds of appeal in a criminal case was made outside the statutory delay. The Court found that there were compelling grounds to grant an additional ground of appeal and remarked as follows:

"It stands to reason that the rule as to the peremptory application of time limits ought not to be followed with undue rigidity, and without exception, in a manner which may lead to a serious miscarriage of justice. One must not, however, lose sight of the necessity for grounds of appeal to be lodged within the prescribed time limits and to adhere strictly to the statutory time limits in respect of an appeal following conviction. If that were not so, it would be impossible to achieve finality and it might lead to abuses in practice. Appellants should, as a result, be prudent in observing strictly the provisions of section 93 and, more particularly, the time limits prescribed therein as failure by them to do so will entail the serious consequence of their not being able to raise additional grounds of appeal beyond the statutory time limit. Whether or not the Court proprio motu will raise the point is a matter for the Court itself to consider in the exercise of its discretion in order to avoid any gross injustice and not for the appellants to raise by way of belated additional grounds of appeal. The appellants and their legal advisers should therefore be wary of omitting or overlooking to raise in their grounds of appeal any fundamental defect in the information or in the judgment or any material irregularity in the course of the trial trusting that if there is any such defect or irregularity, the appellate Court will either of its own accord take up the matter proprio motu, or exceptionally allow additional grounds of appeal to be filed outside the statutory time limit."

In matters concerning the conduct of litigants in general, the Courts have tended to take a strict approach in upholding the application of statutory deadlines. The judicial cursus appears to be that there may be a discretion in allowing tardy actions but such departures will be exceptional and would require acceptable explanations. In the case of **Salim Muthy v The State of Mauritius 2020 SCJ 318**, the applicant who described himself as a "reputed and respected social worker", sought constitutional relief against various provisions of the

Prevention of Terrorism (Amendment) Act 2016 – which he claimed were unconstitutional. Rule 2(2) of the Supreme Court (Constitutional Relief) Rules 2000 provided that :"Except with leave of the Supreme Court, on good cause shown, no application shall be lodged more than 3 months after the right of action arises." The plaint was lodged well after the expiry of 3 months, after the law was passed. The Supreme Court (Narain & Dabee JJ.), held as follows:

*"Now rule 2(2) does allow for an application for constitutional redress or relief to be made outside the prescribed delay of three months in exceptional cases where the applicant has shown good cause in relation to the delay and obtained leave from the Supreme Court to that effect (see also **Luk Tung v The Commissioner of Police & Ors** [1996 SCJ 240], **Mohamadally v The State** [1999 SCJ 383] and **De Boucherville v The Director of Public Prosecutions** [2002 MR 139]). However, in this case no attempt, let alone any serious attempt, has been made by the plaintiff to show good cause and obtain leave from the Court, although his plaint was duly signed by his attorney from the start. The delay in lodging the plaint is in the circumstances fatal to the plaint."*

Having considered the above cohesive approach of the Courts in the interpretation of statutory deadlines, it is noted that the situation begins to change with the application of such deadlines in the realm of public law. In the case of **Seebaruth v. The District Council of Flacq 2020 SCJ 138** , the appellate Court (Chan Kan Cheong & Gunesh- Balaghee JJ.) considered the consequences of the failure of the Environment and Land Use Tribunal to deliver its determination within the time limit prescribed by section 5(7) of the Environment and Land Use Appeal Tribunal Act. The conclusions of the Court were as follows:

"[...] The Tribunal, therefore, has important public functions and powers. Its determinations are of public interest.
If these determinations were to be invalidated merely because they were delivered outside the statutory time limit and, as a result, the appeals had to be heard anew, this could cause public inconvenience and injustice, the frustration of the purposes of the legislation and additional public expense.
In these circumstances, we are of the view that the legislature could not have intended that a breach of the time limit under section 5(7) of the ELUAT Act would prevent the Tribunal from discharging its public function and duty. In other words, we do not believe that it was the intention of the legislator that non-compliance with the time limit would result in fettering the

jurisdiction of the Tribunal and invalidating its determination.
Our view is buttressed by the fact that, tellingly, no sanction is provided in the law for failing to comply with the time limit prescribed under section 5(7) of the ELUAT Act. Neither does the Act provide that any breach of the requirement under section 5(7) will render the determination of the Tribunal invalid, nor does it indicate what will be the consequences thereof.
This is not to say that this Court will never declare invalid a determination delivered in breach of the statutory time limit by the Tribunal. One might envisage a particular case where this Court might feel bound to intervene where, for instance, the delay was inordinately lengthy and in bad faith, or due to the inordinate delay, a party suffered material prejudice, did not benefit from a fair hearing or fundamental human rights were in issue. Such is not the case here."

This case was preceded by the case of **Dr. Ng Kuet Leong v The Medical Council of Mauritius [2019 SCJ 1]**, which concerned a case where the Medical Council had failed to comply with a statutory time limit of 14 days in which to communicate its decision to the applicant. The Appellate Court (Caunhye & Kwok Yin Yen JJ.) held that the decision was valid despite having been communicated outside the statutory time limit:

"The question which arises therefore is what is the effect of a breach by the Council to comply with the statutory requirement as to the time limit which is imposed in imperative terms by the use of the word "shall" under section 17(6) of the Act.
We need first to observe that the legislator has not expressly laid down in the Act itself that any act done in breach of section 17(6) would render a decision of the Council invalid nor has the legislator indicated what should be the consequences for non-compliance with the time limit for the communication of the decision.
Although the word "shall' is meant to be imperative, it is necessary to ascertain the consequences which was intended by Parliament in case of non-compliance with the time limit laid down in section 17(6) of the Act. For that purpose, it is incumbent upon the Court to try to get at the real intention of the legislature, by examining the object and design of the whole statute and by evaluating the seriousness of the breach and any resulting injustice, public inconvenience or prejudice which may be caused either by invalidating or maintaining the decision.
According to the Act, the main function of the Medical Council is to "exercise and maintain discipline in the practice of medicine". The provisions of the Act also set out explicitly how complaints against medical practitioners should be dealt with through a process of investigation of these complaints and eventually, the holding of disciplinary proceedings and the imposition of disciplinary measures.
It clearly emerges, from the design and contents of the Act, that its overriding objective is to give effect to a compelling public interest to deal effectively with complaints of professional misconduct or negligence on the part of medical practitioners. The public interest consideration in ensuring the implementation of disciplinary measures in conformity with the Act by far outweighs the inconvenience, if any, which may result from a failure to communicate the decision in time."

The appellate Court further distinguished this case from that pertaining in **Mauvilac Industries v Ragoobeer (Supra)**, in the following terms:
"The present case can be easily distinguished from ***Mauvilac Industries v Ragoobeer (Supra).*** *Unlike the present case, the scheme of the legislation, more particularly under section 32 of the Labour Act, indicate that it was clearly intended by the legislator that the failure to comply with the time limit of 7 days following a dismissal of an employee would constitute unjustified termination of employment under the Act.*
The requirement laid down in section 17(6) of the Act concerns only the communication of the Council's decision to impose a disciplinary measure to the applicant. It can hardly be disputed that a delay in the communication of the decision cannot, in the light of the overall scheme of the legislation, be of such significance so as to vitiate and invalidate the imposition of a disciplinary measure which has gone through the whole process of a disciplinary procedure in accordance with the Act.
In view of the object of the statute and the general scheme of the legislation, it cannot be said that it was the intention of Parliament

to insist on a strict compliance of the time limit prescribed under section 17(6) of the Act and that it was intended by Parliament that any delay in communicating the decision with regard to disciplinary measures would invalidate the decision of the Council. To insist on a strict timely compliance of that particular procedural provision of the Act would be inimical to, and would indeed frustrate, the legislator's overriding concern to effectively implement disciplinary measures after charges have been found proved following the due, and a fair, process."

The same reluctance to invalidate administrative action on account of non-compliance with statutory deadlines can be seen in the case of **Jeebun Runal Singh v The Financial Intelligence Unit 2023 SCJ 173**, where the failure of the Financial Intelligence Unit to comply with the statutory delay of 21 days for service of the notice of a Restriction Order was held not to be fatal. The Court (Maghooa J.) observed the following:

*"In **Attorney General Reference (No. 3 of 1999) [2001] 2 AC 91**, the House of Lords held "that the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity".*
This decision led to the adoption of a flexible approach of focusing intensely on the consequences of non-compliance, and posing the question, taking into account those consequences, whether Parliament intended the outcome to be total invalidity.
The Court has therefore to examine the consequence that may follow from insisting on a strict observance of the particular provision and more importantly the scheme of the other provisions of which it forms part and whether the failure to comply with the particular provision has caused prejudice to applicant."

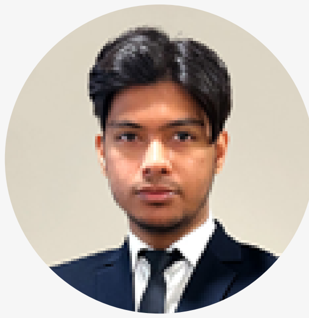
On the other hand, actions entered against the State are also subjected to strict account as regards compliance with statutory deadlines. There is a long and consistent string of cases witnessing the guillotine approach taken by the State as regards its systematic objection to non-compliance with the delays laid down under the State Proceedings Act for actions entered against the State and under the Public Officers' Protection Act for actions entered against public officers. The Supreme Court has in both cases, observed a steady cursus of applying such delays strictly at the expense of striking out actions.

The difference in the judicial treatment of statutory delays has had the effect of pigeon-holing types of delays eligible for strict adherence from other types of delays whose non adherence would not be fatal. The previous classifications of delays into "mandatory" and "directory" ones as admitted in the case of **Perrine & Ors v/s Foogooa & Ors 1967 MR 134,** although stated as no longer being applicable in the later case of **Librairie Le Cygne Ltée v/s CEB 2010 MR 382** – do not assist in bringing certainty and finality in the court process. All in all, it would appear that now, more than at any time before, the extent of judicial discretion applied in the interpretation of statutory delays, has substantially blurred the lines of demarcation leaving each case to be treated on its own merits.

About the authors

URMILA BOOLELL SC
FOUNDER & GROUP HEAD - TEMPLE
HEAD OF CHAMBERS, TEMPLE LAW

Urmila Boolell SC is a barrister with nearly 40 years of experience and the founding member of Temple Group. She became Senior Counsel in 2016 and is the most senior woman at the Mauritian bar. Recognised as a 'Leading Lawyer' by international rankings, she specialises in civil and commercial litigation.



ZAKARIYYA SEEKDAUR
BARRISTER AT TEMPLE LAW

Zakariyya joined Temple Law as a Barrister in November 2023. He advises and represents clients in civil and employment matters, appearing regularly before the District and Intermediate Courts of Mauritius and the Supreme Court. Zakariyya assists in employment matters, representing employers in labour disputes, and conducting disciplinary hearings.

Reviewability of decisions taken by the President, following advice of the commission on the prerogative of mercy

ARTICLE WRITTEN BY
SATYAJIT BOOLELL SC
HANSHINI SHIKSHA JALIM

The power to grant mercy is a fundamental aspect of the Executive, vested in the President and exercised following the advice of the Commission on the Prerogative of Mercy ("**Commission**"). The judicial review of these decisions poses legal and constitutional questions, balancing executive discretion with principles of justice and accountability. This article will explore the arguments surrounding the reviewability of presidential decisions on mercy, highlighting the principles, case law, and theoretical perspectives.

The Prerogative of Mercy ("**POM**") is rooted in the sovereign's power to dispense clemency. In Mauritius, the POM is one provided by the Constitution. This power is conferred upon the President, advised by the Commission. The Commission evaluates applications for mercy and advises the President, who then makes the final decision of clemency.

Section 75 of the Constitution grants the President broad powers regarding the POM. These include granting pardons to convicted persons, respites or reduced punishments, and remitting penalties or forfeitures. Advising the President is the Commission, composed of a chairman and at least two members appointed by the President. The President is mandated to act upon the advice of the Commission, though there exists section 75(4)(b) which provides the President the power to request reconsideration of such advice by the Commission. After reconsideration, the President must adhere to the Commission's advice.

Historically, courts have shown reticence in reviewing mercy decisions, often viewing them as unsuitable for judicial review due to their discretionary nature, but pivotal cases have gradually shaped the legal landscape, opening the door to judicial scrutiny under specific circumstances.

Notably, the case of **Poongavanam v The Commission on the Prerogative of Mercy 1999 SCJ 396** marked a significant milestone, whereby the Supreme Court acknowledged the potential for judicial review of mercy decisions under specific circumstances. This case was an application for leave to apply for judicial review of the of the President acting on the advice of the Commission. The Supreme Court stated that until recently the POM was considered by courts in England as being unsuitable for judicial review.

However, the court referred to the case of **R. v. Secretary of State for the Home Department, ex parte Bentley [1993] 4 LRC 15**, where the High Court held that it had jurisdiction to review the exercise of the royal POM by the Home Secretary in accordance with accepted public law principles since the exercise of the prerogative was an important feature of the criminal justice system and a decision by the Home Secretary which was infected with legal errors ought not to be immune from legal challenge merely because it involved an element of policy or was made under the prerogative.

The court in that case went so far as to review the decision of the Home Secretary not to recommend a posthumous free pardon for a youth hanged for murder 40 years previously, on the ground that he had considered only an unconditional pardon and had failed to take account of other possibilities. Although in the exceptional circumstances of that case the court did not think it would be right to make any formal order or declaration and merely invited the Home Secretary to look at the matter again, it clearly took a long step towards judicial review of the POM.

The Supreme Court recalled that the combined effect of sections 118 and 119 of our Constitution is that a court of law is not precluded from exercising jurisdiction in relation to any question as to whether any Commission established by the Constitution has performed its functions in accordance with the Constitution or any other law. Given that section 75(1) provides for a constitutional exercise of a quasi-judicial function by the Executive, the court only has power when the POM is exercised in breach of the Constitution.

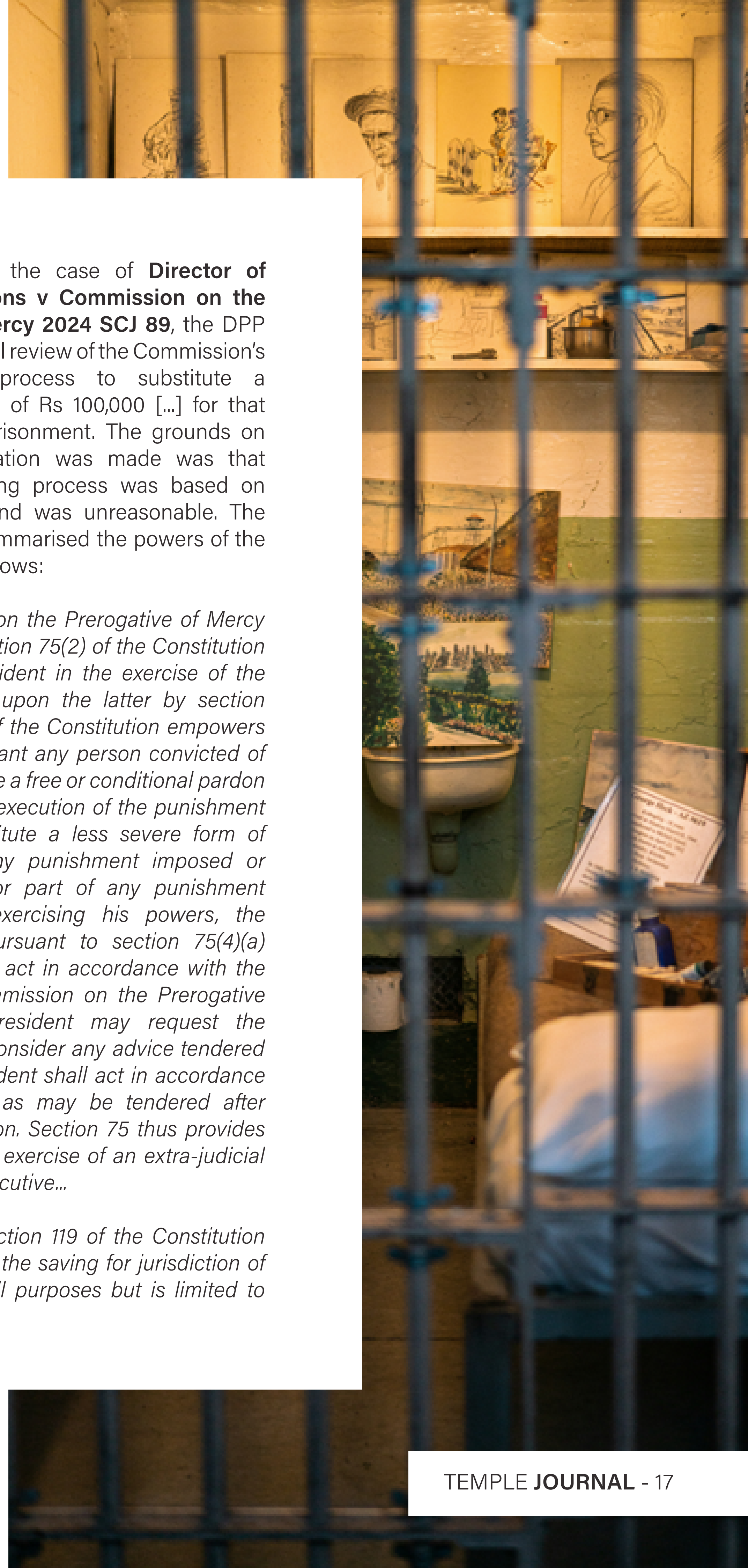
The court hence concluded that the Commission may advise the President to substitute any less severe form of punishment so long as that other form of punishment does not breach any other provision of the Constitution, more particularly in relation to fundamental rights.

Indeed, since then, the Judiciary's role in reviewing executive decisions on mercy has been a subject of legal interpretation, with subsequent cases increasingly favouring the principle of reviewability, albeit in specific circumstances. In the case of **De Boucherville Roger F P v State 2009 SCJ 5**, the Supreme Court reaffirmed the principles established in ***Poongavanam (supra)***, stating that decisions of the Commission are amenable to judicial review. The court highlighted the quasi-judicial function of the Executive under section 75(1) and emphasised that judicial intervention is warranted if there is a breach of the Constitution.

In **Mertz v State 2012 SCJ 382**, the court further elucidated on the constitutional framework surrounding the POM. It affirmed that this power is integral to the Constitution, not

merely a discretionary act but a fundamental component of the constitutional scheme. The court clarified that this constitutional function falls squarely within the executive domain, distinct from judicial powers, thereby upholding the integrity of the separation of powers.

This case however emphasised that the wording of Section 119 of the Constitution clarifies the scope of judicial review over the Commission's actions, and that courts retain jurisdiction to ensure adherence to constitutional and legal standards. This provision safeguards against arbitrary exercise of executive authority, ensuring that mercy decisions uphold the principles of justice and constitutional rights.



More recently, in the case of **Director of Public Prosecutions v Commission on the Prerogative of Mercy 2024 SCJ 89**, the DPP applied for a judicial review of the Commission's decision-making process to substitute a sentence of a fine of Rs 100,000 [...] for that of one year's imprisonment. The grounds on which the application was made was that the decision-making process was based on an error of law and was unreasonable. The Supreme Court summarised the powers of the Commission as follows:

"The Commission on the Prerogative of Mercy is set up under section 75(2) of the Constitution to advise the President in the exercise of the powers conferred upon the latter by section 75(1).This section of the Constitution empowers the President to grant any person convicted of any criminal offence a free or conditional pardon or a respite of the execution of the punishment imposed, or substitute a less severe form of punishment for any punishment imposed or remit the whole or part of any punishment imposed. When exercising his powers, the President must pursuant to section 75(4)(a) of the Constitution act in accordance with the advice of the Commission on the Prerogative of Mercy. The President may request the Commission to reconsider any advice tendered by it and the President shall act in accordance with such advice as may be tendered after such reconsideration. Section 75 thus provides for a constitutional exercise of an extra-judicial function by the Executive...

The wording of section 119 of the Constitution makes it clear that the saving for jurisdiction of courts is not for all purposes but is limited to

courts exercising jurisdiction in relation to any question whether the person or authority has exercised those powers in accordance with the Constitution or any other law. The saving provision set out in section 119 applies to the constitutionality or lawfulness of Commission's actions".

The Court found that the Commission had the authority to regulate its own procedure under section 118(3) of the Constitution and to advise the President on substituting punishments under section 75(1)(c). At the time of the decision, no appeal for special leave to the Judicial Committee of the Privy Council (JCPC) was pending, as the co-respondent had withdrawn his application, making the conviction and sentence final. The Supreme Court concluded that the Commission's actions were lawful, the substitution of the fine was within legal bounds, and there was no evidence of improper conduct. The court hence concluded that the Commission acted within its constitutional authority, and its decision was valid and appropriately executed.

Hence, such case laws underscore the Judiciary's authority to intervene if mercy decisions violate constitutional rights or procedural fairness. While section 118(3) of the Constitution grants the Commission autonomy in regulating its procedures, section 119 ensures that the Commission operates transparently and fairly in evaluating mercy petitions. Despite its executive status, the Commission must uphold constitutional principles, including the protection of fundamental rights and due process.

Nevertheless, it is important to note the lack of transparency in the decision-making process of the POM. The decision-making process and the rationale behind the decision taken are not communicated to the interested parties nor are these published. Without knowing the basis for the Commission's advice and the President's

decision, it is challenging for applicants to identify potential legal errors or breaches of constitutional principles that could form the grounds for judicial review. It is only in an application for judicial review that one can ask the Commission to bring up the records, that also has to be granted by the court at the leave stage.

The absence of published decisions and rationales means there is no established precedent for future cases, making the process unpredictable. We are also left in the dark as to the criteria used by the Commission and the President to make their decisions as these are not clearly defined or publicly available, leading to perceptions of arbitrariness. There may consequently be inconsistencies in how similar cases are treated, leading to perceptions of injustice or inequality.

Therefore, the reviewability of presidential decisions on mercy underscores a delicate balance between executive authority and judicial oversight in Mauritius. While the President exercises discretion in granting clemency, informed by the advice of the Commission, the Judiciary has a critical role in ensuring adherence to constitutional standards. However, the current lack of transparency in the decision-making process poses significant challenges, hindering accountability and potentially compromising the fairness of outcomes.

About the authors

SATYAJIT BOOLELL SC

SENIOR COUNSEL & CHAIRMAN AT TEMPLE

Satyajit Boolell SC served as Assistant Solicitor General and Parliamentary Counsel at the Attorney General's Office, working on the development of legislation and with Sir Ian Brownlie on the Chagos Archipelagos issue. His international expertise includes participation in United Nations conferences and work with the Commonwealth Secretariat. Appointed as Director of Public Prosecutions in 2009, he held the position until 2022. After retiring, he joined Temple as Chairman.

HANSHINI SHIKSHA JALIM

BARRISTER AT TEMPLE LAW

Shiksha, a Barrister at Temple Law since September 2023, holds a Bachelor of Laws with Honours from the University of Mauritius. She advises on corporate and compliance matters, including commercial transactions, trusts, tax, AML/CFT, data protection, and HR audits, and assists in litigation.

Unpacking Mauritian succession law

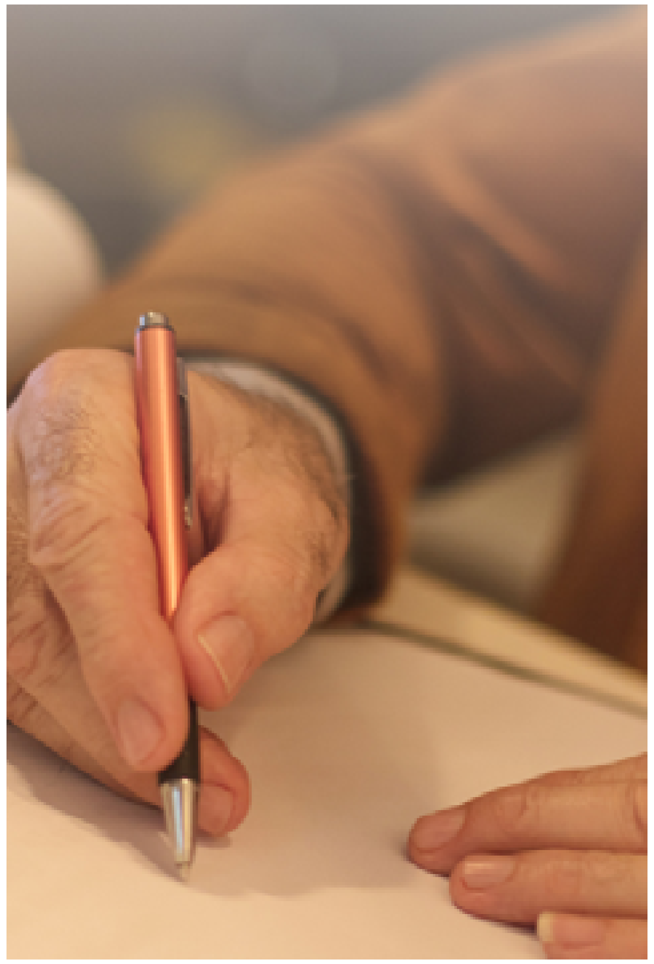
ARTICLE WRITTEN BY
WILLEM JANSEN VAN RENSBURG

Moving to another country comes with a lot of planning and stress. So does investing internationally. But one of the often-neglected considerations is how your assets in your new country of residence will be dealt with when you pass away. This gets even more complicated if you have assets in more than one country: which country's laws will apply to these various assets? Can they be dealt with in one Will? Who will administer it all?

In countries like the UK, the USA and South Africa, testators have almost absolute freedom to choose what happens to their assets after their death – in many cases up to the extreme of bequeathing everything to the family poodle. Unless you come from a country like France, Germany, Italy, Spain or Switzerland, chances are that you have never heard of the concept of forced heirship. Mauritius inherited from French law in this regard, and this means that forced heirship applies. There is a major distinction between these two systems and it's crucial to determine which system will apply to your estate, and plan accordingly.

To determine this, a distinction has to be drawn between movable and immovable property. The principles of Lex rei sitae and Lex Domicilii exist under private international law. Lex rei sitae applies to immovable property, meaning that the inheritance of immovable property is governed by the law where the property is located. This means that your villa or apartment will be governed by Mauritian law if the villa or apartment is situated in Mauritius in which case forced heirship will apply to this part of your estate.

Thus, the mere fact that a person resided in Mauritius at the time of their death, by itself does not mean that forced heirship rules will apply to their estate. If the deceased are considered to be domiciled elsewhere, and have no immovable property in Mauritius, forced heirship rules may not apply to the estate at all.



But what is forced heirship? In direct contrast with the principle of total freedom of testation, forced heirship creates categories of heirs that are protected (their share is referred to as the "reserved portion"), and thus have an irrevocable right to a part of the deceased's estate. The testator is only free to deal with the remainder, or "unreserved portion". In the first order, the protected heirs are the children of the deceased. If there is one child, the reserved portion is half of the estate, meaning that the child will be entitled to half and the testator can bequeath the other half freely. If there are two children, the reserved portion is two thirds, and if there are three or more children, it's three quarters. Seen from the other angle, this means that a testator can only freely bequeath half, a third or a quarter of the estate in the above scenarios.

One effect of forced heirship is that the testator cannot disinherit a child – children have an automatic right to the reserved portion. There has to be a biological link (all biological children whether born in or out of wedlock) or a legal link (adoption) though. What is also important to note is that a spouse is not a protected heir and can thus only hope to share in the unreserved portion.

For instance, if a man has two children and a spouse, and dies without a Will, all three will inherit in equal portions. This is because the children will get two-thirds by virtue of it being their reserved portion, and the wife will get the available portion by virtue of intestate succession law. If the man does make a Will, the two children will still get their two-thirds reserved portion, but the wife has no vested right to inherit. Although she is not entirely without rights (she will for instance have a right of usufruct (use and enjoyment) over the matrimonial home), this one-third of the estate can be bequeathed to anyone. The husband can choose to give it to the spouse, or to divide it between the two children on top of what they already have, or even favour one child by giving it all to him/her. Alternatively, he can give it to someone else entirely (though not the poodle, under Mauritian law).

Certain questions arise: What if a property is in the name of both spouses, or if they are married under the regime of community of property. The key here is to keep in mind that a person can only pass on that which they own. It follows that if a property is registered in the names of both spouses or they share it by virtue of their marriage regime the surviving spouse's share is

not affected by the death of the other spouse. In the example above, the two children will each get their third of their father's half share, and the other third of his half share will go where he pleases. The surviving spouse will continue to have her own half share, plus whatever she inherits from the husband.

Also, what is the situation regarding a blended family, where spouses have children from their own marriage but also from previous marriages? Insofar as children are concerned, the key is to keep in mind the legal or blood-relationship requirement. If a husband and wife have one child together, and each have another child from a previous marriage, then that common child will always have an advantage over the other two. If the husband passes away, his two biological children will be entitled to the reserved portion, but the wife's child will not be entitled to anything, and vice versa. Of course, nothing prevents them from allocating the remaining portion to the other child, but this is in their absolute discretion. If both parents pass away, the common child will inherit from the reserved portion of both parents, whilst the other two will only be entitled to the reserved portion of their own parent.

There are not many ways around these rules. Children (except minors) can renounce their portions if they so choose, which may be important from an international perspective. Say a Will made in the UK dictates that Peter will get the house in London, Sue will get the house in Cape Town and Jack will get the one in Mauritius: in this case, this intention to provide each child with their own house will not realise. Although Peter and Sue will each get their own houses (in London and Cape Town), the house in Mauritius will be shared by all the children, regardless of the Will. Each child has a 25% stake by virtue of forced heirship, and the most Jack can own is half of the property (25% as his right to the reserved portion and 25% as bequeathed by him in the Will). The only way Jack will be entitled to the whole property, is if Peter and Sue both renounce their portions of the Mauritius house. In light of this, the testator might want to change his Will to stipulate that Peter and Sue will be entitled to their respective houses only if they renounce their stake in the Mauritius house, so that Jack can inherit it, or alternatively the children will each have an undivided and equal stake in all three properties.

From this example it is clear that forced heirship does not only affect property in Mauritius (and the Mauritian Will), but may also impact the overall strategy of a testator with multiple properties in various jurisdictions.

Trusts are great and popular tools for estate planning too. One of the benefits of a trust is that the trust property is removed from the settlor and no longer forms part of their estate and are thus not subject to succession rules (or estate taxes in countries where these apply). To be successful in this respect, the trust must be set up in the right way though, and it is essential that the settlor must give up real control of the assets to the trustees.

In conclusion, succession planning is a tricky subject at best. But when forced heirship is added to the equation, this can throw the whole plan off track. Some heirs may inadvertently be better or worse off than others, and this applies especially to the spouse, who is not a protected heir. It's therefore important to understand which country's laws will be applicable to your estate, especially if more than one set of laws apply. Once this is determined, it may be worth taking a second look at the overall picture. Does the overall result achieve what the testator wanted? Should there be a separate Will in each country, to deal with the assets in that country? Should everything be put in a trust? These questions will be answered in future issues.

About the author

WILLEM JANSEN VAN RENSBURG
FOREIGN LAWYER - TEMPLE LAW
DIRECTOR OF OPERATIONS

Willem has over 20 years of legal experience, mostly leading his own firm in South Africa. After moving to Mauritius in 2018, he completed a Master's in International Business Law and became Director of Operations at Temple Law. Practising in Mauritius for five years, Willem remains on the roll of attorneys in South Africa. Initially a property conveyancer, he is now a versatile lawyer specialising in international commercial law and the African market. In 2024, he was appointed Chair of the African Leadership Group of Meritas Law Firms Worldwide.

Severance Allowance: Two avenues for the same remedy!

ARTICLE WRITTEN BY
NIKHIL BOOLELL

The culture of promoting the protection of employment in Mauritius is enshrined in statute. It remains exceedingly, an opportunity of popular public policy for the law maker to consolidate its ties with the workforce. So much so, that the lawful termination of employment can only succeed in our jurisdiction under sparing circumstances.

The rigidity and scrupulousness of the mechanisms of termination as imposed under our law, compels an employer to soothe the insatiable 'work- life' demands of a disgruntled employee in the course of his employment. If the route for termination was anyhow seen as a treacherous option for the employer; the amendments brought by the Finance Act 2022 in no way alleviates the employer's burden by offering the route of securing a claim for severance allowance in the 90 days window prescribed by the time stricken regime of the Employment Relations Tribunal ("ERT").

Specifically the insertion of section 69A to the Workers' Rights Act; and 70A to the Employment Relations Act, now means that the ERT is equally conferred the powers of the Industrial Court to make a finding of severance allowance. In practice, the outcome of the conferment of these powers to the ERT is egregious and dilutes the effect of legal finality.

An employee who alleges unjustified termination will achieve an enforceable outcome by electing the traditional route of the Industrial Court; and securing a successful claim for severance allowance.

The Industrial Court

Indeed, severance allowance serves as a punitive remedy brought upon by a civil litigant before the Industrial Court to punish their employer for having severed the contract of employment by committing the act of an unjustified termination. As a rule of thumb, severance allowance acts as a punitive remedy to impose damages payable to the aggrieved employee at the statutory rate, classically in cases where:

i. the grounds put forth for the alleged misconduct, or poor performance do not constitute valid grounds for the termination of employment; or
ii. there could have been in good faith another course of action that was undertaken, such as a reinstatement of the worker in a different position with the same employer; or
iii. there is a breach of the statutory delays or other provisions borne at section 64 of the Workers' Rights Act.

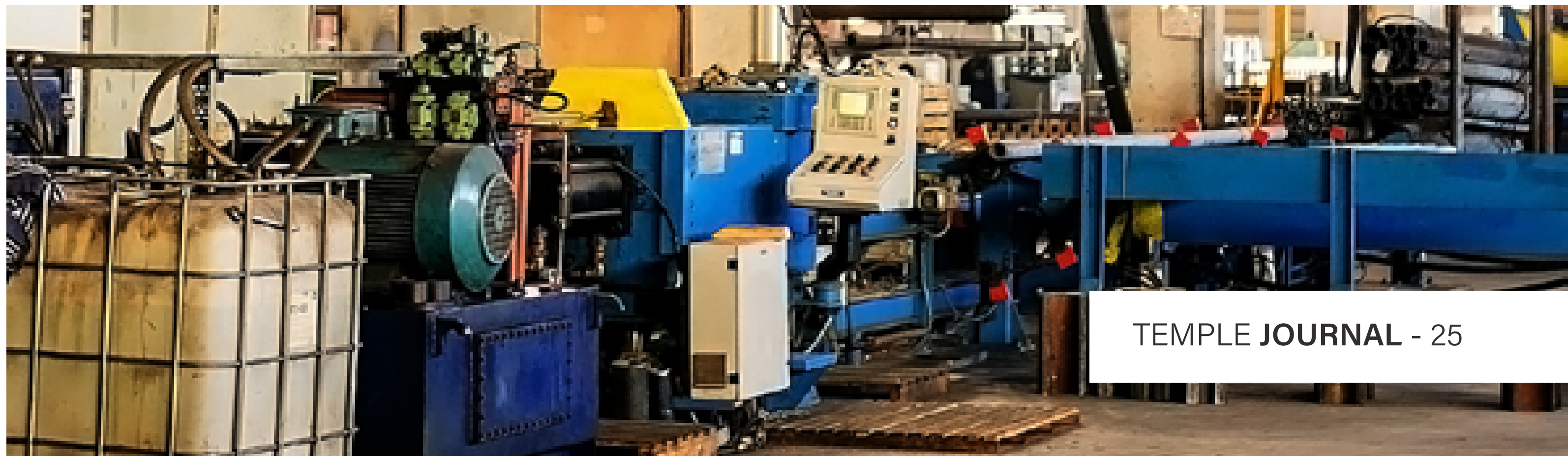
In general terms, the outcome to this would be the payment of a sum equivalent to 3 months of remuneration for every period of 12 months of continuous employment. Since the inception of the Industrial Court, it has been set practice that severance allowance claims would therefore be brought for trial before the Industrial Court at first instance. The Supreme Court's appellate jurisdiction would then be apt to hear any appeals against judgments of the Industrial Court.

The known qualm of litigants selecting the Industrial Court though has consistently been one of a systemic nature. This is undeniably associated to the clogging of the court systems and of the lengthy duration it can take to obtain a judgment ordering severance allowance. The enforcement against an employer of a judgment ordering the payment of severance allowance is straightforward and hardly ever a riddle. There only is cause for concern when the employer is impacted by insolvency proceedings.

Broadening the powers of the Employment Relations Tribunal - a Cathartic step

The ethereal nature of the Government's announcement is borne out in the Hansard Debates on the Finance Act in 2022 (No. 23 and 24 of 2022), wherein the enunciation of the changes to the labour law adhere to the sense of a broad rhetoric devised as:

- *...We want to reinforce the rights of workers and guarantee them a better equilibrium between work and family; OR*
- *...promoting an inclusive labour market, further protect workers' rights, improve their conditions of employment and to facilitate good faith collective bargaining; OR*
- *...The amendments to the WRA and to the ERA in the Bill are in line with Government's vision to promote an inclusive labour market; OR*
- *...we are also amending Section 69A, that is, with regard to reinstatement; OR*



- *...The objective of this amendment is to broaden the scope for reinstatement of a worker; OR*
- *...a worker can also claim for reinstatement where his employment has been terminated for other reasons, including alleged misconduct of poor performance"... ERT can order for reinstatement... OR*
- *Ensure greater fairness in disciplinary proceedings...*

The issue seems not to address delays faced in delivering finality before the Industrial Court, but rather in withdrawing the exclusive jurisdiction of the Industrial Court for claims of severance allowance; it seems the aim is to promote reinstatement. This is surprising to say the least, as the jurisdiction of the ERT under section 70A of the ERA is to "hear the case and give its determination" where a referral is made under section 69A, "within 60 days". To exacerbate the lack of cohesiveness, there is no mention or discussion at any point in the parliamentary debates of the intention behind the addition of "severance allowance" to the powers of the ERT.

Lost in Translation: the law maker and its drafter

Arguably, there is a blunt disjointedness between the Government's announcements on its desired policy objectives on one hand, and what is actually designed in the dichotomy of the law by the drafter. The misapprehension of the law maker as regards the implication of a reinstatement back to the workplace, imposes an utterly unrealistic meeting of minds between the employer and the employee in cases that have warranted the employer to trigger a lawful termination under the law.

The drafter of the amendments has sought to create an uncanny consonance between "reinstatement" and "severance allowance" at section 70A(4) of the Employment Relations Act, in cases where a referral is made to the Tribunal by the Ministry:

(4) Notwithstanding subsection (3), where the Tribunal finds that the claim for reinstatement of a worker is justified but the Tribunal has reason to believe that the relationship between the employer and the worker has irretrievably been broken, it shall order that the worker be paid severance allowance at the rate specified in section 70 (1) of the Workers Rights Act 2019.

The above statutory construction raises a number of anomalies when the jurisdiction of the ERT is commenced. These are listed for consideration:

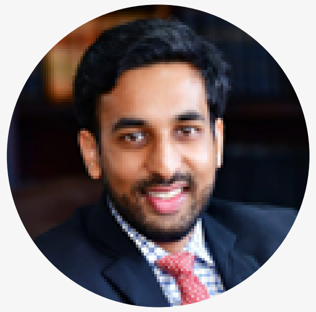
- Can the Supervising Officer of the Ministry of Labour, Human Resource Development and Training (the"Ministry of Labour"), (especially in light of its mandate in favour of workers), be called upon to make an "opinion that the worker has a bona fide case for reinstatement"?
- What is the methodology to be adopted by the Supervising Officer of the Ministry of Labour in making a decision on whether there is a "bona fide case for reinstatement"?
- How much weight must the ERT attribute to the Supervising Officer of the Ministry of Labour in deciding on the validity of a section 69A referral brought to it?
- In the event that "reinstatement" is not appropriate, does this contrive the ERT to an automatic finding that severance allowance is payable?
- Can the ERT simultaneously adjudicate on "reinstatement" and "severance allowance" on the face of the same facts? (the recent Determinations of the ERT in Chellen (Award ERT/RN 98/23) and Auckle (Award ERT/RN 12/232024) are relevant for further discussion)
- How does an employer proceed to support the fact of a lawful termination on appeal, considering the ERT is a public body; and its decisions are only amenable to challenge by way of judicial review?

On the 15th July 2024, their Ladyships Hamuth Laulloo and Goordyal-Chittoo delivered their judgment in **Airports of Mauritius Co Ltd v The Employment Relations Tribunal ipo Dewananda Chellen [2024 SCJ 321]**. Their Ladyships declined to grant the prayers sought by the Applicant and leave stage could not be overcome. One will recall that the judicial review sought was of the Tribunal's Determination dated 27th September 2023. *(Indeed, the determination was amongst the first by the Tribunal, ordering the payment of severance allowance. The determination was reached following a full hearing of fact on the worker's termination.)*

The Applicant fell short of persuading the Court on the issue of arguability. Be that as it may, an analysis of the controversy with respect to the decision-making process of the Tribunal in exercising its discretion in ordering severance allowance, remains open. If there was any such expectation, there was no sprouting of judicial activism by the Courts on the anomaly caused by the widened powers granted to the Tribunal. Certainly, no cause for euphoria of employers on this score!

In conclusion, it is necessary for the law maker to rectify the open-ended insinuation that the ERT is a much faster route than the Industrial Court with respect to claims for severance allowance. The amalgamation of severance allowance to reinstatement is wrong in law and achieves the undesired result of preventing the employer from bringing an appeal on a finding of fact. An employer who seeks to challenges a determination of the ERT can by virtue of the ERT's public character, only dispute the decision-making process. If matters are left as they are, it will only serve to obliterate the existing balance in remedies available to employers and employees.

About the author



NIKHIL BOOLELL
BARRISTER AT TEMPLE LAW
PARTNER

Nikhil specialises in Civil and Commercial Dispute Resolution, focusing on company, employment, insurance, and administrative law. He has extensive experience in Mauritian courts and tribunals, appearing unled up to the Supreme Court. Nikhil handles commercial claims for both claimants and defendants and collaborates with Silk from the law firm. His practice also includes strong advisory and corporate work, advising foreign and domestic companies, diplomatic bodies, and individuals on their activities in Mauritius.

Violence at Work: Anything but nothing?

ARTICLE WRITTEN BY
FAARZAAD SOREEFAN

In today's fast-paced and ever-changing world, violence permeates all aspects of the society, as daily newspapers attest. Workplaces are not immune to this phenomenon, which can manifest physically, verbally, or virtually. Technological advancements have exacerbated this issue, extending its reach beyond traditional boundaries. Mauritius, in particular, has implemented laws to combat workplace violence, recognizing its potential to harm both employees' well-being and organizational effectiveness. However, while these laws exist on paper, their practical efficacy warrants thorough examination.

Violence or harassment at work impacts the individual, their family, the employer, and society. It can occur in any workplace, regardless of the field or sector. According to the International Labour Organization's ("ILO") most recent publication on the matter, more than one in five workers experience violence or harassment at some point during their working lives[1].

The Workers' Rights Act 2019: A Closer Look – Section 114

A few months after the adoption of the ILO Convention No. 190, being the first international treaty recognising "the right of everyone to a world of work free from violence and harassment, including gender-based violence and harassment"[2], the Workers' Rights Act 2019 ("WRA 2019") was passed by the National Assembly of Mauritius, with the primary aim of repealing the Employment Rights Act 2008 so as to address its deficiencies. Notably, it sought to "expand the scope of worker protection against violence by making employers vicariously liable, in certain situations, for the actions of a co-worker or any other individual towards a worker"[3].

The lawmakers have caused section 114 of WRA 2019 to be enacted to comprehensively address violence at work to the extent of criminalising such acts. The said section explicitly prohibits various forms of violence, including harassment (sexual or otherwise), assault, verbal abuse, threats, bullying, and the use of aggressive gestures. It also stipulates that employers shall be vicariously liable for such acts if they knew or should have known about them and failed to take action. Employers must investigate and act on any reported incidents within 15 days. Violations can result in fines up to MUR 100,000 and imprisonment for up to five years.

Defining Violence: Can Anything Be Disdained?

The phrase "anything but nothing" in this context highlights the challenge of defining what constitutes violence at work. Whilst the legislator has taken the pain to define specific terms, the remainder is left to wide arena of interpretation. As such, section 114's language suggests that many negative interactions could be interpreted as violence, but the lack of precise definitions for some specific terms complicates enforcement. This raises several important questions:

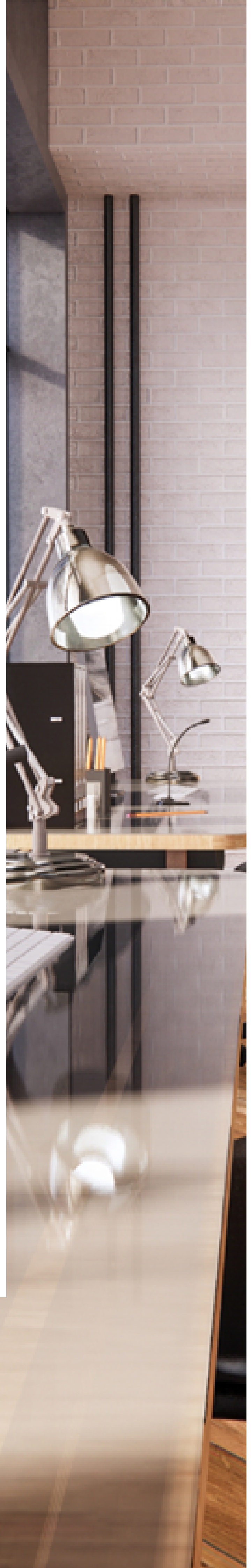
- What specific actions or words constitute "harm" or "hinder"? Defining these terms clearly is crucial to prevent subjective interpretations that could vary widely between individuals and cases.
- How should "aggressive gestures" be objectively identified and measured? Establishing criteria for what constitutes an aggressive gesture is necessary to ensure consistent application of the law.
- What criteria determine when an employer "knew or should have known" about violence at work? Clarifying these criteria can help employers understand their responsibilities and avoid unjust penalties.
- How should the law differentiate between severe and minor infractions? Not all forms of negative behaviour have the same impact, so the law should address varying degrees of severity appropriately.
- What mechanisms are in place to protect against false accusations? Ensuring that accusations are credible and evidence-based is important to maintain fairness for all parties involved.and imprisonment for up to five years.

Practical Implications for Employers and Employees

The broad and vague language of section 114 of the WRA places significant responsibilities on employers to interpret and enforce the law correctly. Employers must balance addressing legitimate complaints with avoiding frivolous or exaggerated claims. Clear internal policies and training are required to ensure all employees understand what constitutes workplace violence and how to report it.

Policy Development and Training: Employers need to develop comprehensive policies that clearly define unacceptable behaviours, reporting procedures, and consequences for violations. Regular training sessions can help employees recognize and appropriately respond to instances of workplace violence.
Investigation and Response: Employers have a statutory obligation to investigate reported incidents promptly and take appropriate actions within the stipulated 15-day period which may involve disciplinary actions, mediation, or other conflict resolution strategies.
Balancing Protection and Fairness: Employers must ensure that protections against workplace violence do not lead to misuse of the law. Establishing clear guidelines for what constitutes credible evidence and providing support for both complainants and accused can help maintain fairness.
Legal and Financial Risks: Non-compliance with section 114 of WRA can result in severe penalties, including significant fines and imprisonment. Employers must stay informed about legal obligations and seek legal advice when necessary to mitigate risks.

For employees, understanding their rights and the protections available under section 114 of WRA is crucial. They should be encouraged to report any instances of violence without fear of retaliation. However, they must also be aware of the importance of providing accurate and truthful information to prevent false accusations.




Vicarious Liability of Employers

Indeed, as intended by the legislator, the WRA introduced the concept of vicarious liability for employers. In other words, employers are held responsible for acts of violence at work committed by their employees and even third parties, provided the employer knew or should have known about the violence and failed to take action to prevent or stop it. However, the legislation is nebulous regarding how an employer should "know" or "should have known" about such incidents.

The ambiguity lies in defining the threshold at which an employer is deemed to have knowledge of workplace violence. Co-workers frequently engage in discussions, but discerning when these interactions cross the line into harassment, abuse, insult, or humiliation can be challenging. Likewise, the law is unclear about the specific actions an employer must take to prevent or stop violence which in turn raises several questions:

- What constitutes sufficient action by an employer? Is it enough to mediate between the parties involved, or is a more stringent response required?
- What defences are available to employers? Can an employer argue that no appropriate action was possible or that the actions taken were the best under the circumstances?
- Is termination of employment a viable response? Would dismissing an employee for violent behaviour be considered excessive, or would it fulfil the requirement of taking preventive action in good faith?

The employer's obligation to investigate allegations of workplace violence within a strict 15-day period also presents challenges. The adequacy of this timeframe is questionable, especially for complex cases that require thorough investigation. Interrogations arise about whether this period is sufficient for all types of incidents and what happens if an investigation cannot be completed within this timeframe.

Is the 15-day period adequate? Can this be a "one-size-fits-all" solution for all cases of workplace violence?
What happens in complex cases? If an investigation requires more than 15 days, how should employers proceed to ensure compliance with the law while conducting a thorough investigation?

These ambiguities create significant uncertainties for employers, who must navigate these grey areas to ensure compliance and avoid liability. Clearer guidelines and definitions would have been valuable, easing employers in understanding their responsibilities as well as in taking appropriate actions to prevent and address workplace violence effectively.

The Concern of Vagueness and Criminal Liability

A significant concern which may crop upon dissecting section 114 of WRA is the imposition of criminal liability on both employees and employers for breaches of its provisions. The part vague language of the law could hinder prosecution. Certain terms like "hinder," and "disdain" are not clearly defined, therefore proving beyond reasonable doubt that an offence has occurred becomes challenging. This ambiguity may lead to inconsistent enforcement and judicial outcomes.

The fundamental principle of legality mandates that laws must be drafted with sufficient clarity to allow individuals to discern and distinguish which of their actions or omissions constitute criminal offences, as illustrated in D. Sabapathee v The State [1999 MR 233]. Section 10(4) of the Constitution implicitly requires that criminal laws be articulated with enough precision to enable citizens to regulate their conduct accordingly. Legislation that contravenes this principle could be deemed unconstitutional and invalid by the Supreme Court. Nevertheless, the degree of precision required may vary depending on the subject matter. Despite potential ambiguities, citizens must be able to ascertain which actions and omissions will render them liable.

An instructive analogy can be drawn from the landmark case of Seegum J v The State of Mauritius [2021 SCJ 162]. In this case, the appellant argued that Section 46(h)(ii) of the Information and Communication Technologies Act, which criminalized causing annoyance to another person, violated the principle of legality. The Supreme Court concurred that the provision of the law was drafted in overly broad terms. The Court noted that in the absence of a statutory definition, the ordinary dictionary meaning should be applied, defining the terms as "making a little angry" or "harm or attack repeatedly."

The Supreme Court acknowledged that numerous scenarios could involve the use of information and communication services to mildly irritate another person. To illustrate this, the Court provided a familiar example for the Mauritian society: whether a football fan sending a single derogatory and irritating message on Facebook to another football fan about the latter's team, with the intent to "wind him up" or annoy him, constitutes a criminal offence? While the elements of the offence might technically be met, the Court questioned whether any reasonable person would seriously consider such conduct as criminal. Similarly, could any reasonable person consider the use of gestures indicating disdain towards someone else constitute workplace violence and aggressive in nature? It is ultimately for the Court to adjudicate on this matter.

[1] Experiences of violence and harassment at work: A global first survey, 2022
[2] https://www.ilo.org/topics/violence-and-harassment-world-work#convention
[3] Workers' Rights Bill (No. XXIV of 2019), Explanatory Memorandum

Concluding remarks

While section 114 of the WRA represents a significant step towards addressing workplace violence in Mauritius, its apparent vague language and broad definitions pertaining to some of the terms may pose challenges for effective implementation. The imposition of criminal liability under such terms could potentially make successful prosecution difficult, possibly undermining the legislator's intent. A more precise delineation of terms and clearer guidelines for enforcement could be considered to ensure that the law protects employees without placing undue burdens on employers.

About the author

FAARZAAD SOREEFAN
BARRISTER AT TEMPLE LAW
SENIOR ASSOCIATE

Faarzaad specialises in dispute resolution and legal advisory services for domestic and international companies and foreign governments. His focus includes asset recovery, civil, commercial, and employment disputes, international arbitration, financial crimes, and insolvency. He also advises on employment law matters, conducts investigations, negotiations, and disciplinary hearings. As an MQA-accredited trainer, he delivers training on employment law.

Should Mauritius implement a Right of Asylum?

ARTICLE WRITTEN BY
ANUJA GHOORAH

Situated in the Indian Ocean, Mauritius is famous for its unspoiled beaches, lively culture, and peaceful blend of different backgrounds. The globe is experiencing an increase in displacement, as millions escape war, persecution, and extreme suffering. Should Mauritius, known for its peace and acceptance, offer asylum to those in need as they seek safety?

Let us picture the situation of a mother holding her child while they start a dangerous journey, motivated by the desire to discover a secure refuge. Or a father whose aspirations for his children's future are destroyed by the violence of war, looking for a fresh start in a place that offers tranquillity. For these families, asylum is more than just a legal right; it is a crucial source of hope during challenging times.

Mauritius does not have a specific national legal system on asylum, nor any regulations or processes in place that clearly outline the rights and protections that asylum-seekers and refugees are entitled to. Mauritius has not acceded to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. Therefore, asylum-seekers and refugees do not presently have any legal rights in Mauritius, with the exception of those rights that are found in customary international law.

It is essential to note the difference between an asylum-seeker and a refugee. A refugee is a person who has fled their own country because they are at risk of serious human rights violations and persecution there – they have a right of international protection. On the other hand, an asylum-seeker is someone who has left their country and is seeking protection from persecution and serious human rights violations in another country, but who has not yet been legally recognized as a refugee and is waiting to receive a decision on their asylum claim.[1]

Nevertheless, Mauritius tries to handle certain applications for refugee status or political asylum on an individual basis, working to facilitate their re-settlement in a welcoming country in collaboration with the United Nations High Commissioner for Refugees ("UNHCR").[2] The UNHCR assesses these asylum/refugee cases in the absence of national legislation setting out a specific procedure and criterion for seeking asylum. Given that the UNHCR does not have an office in Mauritius, Mauritius is overseen by the UNHCR Regional Representation for Southern Africa, which is headquartered in Pretoria, South Africa.

According to UNHCR, depending on it to evaluate requests for asylum and persuade other countries to accept refugees is not a long-term solution because the UNHCR is unable to ensure that the resettlement of asylum-seekers/refugees recognised under its responsibilities will be carried out.[3]

Instead, the UNHCR is dependent on States to supply resettlement spaces and deal with asylum claims under their properly established national legislation. Despite the fact that there is no national legislation into place to deal with asylum applications, Mauritius is prohibited from expelling, returning or extraditing a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. This is known as the principle of non-refoulement, which is one of the main tenets of refugee protection and which is applicable to all States because it is customary international law.

Some courts have interpreted the ban on refoulement to cover a wide range of grave human rights breaches, including torture, and other cruel, inhuman or degrading treatment, flagrant denial of the right to a fair trial, risks of violations to the rights to life, integrity and/or freedom of the person, serious forms of sexual and gender-based violence, death penalty or death row, female genital mutilation, or prolonged solitary confinement, among others. It has further been interpreted to encompass severe violations of economic, social and cultural rights because they would represent a severe violation of the right to life or freedom from torture or other cruel, inhuman or degrading treatment or punishment. For example, degrading living conditions or lack of medical treatment have been found to prevent return of persons.[4]

In summary, although Mauritius is well known for its multicultural and tranquil culture, individuals attempting to seek asylum within its boundaries face considerable obstacles due to the lack of a clear legal structure. Relying on the UNHCR to handle requests for asylum and arrange for relocation is not a long-term viable answer. Some protection is provided by the non-refoulement principle, which makes sure that people are not sent back to situations where they could suffer grave consequences. But this idea by itself is unable to meet the more extensive requirements of refugees and asylum-seekers, who need an all-encompassing legal protection.

If Mauritius were to establish an asylum right, it would create a legal pathway of escape for individuals escaping persecution and human rights breaches. In addition to preserving human dignity and giving hope to those in need, establishing national legislation to handle asylum requests will also show Mauritius's dedication to upholding international humanitarian norms.

As global displacement continues to rise, Mauritius faces a pivotal decision: will it extend its tradition of hospitality to those most in need, reinforcing its reputation as a beacon of safety and compassion? This question remains open for debate, inviting thoughtful consideration and discussion on the future role of Mauritius in the global humanitarian landscape.

[1]Definition of Amnesty International https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/
[2] National Voluntary Review of the Republic of Mauritius, Implementation of the Global Compact for Safe, Orderly and Regular Migration (GCM) August 2021 p. 15
[3] UNHCR - Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: 3rd Cycle, 31st Session Mauritius
[4] United Nations Human Rights. The Principle of Non-Refoulement under International Human Rights Law. https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf

About the author

ANUJA GHOORAH
BARRISTER AT TEMPLE LAW
SENIOR ASSOCIATE

Anuja specialises in corporate and commercial law, advising domestic and international clients, including banks and diplomatic bodies. Her expertise includes intellectual property, company law, tax, trusts, insolvency, data protection, foreign investment, and medical negligence. As an MQA accredited trainer, she conducts training in corporate law. Anuja is the co-chairperson for the African Emerging Leaders Group Meritas for 2024.

Promptitude of Leave Application to seek Judicial Review

ARTICLE WRITTEN BY
JAGESHWARSINGH LUKEERAM

Under its supervisory jurisdiction, judicial review remains one of the powers in the armoury of the Supreme Court, whereby it exercises judicial control over administrative action. However, seeking judicial review is not akin to embarking on a fishing expedition in uncharted waters. The pathway for obtaining leave to apply for judicial review is not without procedural hurdles, and the prompt submission of such an application continues to be one of the challenges that applicants, regardless of the merit of their applications, typically fall short of satisfying the Supreme Court.

Surprisingly enough, we note that several applications for leave are disposed of on the ground that the litigants have failed to lodge their application promptly, and it would be naive on the part of litigants to think that the opposing party to a leave application would not be tempted to raise the issue of delay as an objection. Having said this, the present article delves into, inter alia, the uncertainties that the rule of promptness poses for prospective litigants, the parallel statutory delay of 21 days to seek leave in some cases, and the available avenue for litigants who believe they have not been prompt enough to seek leave for judicial review.

Promptly and in any event within 3 months

It is worth noting that we do not have rules of procedure governing applications for prerogative orders, and decades have gone by since our justice system has been guided by practice prevailing in the Court of England and Wales. The rule says that an application to apply for judicial review must "be made promptly and in any event within three months from the date when the grounds for the application first arose....".

As the rule has been interpreted, there is no fixed time limit of three months for bringing an application for leave to apply for judicial review. The primary prerequisite is that it must be brought "promptly". If an application made within three months does not satisfy this requirement, leave is liable to be refused as held in Mauritius Shipping Corporation Ltd v Employment Relations Tribunal [2019] UKPC 42.

There is no general legislative formula to guide the Court on issues of delay. Similarly, whether the test of promptness is sufficiently met requires an evaluative judgment to be made by the Supreme Court, having regard to the particular context and the specific facts and circumstances of the matter at hand. What is regarded as prompt does not necessarily mean it will satisfy the test in other circumstances.

While we have seen leave applications which had been made 6 weeks after the impugned decision, such as in the matters of Medical & Surgical Centre Ltd v. Employment Relations Tribunal [2019] SCJ 287 and C-Care (Mauritius) Ltd v. Employment Relations Tribunal & Ors [2022] UKPC 58, refused on the ground that they did not meet the requirement of promptness, we should not lose sight of the strong admonition of the Law Lords of the Judicial Committee of the Privy Council ("JCPC") in Peerless Limited v. Gambling Regulatory Authority and Others [2015] UKPC 29, where it was emphasised that: "a refusal to grant leave to apply for judicial review is a final and terminating decision which precludes a party from having the merits of his case considered at a substantive hearing. The power to terminate proceedings without any hearing on the merits is one which should be exercised with considerable caution and in a proportionate way."

The current rule of promptness leaves litigants and their advisers in a difficult position in that the current practice raises questions that should legitimately be addressed based on effectiveness and legal certainty: how can a litigant conclusively resolve that he or she is being prompt enough, in the eyes of the Court, in his or her endeavour to seek leave for judicial review? Equally, this poses another question mark; it is not clear when leave should be sought by a litigant who wishes to proceed outside delay.

It is true that upon the application for leave being heard by a bench of two judges, an appeal against such a decision will only lie before the JCPC. The Law Lords in Shipping Corporation Ltd (supra) unequivocally termed the threshold as a "high hurdle" for an appellant to surmount when seeking to show that the first instance court has erred in a decision to refuse leave for a judicial review application to be brought, on the grounds that the application was not made promptly. Let us set the financial aspects aside in bringing an appeal before the JCPC; the high hurdle would somehow deter litigants from challenging the initial decision.

21-day delay vs. promptness

In certain specific cases, ironically or not, our legislature has deemed it appropriate to impose a strict time limit for seeking leave to apply for judicial review. For instance, there is a 21-day delay for seeking leave under section 9 of the Public Bodies Appeal Tribunal Act 2008, as held in Cheddy Y. I. A. v. Public Bodies Appeal Tribunal [2020] SCJ 254, should a relevant party wish to challenge the decision of the Public Bodies Appeal Tribunal through judicial review.

This provision effectively overrides the usual requirement for such an application to be made "promptly" and in any event within three months of the impugned decision. Because of this, the stringent statutory delay offers litigants a clear timeframe and introduces a degree of predictability to the issue of delay.

Leave to apply for judicial review outside delay

Nonetheless, amidst the uncertainties regarding the promptness of an application for leave, there is a glimmer of hope for litigants who believe they are not being prompt enough with their leave application. It is open for litigants, who have cogent reasons for the Court to exercise its discretion, to move the Court for permission before proceeding with an application for leave to apply for judicial review outside delay.

The Supreme Court, however, recently overturned the longstanding practice of "killing two birds with one stone" when it ruled in Shirao v. Polytechnics Mauritius Ltd [2020] SCJ 19 that leave for judicial review application and application for leave to proceed with judicial review outside delay cannot be made simultaneously. Therefore, leave to proceed outside delay should be sought in the first place before moving forward.

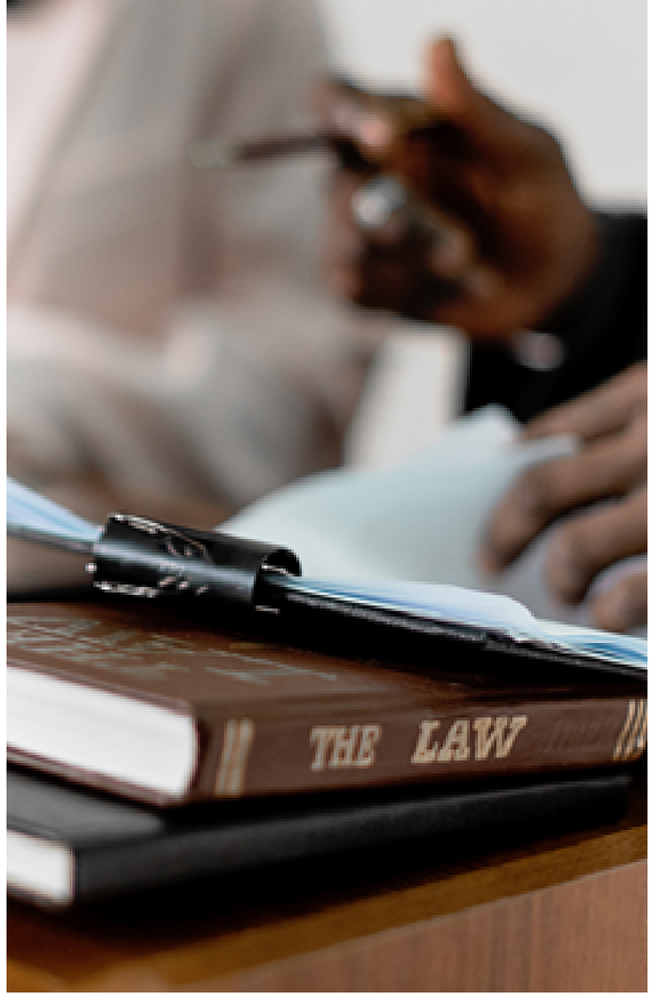
Although leave to proceed outside delay appears to be a silver lining for litigants, the fundamental question that must be addressed is "when leave should be sought from the Court to file a judicial review application outside delay?" Should litigants play safe and seek leave to proceed outside delay before the expiry of the "longstop" delay of 3 months?

Furthermore, we should be mindful that the determination of whether the application was made promptly rests solely with the discretion of the Supreme Court, and therefore, the "longstop" delay of 3 months may well deter litigants from seeking leave to apply for judicial review outside delay on the belief that they may still persuade the Court about their promptitude.

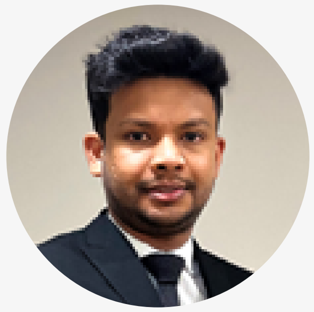
Last remarks

Any doubt a prospective litigant may have regarding whether the necessary level of promptness has been met should not be allowed to aggravate, even though it is acknowledged that delay may cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration. Eventually, finality should sooner or later strike an impugned decision to preserve the decision maker's integrity and proper administration.

Therefore, should uniformity, clarity, and legal certainty do the calling for shaping a singular rule across the board, i.e., the "bright light time limit", to govern leave to apply for judicial review? Perhaps this would eliminate doubts and streamline the process, benefiting both litigants and the judicial system.



About the author

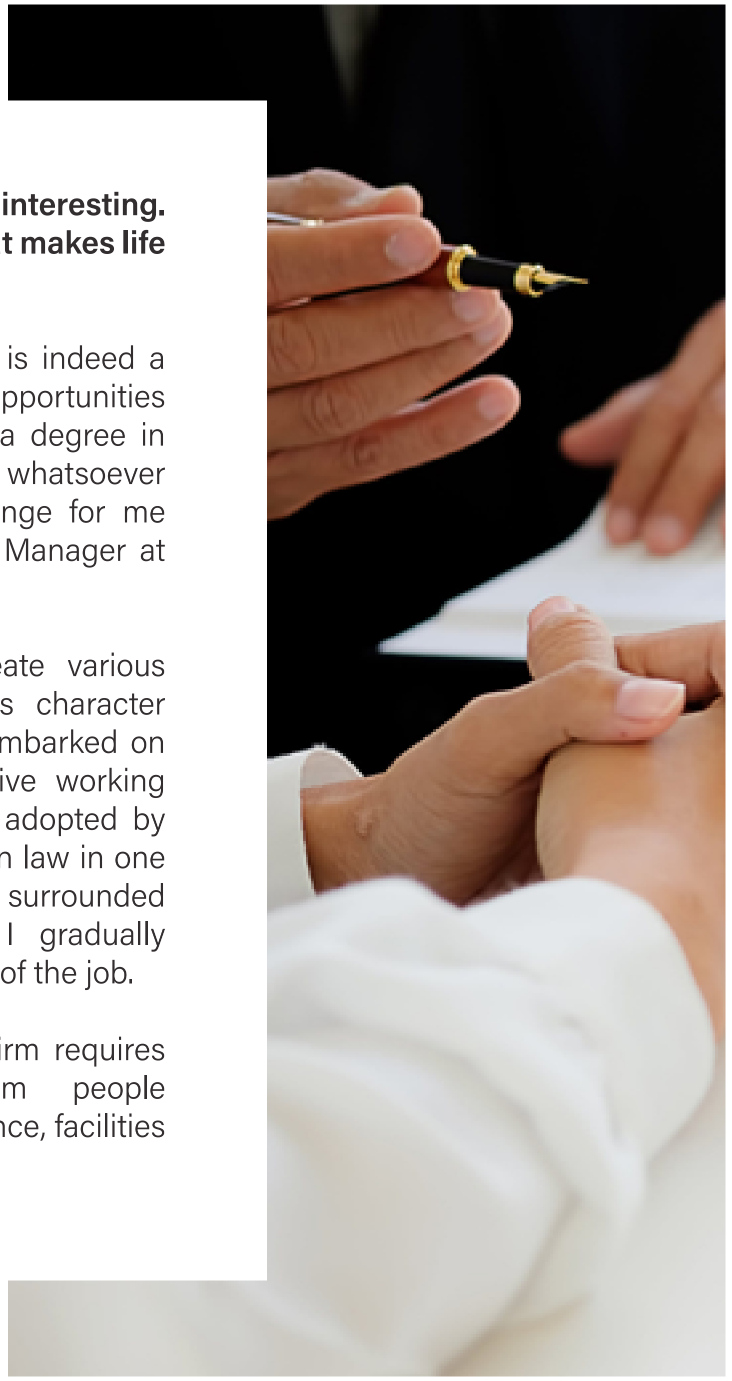


JAGESHWARSINGH LUKEERAM
ATTORNEY AT TEMPLE LAW

Jageshwarsingh, an Attorney-at-Law since early 2023, has five years of experience at Temple Law. He specialises in drafting corporate documents, legal opinions, and advising on civil, corporate, commercial, and insolvency law. Jageshwarsingh regularly appears in the Family and Commercial Division of the Supreme Court.

Becoming Practice Manager in a law firm

ARTICLE WRITTEN BY
SAROJINI NAIDOO



Challenges are what make life interesting. Overcoming challenges is what makes life meaningful.

My job as a Practice Manager is indeed a challenging one, yet full of opportunities for learning and growth. With a degree in Psychology and no background whatsoever in law, it was indeed a challenge for me to take up the role of Practice Manager at Temple Law.

Admittedly, as challenges create various opportunities to develop one's character and strength, I accepted and embarked on this journey. Being in a positive working environment I quickly became adopted by my colleagues who all worked in law in one way or another. I was glad to be surrounded by supportive persons, and I gradually acquired a good understanding of the job.

A Practice Manager in a law firm requires diverse skills ranging from people management, marketing to finance, facilities and administration.

It also requires good organisation skills and good communication skills. Accounting experience along with book-keeping, billing and debt recovery are also essential aspects of the job of a Practice Manager.

As Practice Manager, I oversee the administrative and operational aspects of the law firm and ensure the smooth functioning of the service delivery side of the practice. I onboard clients, make them comfortable so that they feel free to come back to me for any query. The client thus feels supported and they put their trust in our team who is there to help them resolve whatever issue that they are going through. These are often broad in nature.

I multitask a lot, often simultaneously undertaking client communication, invoice preparation, and record keeping. I am after all responsible for ensuring there is a sound paper trail in place for all our clients. This is a part of the role that I handle with utmost discipline and rigour.

One of the best things I enjoy about being a Practice Manager is the communication with clients. Being able to speak to the clients, connecting to them, helping them, answering their queries is one part of my job that I find very fulfilling. Creating a good rapport with clients is indeed very important.

The client feels comfortable and supported, and this is a benefit for the firm, as in the future, the client is very likely to come back to us if they feel there is trust.

The biggest challenge though remains the chasing of debtors which is a very important part of a Practice Manager's role. There are always those clients who are not willing to pay within the agreed time. Then comes the sending of multiple payment reminder emails, the various phone calls, sometimes with no response at all. It is always difficult to chase clients for payments. But eventually, when the client responds and the payment is done, it is indeed a satisfaction of a successful task being accomplished.

Another crucial aspect of a Practice Manager's job is the keeping of records. This requires good organising skills, and as Practice Manager I need to be very disciplined.

Overall, the job of a Practice Manager involves multiple tasks. It is an opportunity to develop a lot of different skills. It consists of lots of challenges. We just need to rise up to those challenges and learn from them. I would recommend embarking on a role in Practice Management to anyone who wishes to talk about it.

About the author

SAROJINI NAIDOO
PRACTICE MANAGER

Sarojini, Practice Manager at Temple Law, holds a degree in Psychology and excels in client communication. She oversees the firm's administrative and operational tasks, ensuring smooth service delivery. Sarojini onboards clients, making them feel comfortable and supported, fostering trust and encouraging them to return with any queries.

“Legal innovation does not necessarily happen on podiums or in the writings of theoreticians, but rather it comes about in the day-to-day reality of lawmakers and implementers of law (such as legislators, magistrates or attorneys).”

Haim Sandberg: Law professor, College of Management, University of Illinois law review, 17 March 2021

Commissioned Artwork of our then premises, a colonial house converted to office on 2 Labourdonnais, Street, Port Louis prior to construction of Temple Court about 2004

TEMPLE LAW

Temple Court, 2 Labourdonnais Street, Port Louis, Mauritius, 11413

+230 212 9810 | law@temple.mu | www.temple.mu