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GIFT OF PROFESSIONAL INCOME GENERATED BY A SPOUSE TO A THIRD PERSON IN MAURITIAN CIVIL LAW

For historical reasons, Mauritian civil law has been influenced by French civil law. However, despite the differences between Mauritian civil law and French civil law and the indisputable autonomy of the Mauritian civil law, it is impossible to deny that the latter is strongly inspired by the French civil law and that the Mauritian judge will in most cases refer to the decisions rendered by French courts – and in particular by the Court of Cassation – as well as to the French doctrine. This statement is applicable to Mauritian Law on Matrimonial Property Regimes which is inspired by French civil law. In this article we will first provide a brief overview of the Mauritian Law on Matrimonial Property Regimes, followed by an analysis of the validity of a gift of professional income generated by a married person to his concubine.

Key words: *Mauritius. – Law. – Gift. – Spouse. – Concubine. – Income. – Obligations.*

1. INTRODUCTION

For historical reasons, Mauritian civil law has been influenced by French civil law (Law Reform Commission, 2010; Domingue 2002, 62; Agostini 1992, 21; Venchard 1982, 31; Angelo 1970, 237; Bogdan 1989, 28; Burgeat 1975, 315; Marrier d'unienville 1969, 96; Moolan 1969, 137; Mixed Jurisdictions Worldwide 2012, 629). The French Civil Code, which came into force in 1804 and has been revised many times,

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has influenced the Civil Code of the Republic of Mauritius. The original text of the French Civil Code of 1804, was incorporated into the positive law of Mauritius. This is due to the fact that at the early 19th century, Mauritius was a French colony, before the English took possession of the Island. Article 8 of the *Act of Surrender*, signed in 1810, provided that the People of the Island would maintain their religion, *laws* and customs. In addition, “the Treaty of Paris of 1814, which officially transfers the legal possession of Mauritius to the Englishmen, does not have the effect of fundamentally overturning French laws considered in certain respects as the personal legislation of the inhabitants” (Venchard 1982, 31). Consequently, Mauritian civil law and, in particular, the Mauritian Civil Code, was modeled on French civil law and the French Civil Code of the time.

Despite the great resemblance between Mauritian civil law and French civil law, the former has managed to preserve an indisputable autonomy *vis-à-vis* the latter. This has been possible not only because of the reforms of the French Civil Code that took place over the years, but also thanks to the reforms of the Mauritian Civil Code that occurred during the 19th and 20th centuries. For example, the Act of 1980¹, which became Article 476 and following of the Mauritian Civil Code, stipulates that the only case of emancipation of a minor in Mauritius is emancipation by marriage.² On the other hand, in French civil law, in addition to marriage, the emancipation of a minor is possible through a court decision (Article 413–2 of the French Civil Code).³ Moreover, Article 478 of the Mauritian Civil Code prohibits an emancipated minor from being a merchant.⁴ On the other hand, Article L. 121–2 of the French Code of Commerce (Law n° 2010–658, 15 June, 2010) makes it possible, provided that it is authorized by a court’s decision, during the procedure of emancipation or after the emancipation has been completed.⁵ Another example of the autonomy of

¹ Act n° 8/1980

² “The minor is automatically emancipated by marriage”. – It has to be noted that there is a Children’s Bill recently introduced in the National Assembly of Mauritius, which proposes to modify the conditions for the marriage of minors. – See: <http://www.mauritiustimes.com/mt/the-childrens-bill> (last visited 24 February 2020). – <https://www.lemauricien.com/article/childrens-bill-un-projet-de-loi-qui-autorise-le-mariage-des-enfants> (last visited 24 February 2020).

³ “Minors, even unmarried, can be emancipated when they reach the age of sixteen. After hearing the minor, this emancipation will be pronounced, if there are just reasons, by the guardianship judge, at the request of the father and mother or one of them.”

⁴ “A minor emancipated by marriage cannot be a merchant.”

⁵ “The emancipated minor may be a merchant with the authorization of the guardianship judge given at the time of the decision of emancipation or on the decision of the president of the tribunal of “*grande instance*” if he makes this request after being emancipated.”.

Mauritian civil law is provided by Article 887. The latter stipulates that in case of lesion in a sharing agreement, the party to the contract having suffered a loss will be allowed to ask for the cancellation thereof.⁶ On the other hand, in France, a legislative reform removed this sanction from the Civil Code. Henceforth, the party to a sharing agreement having suffered a lesion has only the right to request a supplement from the other party to this agreement having benefited from that lesion. The former is not entitled to request the cancellation of the sharing agreement. This legal rule is stipulated in Article 889 of the French Civil Code.

It has to be underlined that in Mauritius, the decisions of the French Court of Cassation are a persuasive and not a binding authority.⁷ Thus, a Mauritian judge will only cite and follow the reasoning developed in a judgement of the French Court of Cassation if the judge considers them appropriate to the context. On the other hand, no formal obligation lies upon the Mauritian judge to follow the decisions of the Court of Cassation relating to the issue treated. This rule has been, for instance, clearly confirmed with regard to the issue of reparation for indirect damage suffered by an unmarried partner in the event of the death of the other partner.⁸

Despite all the differences between Mauritian civil law and French civil law which have been pointed out previously and despite the indisputable autonomy of the Mauritian civil law, it is impossible to deny that the latter is strongly inspired by French civil law and that the Mauritian judge will refer most of the time to the decisions rendered by French courts, – and especially by the Court of Cassation – as well as to French doctrine. This statement is applicable to Mauritian Law on Matrimonial Property Regimes which is inspired by French civil law.

⁶ “There may also be rescission (cancellation), when one of the co-heirs establishes that he has suffered a lesion of more than a quarter.”

⁷ In the judgement of the Supreme Court of Mauritius *Lingel-Roy M. J. E. M. and ORS v. The State of Mauritius and Anor* 2017 SCJ 411 we can read: “It is appropriate to recall the practice that when it comes to the interpretation of a law borrowed from French law we stand guided for its interpretation by French doctrine and case law. One can quote in that respect the following passage from *L’Etendry v The Queen* [1953 MR 15]: “the normal rule of construction laid down time and again by this court (...) is to the effect that when our law is borrowed from French law we should resort for guidance as to its interpretation to French doctrine and case law.” But, it has to be pointed out that the practice of relying on French authorities has always been for guidance and not in application of the stare decisis principle.” (highlighted by author)

⁸ On that issue see the judgements of the Mauritian Supreme Court in *Jugessur Mrs Shati & ORS v. Bestel Joseph Christian Yann & Anor* 2007 SCJ 106 and *Naikoo v. Société Héritiers Bhogun* 1972 MR 66 1972, as well as the judgements of the French Court of Cassation Cass. ch. mixte, 27 February 1970 n° of pourvoi: 68–10276 and Cass. crim. 17 March 1970 n° of pourvoi: 69–91040.

In this article we will first provide a brief overview of the Mauritian Law on Matrimonial Property Regimes and then analyze the validity of a gift of professional income generated by a married person to his concubine.

2. BRIEF OVERVIEW OF THE MAURITIAN LAW ON MATRIMONIAL PROPERTY REGIMES

In Mauritius, Matrimonial Property Regimes are regulated in articles 1387 through 1480 of the Civil Code, which is written in French. Few rules can be found here and there in special laws written in English, such as the *Civil Status Act*⁹ or the *Borrower Protection Act*.¹⁰ Matrimonial property regimes can be defined as the set of general legal rules enshrined in the Mauritian Civil Code which govern (which apply to) the property of the spouses during the marriage and after its dissolution (comp. with Terre, Simler 2019, 1; Revel 2018, 1; Peterka 2018, 3). It has to be noted that in Mauritius cohabitation of unmarried partners is not placed on an equal footing with marriage, from the legal point of view. This means that the Matrimonial Property Regimes Law does not apply to cohabiting partners; the financial issues pertaining to cohabitation of unmarried partners are resolved by application of the Law of Obligations (for example, unjust enrichment).¹¹

The Mauritian Law of Matrimonial Property Regimes can be divided into two parts. On one hand, there are the rules in the Civil Code (Articles 212 through 226) called the *primary matrimonial property regime* (Terre, Simler 2019, 29; Revel 2018, 19; Peterka 2018, 51). The rules of primary matrimonial regime are applicable to all marriages, i.e. to all married couples in Mauritius regardless of the matrimonial regime chosen. On the other hand, there exist also rules on specific matrimonial regimes, such as community of goods (articles 1400 through 1474), separation of goods

⁹ Thus, according to section 20 (1) of the Act “where an application is made to an officer for the publication of a proposed civil marriage, the officer shall – (...) (b) inform the applicant that – (i) different matrimonial regimes are provided for under the Code Napoleon and give the applicant a printed explanatory note to that effect; and (ii) the intending spouses should consider under which matrimonial regime they wish to be married.” Moreover, Section 24 (2) of the Act provides that “the officer shall – (...) (b) enquire from the parties the matrimonial regime under which they wish to be married and whether any marriage settlement has been made between them and if so, the name of the notary with whom it is deposited.”

¹⁰ See section 12 of the Act.

¹¹ Thus, if one of the unmarried partners does not have a job, but does the housework on a regular basis and the other partner has a job, works outside the house and saves money because they do not have to employ someone to perform the chores, the former will be able to receive compensation based on the “*enrichissement sans cause*” (unjust enrichment) from the latter.

(Articles 1475 through 1478), and contractual regimes (articles 1478 and 1479).

2.1. Primary Matrimonial Property Regime in Mauritius

The primary matrimonial regime is applicable to couples married under the regime of community of property, to couples married under the regime of separation of property, and to married couples having opted for a contractual matrimonial regime, i.-e. to couples who made a matrimonial contract (*contrat de mariage*) prior to the celebration of their marriage (Terre, Simler 2019, 29; Revel 2018, 19; Peterka 2018, 51). Those rules are considered to be of public interest, which means that the spouses cannot insert in their matrimonial contract clauses that would derogate from them.¹² This principal is known in Mauritian Law as *minimum matrimonial public order*. Matrimonial contract derogating from Articles 212 and following of the Mauritian Civil Code would be contrary to Articles 6,¹³ 1131¹⁴ and 1133¹⁵ of the Mauritian Civil Code, and would not produce any legal effect. In other words, such a contract would be null and void.¹⁶

The primary matrimonial regime in Mauritius is comprised of the professional freedom of spouses, the domestic equality of spouses, the autonomy of spouses and protection of third persons, the protection of the matrimonial home, as well as the protection of the spouse in need provided by a judge in chambers. Thus, Article 223 of the Mauritian Civil Code provides that every spouse, male or female, can freely exercise a profession. The freedom of each spouse to exercise their profession is supported by *an important power granted to each spouse over their professional income*. Thus, in Mauritius, whatever the matrimonial regime chosen by the spouses could be,¹⁷ *each spouse can freely collect*

¹² However, Article 226 of the Mauritian Civil Code does not exclude the possibility of contractual agreements in the field of primary matrimonial property regime. Regarding certain issues that can be described as secondary, the parties can enter into contractual agreements (for example, the spouses can determine by agreement the *quantum* or the form of the contribution to the expenses of marriage (Article 214)).

¹³ “One cannot derogate by specific contracts from laws that are of interest to public order and morality.”

¹⁴ “The obligation without cause, or on a false cause, or on a unlawful cause, can have no effect.”

¹⁵ “The cause is unlawful when it is prohibited by law, when it is contrary to morality or public order.”

¹⁶ See articles 1479 and 1480 of the Mauritian Civil Code. – Cass. 1st ch. 28 June 2006, *Revue trimestrielle de droit civil*, 2006, comment Vareille B. 819; *AJ Famille*, 2006, comment Hilt P. 331.

¹⁷ The rule is applicable even to the regime of the community of property, even though professional revenues of each spouse are considered as common property (“bien commun”).

*their earnings and wages*¹⁸ and dispose of them freely (Terre, Simler 2019, 83; Revel 2018, 24; Peterka 2018, 53).¹⁹ The only limit to this freedom, provided in article 223 of the Mauritian Civil Code, is payment of the matrimonial charges mentioned in Article 214 of the Code. In other words, a spouse's professional income is a common property in Mauritian Civil Law, it belongs to both spouses, but the spouse who generated the income has the exclusive power to collect and dispose of this professional income.²⁰ According to Article 214 of the Mauritian Civil Code, the spouses are equal regarding the contribution to the expenses of the marriage (matrimonial charges). This article imposes upon them an obligation to contribute to the expenses of marriage (Chaffois 2020, 60)²¹, in conformity with their respective faculties (Terre, Simler 2019, 31; Revel 2018, 31).²² The equality of spouses exists also in regard to the power to contract household debts. According to Article 221 of the Mauritian Civil Code, each spouse has the power to enter contracts, without the consent of the other, with the aim of maintenance of the household or education of the children. The obligation contracted by a spouse alone will bind the two spouses jointly and severally (Terre, Simler 2019, 58; Revel 2018, 35).²³ It should be noted that in Mauritian Law on Matrimonial Property Regimes, the responsibility of the spouses for the household debt will not be joint and several in some cases, despite of the fact that a debt is contracted by one spouse alone for the maintenance of the household or for the education of the children. First, the responsibility of the spouses for the household debt will not be joint and several where the debt is manifestly excessive (Terre, Simler 2019, 62; Revel 2018, 39). According to the Mauritian Civil Code the judge will take into account

¹⁸ Earnings and wages mentioned in Article 223 of the Mauritian Civil Code, i.-e. professional income, are all incomes generated by the work of a spouse (e. g. salary of a state officer or of an officer of a parastatal body, remuneration of a worker hired to do work under the contract of construction, etc.).

¹⁹ Cass. 1st ch., 14 November 2007, *AJ Famille* 2008, comment Hilt 86.

²⁰ For instance, the husband who generated the earnings and wages can spend them at the race track, in a restaurant, or save them in a bank account, after having contributed to the expenses of the marriage (food expenses, payment of television, electrical and water bills, etc.).

²¹ The contribution in money is not the only form of the contribution to the expenses of the marriage, it can also be made in kind, and especially by the work of the stay-at-home spouse, or by the supply of food products. See: Cass, 1st ch. 3 October 2019, comment Casey J., *Revue trimestrielle de droit civil*, 2019, 913; Cass. 1st ch. 16 January 2019, *Revue trimestrielle de droit civil*, 2019, 638.

²² In other words, the spouse who earns more money will have to contribute more to food expenses, payment of bills, etc., proportionally to the earnings and wages.

²³ Obligations are covered by the solidarity of the household debts, the debts pertaining to the food costs (bread, milk, flour, etc.), to the family accommodation (rent, for example) the healthcare costs (medical consultation, costs of hospital stay, etc.), children's education costs (private school costs), as well as the family leisure costs. See: Cass. 1st ch. 17 May 2017, *AJ Famille*, 2017, comment Casey J., 422.

the couple's lifestyle (financial situation), the usefulness or uselessness of the operation and the good or bad faith of the creditor. Second, in cases where one spouse alone has used credit by means of a loan or an installment purchase, the responsibility of the spouses for the household debt will not be joint and several (Terre, Simler 2019, 63; Revel 2019, 39; Bremond 2003, 1863; Simler, Lasserre Capdeville 2016, 2507).²⁴ Article 222 of the Mauritian Civil Code provides that a spouse may alone make any act of administration,²⁵ act of enjoyment²⁶ or act of disposal²⁷ regarding movable property that a spouse detains individually, including common property.²⁸ Moreover, according to Article 222 of the Mauritian Civil Code, from the point of view of a third party (for instance, the purchaser of the movable property), the spouse who individually detains the movable property is supposed to have the power to perform one of the three types of the above-mentioned acts (Revel 2018, 42; Terre, Simler 2019, 74). If the act is performed, i.e. if the contract is entered with a third party in good faith,²⁹ the act will therefore be considered valid (Revel 2018, 43; Terre, Simler 2019, 80). Finally, the Mauritian Civil Code, as well as the *Borrower Protection Act* of 2007, provide protection of the matrimonial home against the arbitrary acts of disposition that one of the spouses might be tempted to make. Thus, according to Article 216 of the Mauritian Civil Code, one spouse may not dispose of the rights on the matrimonial home (the family's main residence³⁰) nor of the furniture with which it is furnished, without the consent of the other. As long as the spouses are married, under the legal regime of community of property this protection is absolute. In other words, the protection provided in article 216 of the Civil Code applies to a house or a flat belonging exclusively to one of the spouses (personal property) and to a house or a flat belonging to both spouses (common property). It also applies to premises rented by one or both spouses as well as to premises for which usufruct rights been bestowed upon one or both spouses. The

²⁴ However, there is an exception to this rule: when a loan has been taken out by one spouse alone, the responsibility of the two spouses for its repayment will nevertheless be joint and several, provided that the loan relates to modest sums and that these sums are necessary for the needs of everyday life.

²⁵ For example, a spouse can rent out a car that is the common property, for a year.

²⁶ Thus, a spouse can alone collect the income generated by car rental.

²⁷ For instance, a spouse can sell a lawn mower or a TV set that is common property.

²⁸ An exception is made for the furniture that falls within the scope of Article 216 of the Mauritian Civil Code (protection of the matrimonial home).

²⁹ The third party is in good faith if they did not know the real situation, i.e. the opposition of the other spouse to the act. – See: *P. Khulpateea v. Banque Nationale de Paris Internationale* 1996 SCJ 379.

³⁰ Only the main residence qualify as the matrimonial home; the secondary residence, a bungalow, for example, where the family spends a few days or weeks per year, for vacation, is not specially protected by the law.

act of disposition of the matrimonial home, for which Article 216 of the Mauritian Civil Code requires the consent of both spouses, may be in the form of a sale agreement, an exchange agreement, a gift, the constitution of a mortgage, a floating charge or of a fixed charge, etc. As previously mentioned, the protection of the matrimonial home provided for in Article 216 of the Mauritian Civil Code concerns only spouses married under the legal regime of community of property, whether the premises are their personal property³¹ or a common property. Article 216 of the Code affords no protection to spouses married under the legal regime of separation of property regime (Article 216 (3) of the Code).³²

2.2. Legal Regime of Community of Property

In Mauritian civil law, spouses choose their matrimonial regime freely. This freedom is provided in articles 1393 and 1479 of the Mauritian Civil Code. The only limit to this freedom is the need to respect public order and good morals (Article 1479 of the Code). There are two legal regimes in the Mauritian Law on Matrimonial Property Regimes, i.-e. the community of property and the separation of property. When entering into the marriage, the spouses may opt for the application of one or the other legal regime, as provided in section 24 (2) of the *Civil Status Act*. If they remain silent, the regime of community of property is applied (Article 1393 of the Mauritian Civil Code). Finally, the spouses may also adapt the legal rules to their needs, through a marriage contract, as long as this contract is not contrary to public order or to the accepted principles of morality (Articles 1387 and 1393 of the Mauritian Civil Code).

The most frequent regime is the regime of community of property (Terre, Simler 2019, 197). According to Article 1401 of the Mauritian

³¹ In the judgement of the Supreme Court of Mauritius in *Sondhoo v. Hong Kong and Shanghai Banking Corporation Ltd & Anor* 1999 MR 160, and *Aubeelock v. Aubeelock & Ors* 1999 MR 199, the Court was of the opinion that the consent of both spouses is necessary under Article 216 of the Mauritian Civil Code, when the spouses are married under the regime of community of property, even though the premises which serve as the matrimonial home are the exclusive property of one of the spouses. Thus, the contract of security or the sale made by one spouse alone, without the consent of the other, will be subject to relative nullity. The spouse who has not given his or her consent to it will be able to invoke the nullity of the contract.

³² In the judgment of the Supreme Court of Mauritius in *Marc Alain Bouton vs The Mauritius Commercial Bank Limited* 2005 SCJ 60, the applicant (husband) asserted that his wife had created, on their matrimonial home, a security, for the benefit of a bank, and without the husband's consent. Consequently, he ask for the cancellation of this security. The Supreme Court of Mauritius nevertheless decided that the wife did not have to ask for her husband's consent as the couple were married under the regime of separation of property and Article 216 of the Mauritian Civil Code did not apply. – However, the matrimonial home of the spouses married under the regime of separation of property has been protected to a certain extent (against the creation of a mortgage, a fixed charge and a floating charge) by Section 12 of the *Borrower Protection Act*.

Civil Code the community of property of the spouses consists of any property acquired by the spouses for consideration (*à titre onéreux*) during the marriage (Terre, Simler 2019, 198).

First of all, the professional income of each spouse, mentioned in Article 223 of the Mauritian Civil Code, is the common property of the spouses,³³ despite the fact that each spouse can collect it alone and dispose of it alone. Moreover, the income generated by the personal property of each spouse is also considered common property (Monteiro 1998, 28; Terre, Simler 2019, 220; Nicod 2007, 1578). For example, the rent from a house owned by one spouse is considered common property. Finally, all the property that the spouses have acquired for consideration during the marriage is common property³⁴ and the acquisition for consideration is to be understood in a very broad sense (Aubry 2019, 833).³⁵ The origin of the funds used to acquire the property is irrelevant. For example, the purchase of land or a house financed by the personal money of one of the spouses will be considered the property common to both spouses. On the other hand, it does not matter whether, from the formal point of view, only one spouse is a party to the contract for purchase or both spouses are (Bremond., Nicod, Revel 2014, 1905). The spirit of common property will prevail and the acquisition of a property for consideration, during the marriage, is considered more important than the fact that the name of only one spouse is mentioned in the contract for purchase. Thus, even if only one spouse is designated as the purchaser of the house in the contract made before the public notary, both spouses are the owners of the house. The construction of a family house (matrimonial home) on land that is the common property of the spouses is also considered an acquisition for consideration.³⁶ Thus, the house will become common property of the spouses. The rule is based not only on Article 552 of the Mauritian Civil Code (the accession rule), but stems also from the spirit of the regime of community of goods. It is considered that a property made by one spouse

³³ Cass. 1st ch. 17 April 2019, *Recueil Dalloz*, 2019, 665; *Revue trimestrielle de droit civil*, 2019, comment Nicod M., 643.

³⁴ It should be noted that gifts that the spouses receive during the marriage may, under certain exceptional conditions, also become common property: 1) when a gift is explicitly made for the benefit of both spouses, in other words, the gift is made to both spouses as recipients of the donated property; 2) when a gift was made for the benefit of only one spouse, but the gifter's desire to make it a common property for both spouses was clearly expressed in the gift contract. See: *Mrs. Shrutee Bissoo v. Mr Subash Mohunlall Bissoo* 2000 SJC 269.

³⁵ See: CA Paris, 3rd February 2010, *Revue trimestrielle de droit commercial*, 2011, comment Pollaud-Dulian F., 108; Cass. 1st ch. 9 March 2011, *Revue trimestrielle de droit civil*, 2011, 577; Cass. 1st ch. 12 May 2011, *Recueil Dalloz*, comment Marrocchella J. 2011, 1413.

³⁶ This is the case even if the construction was entirely financed with the personal money of the husband or the wife.

alone during the marriage is common property (Terre, Simler 2019, 201), because it results from the common effort of the spouses. This rule is laid down in the judgement of the Supreme Court of Mauritius *Ramanjooloo G. N. v. Vyapooree M.* of 2014.³⁷

In Mauritian Law on Matrimonial Property Regimes, spouses married under the legal regime of community of goods have three types of power. First, there are the powers that are said to be competing, which means that each spouse can perform alone conservatory acts,³⁸ acts of administration³⁹ and acts of disposition⁴⁰ of any property that is not subject to the co-management regime or the regime of exclusive power. In Mauritian Civil Law, the competing powers of the spouses exist for most movable property and each spouse can *a priori* sell a piece of furniture that is common property without the consent of the other spouse. Second, the immovable property (buildings, land, right to construct, etc.) are subject to co-management, which means that the acts of disposition on such property (for example sale, gift, exchange, creation of a mortgage, of a fixed charge and of a floating charge) require the consent of both spouses.⁴¹ If both spouses have not consented to an act of disposition of an immovable property, the act will be void. The nullity is a relative one and may be invoked only by the spouse who has not given his or her consent to the act.⁴² It is to be noted that *the gift of any common*

³⁷ 2014 SCJ 178 – In this judgement the Supreme Court of Mauritius stated that the case falls within the scope of Article 1401 of the Mauritian Civil Code. The Court placed particular emphasis on the fact that an acquisition, in the sense of community of property, is all the property acquired for consideration by one spouse alone or by both of them during the application of the regime of community of property (during the marriage) but also all the goods produced during the marriage by one spouse alone by his or her manual or intellectual activity. The Court also stated that despite the fact that the land was purchased with the husband's personal means and the house was built thanks to the loans that he had taken out, the land and the house are his personal property. Even if one spouse alone created or acquired a property during marriage this property will become part of the common property of the spouses: "However, despite the unrebutted evidence that the plaintiff purchased the land and put up the building from his own personal funds the property in lite does not constitute a *bien propre* of the plaintiff this in view (...) of Article 1401 to the effect that les *acquêts* during the subsistence of the *communauté* between the spouses be it from the sole contribution of one spouse, form part of the *communauté légale*."

³⁸ These acts are necessary, essential, because of the urgency of the situation.

³⁹ These acts are necessary for the proper management of the spouses' common property.

⁴⁰ The acts of disposition pertain to the essence of the spouses' common property, and their effect is to bring out of the common property some of the common goods. For example, contracts such as sale, exchange, gift, etc. of a common goods are the acts of disposition.

⁴¹ Article 1424 of the Mauritian Civil Code.

⁴² Article 1427 of the Mauritian Civil Code.

property, i.-e. the immovable property, as well as the movable property is subject to the co-management regime. In other terms, Article 1422 of the Mauritian Civil Code⁴³ requires the consent of both spouses for a valid gift of the spouses' common property. Third, certain powers bestowed on the spouses married under the legal regime of common property are exclusive. Firstly, each spouse has exclusive powers over their personal property.⁴⁴ Secondly, the professional income of each spouse, which is a common property of the spouses, is subject to the exclusive power of the spouse who earned it. Thus, Article 223 of the Mauritian Civil Code states that each spouse is free to spend as they wish their professional income, but after having contributed to the expenses of the marriage, in accordance with the law (Article 214 of the Code).

3. INTERPRETATION OF ARTICLES 223, 1131, 1133 AND 1422 OF THE MAURITIAN CIVIL CODE

The short overview of the Mauritian Law on Matrimonial Property Regimes leads us to the particularly interesting issue of the gift of earnings and wages made by one spouse, alone, for the benefit of a third person, and especially for the benefit of a concubine. We will try to show that this type of gift is not necessarily invalid from the point of view of the Mauritian Law on Matrimonial Property Regimes as well as from the point of view of Mauritian Law of Obligations.

3.1. Validity of the Gift of the Professional Income Made by Spouse for the Benefit of a Concubine, from the Point of View of Mauritian Law on Matrimonial Property Regimes

According to Article 1422 of the Mauritian Civil Code, the consent of both spouses is always required for any gift of common property. Thus, both spouses have to give their consent for the gift of a common immovable or movable property, otherwise the gift will not be valid. On the other hand, earnings and wages of a spouse, i.-e. the professional

⁴³ "The spouses cannot, one without the consent of the other, make a gift of their common property".

⁴⁴ For example, a spouse who owns a car as the exclusive owner can sell or exchange it alone, without the consent of the other spouse. Moreover, a spouse who is a welder can sell their own welding machine, without the consent of the other spouse. In order to protect the equality of the spouses and their dignity as human beings, it is considered that the spouses cannot enter into a marriage contract that would derogate from this rule by providing, for example, that the sale of a wife's personal (exclusive) property will be subject to the consent of her husband. The rule is of public interest (*ordre public*). See articles 6, 1479 and 1480 of the Mauritian Civil Code. On the other hand, one spouse can grant the other a proxy for the sale of their exclusive property.

income, are a common property and Article 223 of the Mauritian Civil Code stipulates that the spouse who earned the income has the right to dispose of it unilaterally and freely.⁴⁵ It may happen that a married person makes a gift of those earnings and wages to a third person and particularly to a concubine.⁴⁶ Thus, the issue arises of the rule that should prevail in this type of situation; Article 223 or Article 1422 of the Mauritian Civil Code. It is our opinion that the rule on the free disposition of earnings and wages, provided in Article 223 of the Code should prevail. This legal rule forms part of the primary matrimonial regime in Mauritius (articles 212 through 226 of the Code) which is of public order (*d'ordre public*) and applicable to all matrimonial regimes. On the other hand, Article 1422 of the Civil Code is the part of a specific matrimonial regime (community of property) and is not common to all matrimonial regimes.⁴⁷ This is why when a spouse make a gift of a sum of money, derived from his or her professional income, to a concubine, the gift will be valid from the point of view of the Mauritian Law on Matrimonial Property Regimes. In other words, Article 223 of the Code allows a spouse to make a gift of their professional income to a concubine. However, Article 223 of the Mauritian Civil Code does not suffice in order to make such a gift valid. The other issue raised by this type of gift is the issue of the validity from the point of view of Mauritian Law of Obligations.

The technical instrument that the Mauritian judge will use in order to assess the validity of a gift of the professional income made by a spouse to his concubine is the cause of contract (*cause du contrat*). As long as the cause of the gift made by a spouse to his concubine is lawful, this spouse, in spite of the fact that he is married, can freely dispose of his earnings and wages for the benefit of the concubine, provided he has contributed to marriage expenses. This statement needs to be elaborated.

3.2. Validity of the Gift of the Professional Income Made by Spouse for the Benefit of a Concubine, from the Point of View of Mauritian Law of Obligations

The cause of contract (on the suppression of this term in the French Civil Code in 2016 see: Chenede 2018, 67; Tranchant, Egea 2018; Cabrillac 2018, 81; Aubert, Collart-Dutilleuil 2017, 89; Albiges, Dumont-Lefrand

⁴⁵ The only limit to this freedom is the fulfilment of the legal obligation stipulated in Article 214, to contribute to the matrimonial charges.

⁴⁶ In Mauritian Law, the *concubinage* is defined as the community of life, stable and enduring between a man and a woman. *Vide*, Cass. crim. 8 January 1985, *La Semaine Juridique*, Ed. G, 1986, comm. Endréo G., n° 20, II 20588; Cass. crim. 4 June 1985, Responsabilité civile, *La Semaine Juridique*, Ed. G, 1985, n° 41, 102392; Cass. crim., 5 October 2010, *Droit de la famille*, 2011, comm. Larribau-Terneyre n° 1, comm. 1.

⁴⁷ Cass. 1^{ère}, 14 November 2007, *AJ Famille* 2008, comment Hilt P., p. 86

2019, 71; Mekki 2016, 494; Terre, Simler, Lequette, Chenede 2019, 165; Wicker 2015, 107; Ansault 2014, 22; 26; Ferrier 2015, 74; Houtcieff 2009, 198), also known as subjective cause, may be defined in Mauritian civil law as the personal reasons that are at the origin of the act of will. In other words this cause consists of the motives having determined a party to make a contract (Chenede 2016, dossier 4; Latina 2009, 131; Belanger 2007, 82; Baraké, 2007, 117; Josserand 1984, 24). Articles 1131 and 1133 of the Mauritian Civil Code provide that this cause has to be in conformity with the law, public policy and good morals; otherwise the contract will be void. The cause of contract is applicable to contracts without consideration, such as gift. As mentioned before, the judgements of the French Court of Cassation are the persuasive authority in Mauritius. It should be noted that a spectacular reversal, relating to the cause of the acts of disposition without consideration (such as gift) made by a spouse for the benefit of a concubine, occurred in two judgments of the French Court of Cassation, delivered respectively in 1999 and 2004.⁴⁸ For many years, in France, a gift was declared void when its author intended to form, continue, resume or remunerate cohabitation relationships with the beneficiary of the gift, i.-e. his concubine (Mazeaud 2004, 467; Lambert 2006, 288).⁴⁹ On the other hand, when the decisive motive of a gifter consisted of the intention to compensate his former concubine for the damage suffered as the result of their separation or to express his feelings towards the concubine who later became his wife or towards the concubine who took care of him during his illness, the cause of the contract of gift is not considered illegal (Mazeaud 2004, 468; Lambert 2006, 288).⁵⁰ Thus, the gift will be valid. The First Civil Chamber of the French Court of Cassation abandoned this traditional distinction pertaining to the cause of contract, and stated in a judgment rendered on 3 February, 1999 that the act of disposition without consideration made by a septuagenarian to his young mistress a few months before his death was not null for the immoral cause of the act, despite the fact that the author of the above-mentioned gift had made it in order to maintain an adulterous relationship with his mistress (Mazeaud 2004, 468).⁵¹ Moreover, the Plenary Assembly of the French Court of Cassation has stated, in a judgment rendered on 29 October 2004

⁴⁸ Cass. Ass. plén. 25 October 2004, Bull. civ. 2004, Ass. plén. n° 12; Cass. 1^{ère}, 3 February 1999, Bull. civ. I, n° 43, 29.

⁴⁹ Cass. civ. ch. 11 March 1918, DP, 1918, I, p. 100; Cass., req. ch. 8 June 1926, D. P. 1927, I, 113 – See also: Cass., 1st ch., 3 December. 1991, n° of pourvoi: 90–17347; Cass. 1st ch., 11 October 1988, n° of pourvoi: 87–15343; Cass., soc. ch. 4th October 1979, Bull. civ. V, n° 680; Cass. 2nd ch., 10 January 1979, Bull. civ. II, n° 10, 7; Cass. 1st ch., 15 December 1975, Bull. civ. I, n° 365, 303.

⁵⁰ Cass. 1st ch., 26 June 1990, n° of pourvoi: 88–19760 – Compare with: Cass. crim. 21 Decembar 1971, Bull. crim. 1971, n° 365, 916; Cass. 1st ch., 6th October 1959, D. 1960, jur. 515.

⁵¹ Cass. 1st ch., 3 February 1999, *Ibid.*

that an act of disposition without consideration is not null and void for the immoral cause when the author of the act, who is married, aims to remunerate the favors of a concubine.⁵² If the Mauritian Supreme Court decides to follow the new position that the French Court of Cassation expressed in the judgments of 1999 and 2004, it will render any gift of professional income made by a married person to his concubine valid, even if the main mobile of the author of such a gift was to remunerate his concubine. We are of the opinion that such a solution is not the most suitable for the Mauritian Civil Law. It seems impossible to dismiss from the legal analysis of the cause of a gift of professional income made by a married person to his concubine, the legal obligation of loyalty between spouses, arising from the mandatory provisions of the Mauritian Civil Code (Lombard 2008, 123) (Article 212 of the Code⁵³). This obligation of fidelity (loyalty) between spouses forms part of the directional public policy (*ordre public de direction*), as the fidelity between spouses is one of the fundamental values in Mauritian society. Consequently, the personal motive of the gifter, which would be establishment, resumption, continuation or reward of adulterous relationships, is explicitly contrary to the law and to public order in Mauritius (Article 212 of the Code). Moreover, the attempt by a gifter to buy the fidelity of his concubine by means of material goods does not deserve to be tolerated by Mauritian law, because such attempt is not in conformity with morals in Mauritius and is contrary to articles 6, 1131 and 1133 of the Civil Code. Fidelity of spouses is not a commercial goods in Mauritius and it is therefore *hors du commerce*.⁵⁴ In conclusion, we approve the position of the Mauritius Supreme Court expressed in the judgment in *Pool and Arthur Savy v. Delorie* of 1958⁵⁵ where the Court stated that a gift intended to start, continue, resume, or remunerate cohabitation relationships between a married person and his concubine is void for illegal or immoral motives, but the nullity of a gift may be avoided when the gifter seeks, for example, to repair the damage to a concubine who separated from the married person. It is easy to understand that the position of our Supreme Court is the same as the position held by the French Court of Cassation before the reversal made in 1999 and 2004. The validity of a gift made by a married person to his concubine will depend on the conformity of his motives to the law, public interest and the morality. Thus, in most cases a gift of professional income made by a married person to his concubine will be void from the point of view of Mauritian Law of Obligations, because the gifter seeks to remunerate his concubine, in one or another way. However, there may be some cases where the motive of the married person who

⁵² Cass. Ass. plén. 25 October 2004, *Ibid*.

⁵³ “The spouses owe each other loyalty, help, assistance”.

⁵⁴ See articles 1128 and 1598 of the Mauritian Civil Code.

⁵⁵ MR 266.

donates his professional income to his concubine are commendable. It may occur when the gifter wishes to repair the damage caused to the concubine whom he is about to leave or to thank her for having taken care of him during his illness.

4. CONCLUSION

We have attempted to show, after having provided a brief overview of the Mauritian Law on Matrimonial Property Regimes, that a gift of professional income made by a spouse to his concubine is not necessarily void. On one hand, this kind of gift is in conformity with Article 223 of the Mauritian Civil Code, providing that every spouse may dispose alone of their professional income. On the other hand, even if it is true that the above mentioned gift will often be void because the motives of the gifter are contrary to the law, public policy or good morals in Mauritius, it will not always be the case. It may occur that the gift of professional income generated by a spouse to his concubine does not violate articles 6, 1131 and 1133 of the Mauritian Civil Code, because the main motive of the gifter is commendable. The gift will thus be valid both from the point of view of the Mauritian Law on Matrimonial Property Regimes as well from the point of view of the Mauritian Law of Obligations.

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