EMPLOYMENT RELATIONS TRIBUNAL

ORDER

ERT/RN 51/2021

Before: -

Shameer Janhangeer	Vice-President
Marie Désirée Lily Lactive (Ms)	Member
Abdool Feroze Acharauz	Member
Ghianeswar Gokhool	Member

In the matter of: -

Bank of Mauritius Employees Union

Applicant

and

Bank of Mauritius

Respondent

The Bank of Mauritius Employees Union (the "Union") has entered the present application for an order requiring the Respondent to comply with certain provisions of the Procedure Agreement under *section 51 (8)* of the *Employment Relations Act* (the "*Act*"). The Applicant Union contends that the Bank of Mauritius (the "Bank") has not complied with Articles 5 (5), 7 (1) and 4 (1) of the Procedure Agreement found at the *Seventh Schedule* of the *Act*.

The Applicant Union was assisted by its Trade Union Negotiator Mr N. Gopee, whereas the Respondent was assisted by Mr R. Pursem, Senior Counsel, who appeared together with Miss P. Emerith. Both parties have submitted their respective Statement of Case to the Tribunal in the present matter.

THE EVIDENCE OF WITNESSES

Mr Chidanand Rughoobar, President of the Applicant Union, was called to adduce evidence. He notably stated there have been several meetings in the past between the Union and management to discuss Union and staff matters. There is no Procedure Agreement as such between the Union and the Employer but the Bank provided the Union with a draft Procedure Agreement. He produced a letter dated 22 February 2019 from the Bank (Document A) and the draft Procedure Agreement referred to therein (Document A₁) to this effect. The Union thereafter wrote, on 10 May 2019, to management requesting for a meeting (letter produced as Document B) attaching the Union's counter proposal to the Procedure Agreement submitted by the Bank (produced as Document B₁). The Bank replied by letter dated 21 May 2019 (produced as Document C), to which the Union replied on 31 July 2019 (letter produced as Document D) asking for a meeting to sign the Procedure Agreement. The Bank eventually replied by letter dated 28 October 2019 (produced as Document E) stating that it has decided to adopt the Procedure Agreement at the *Seventh Schedule* of the *Act* subject to adaptations and modifications as may be necessary.

Mr Rughoobar disagreed that the Union has not held its Annual General Assembly as they requested the Bank to issue a communique on its intranet to inform members to attend and same was produced (Document F). Management has also been informed of the members of the Executive Committee following the Annual General Meeting in November 2020 and he produced a list of the office bearers (Document G). An extract of the dispatch book showing that the aforesaid list was dispatched to management was also produced (Document G₁).

Mr Rughoobar moreover stated that there is a Procedure Agreement between the Union and Management. They are still awaiting the Bank to finalise same and under Article 3 thereof, the Bank has mentioned that the Union has sole bargaining power and recognition. The Union is recognised by the Bank as they have had several meetings with management and have also been given an office space to conduct their activities in August 2021. The Union, mainly in January, June 2021 and October 2021, made requests to set up a Joint Negotiating Committee ("JNC"). The Governor was totally agreeable to the JNC but other management representatives were not so, regarding the JNC, time-off and check-off procedure. There is presently no check-off made for staff. They have requested same from management and also provided a copy of Article 5 of the Procedure Agreement regarding check-off. Time-off facilities have also been requested and the article was also submitted to management. Mr Rughoobar was questioned by Counsel for the Respondent. He notably stated that the elections for the Executive Committee of the Union took place in November 2020 and there have been no elections since. Elections ought to have been held by end of March this year. He disagreed that the Executive Committee does not have a mandate. Mrs Lily Bastien was the former Chief Human Resources at the Bank, while Mrs Pillay joined this year. Management at the Bank comprises the Governor, the Deputy Governor and also the Secretary. There is no letter to show that the Union applied for recognition, but the Union did obtain an award against the Bank in 1991 before the Permanent Arbitration Tribunal (*RN 242*). He agreed that the email dated 10 June 2021 (produced as Document H) is to effect that management recognises the existence of the Union.

Mr Rughoobar moreover produced a letter dated 24 January 2019 (Document J) from the Bank addressed to the Union, which states that the stand of the Bank is that the Union has never applied for recognition. He was referred to a letter dated 30 January 2019 sent by the Union (produced as Document K), whereby it was stated that there is no requirement for the Union, holding recognition under the previous legislation, to apply for recognition and that following its registration in 1976, the Union obtained recognition by the Bank for collective bargaining. He disagreed that management agreed to discuss the Procedure Agreement in a spirit of good industrial relations. He produced an email dated 11 February 2019 (Document L) from Mr R. Luchmun, Secretary of the Union. The letters of 24 and 30 January dealt with the issue of recognition. He agreed that as at 22 February 2019, the Union was aware of the stand of the Bank that there was no application for recognition.

Mr Rughoobar also stated that he is not aware if the Union submitted any Procedure Agreement prior to Document A₁. He was referred to a letter dated 14 January 2019 from the Union addressed to the Second Deputy Governor, which refers to a draft Procedure Agreement. He agreed that it was in fact the Union which first initiated discussions with respect to the Procedure Agreement. He withdrew his word on the Bank having initiated discussions with respect to the Procedure Agreement. He produced a letter dated 14 January 2019 (Document M) together with the Procedure Agreement enclosed (Document M₁). As per Document A, the Bank provided its comments with respect to the draft submitted by the Union. Following the letter dated 22 February 2019 (Document A), the Union wrote to the Bank on 10 May 2019 (Document B). There is no mention in Document B, that there is any document annexed thereto. He was not aware if any document accompanied the letter dated 10 May 2019 (Document B), he was informed by his members. He agreed that no document may have been submitted with the letter.

Mr Rughoobar, on being referred to Document C, agreed that the Bank was asking for the Union's comments with respect to the Procedure Agreement. He agreed that the Union sent a letter dated 25 June 2019 (produced as Document N) and submitted its remarks on the proposed amendment. Following this, there was a letter dated 31 July 2019 (Document D) from the Union to the Secretary of the Bank. There was no official meeting following this letter. He agreed that as per the Union, management was bound by the Procedure Agreement set out in the *Seventh Schedule* to the *Act* and produced a letter dated 30 September 2019 (Document O). The Procedure Agreement (Document B₁) is the one annexed to a letter dated 10 December 2019 (produced as Document P) from the Union. He disagreed that the Union is not recognised, that the Bank is not bound by the Procedure Agreement.

Upon re-examination, Mr Rughoobar notably stated that the Union held its last elections in November 2020 and could not hold same in March 2021 due to Covid. The Union was established in 1976, there have been several meetings with the Bank. Since they have recognition, it was not important for the Union to apply for recognition anew. He produced an extract of the Bank's Annual Report 2020 (Document Q) whereby it is mentioned that the Bank organised an event together with the Union. He also produced a Supreme Court judgment with reference *1999 SCJ 317* (Document R), where the Union was a Co-Respondent. In the letter of October 2019, the Bank stated that it would abide by the *Seventh Schedule* regarding the Procedure Agreement and asked for the Union to provide necessary amendments; the Union did so by letter in December 2019 and there have been no meetings since. He believes that the Union and the Bank are bound by the Procedure Agreement under the *Seventh Schedule*. Mr Rughoobar further clarified, upon a question from Counsel for the Respondent, that the letter dated 28 October 2019 (Document E) mentions the word 'adopt' and not 'abide'.

Mrs Kobashni Pillay, Chief Human Resource Manager at the Bank, adduced evidence on behalf of the Respondent. She stated that since her appointment, she has taken over all liaison between the Bank and the Union. There were discussions between the Bank and Union relating to a Procedure Agreement. The Bank has not recognised the Union as the latter has never been able to produce its recognition in writing to the Bank. There is no record from the Bank where it has recognised the Union. The Bank embarked upon discussions regarding the Procedure Agreement in a spirit of good faith and to foster the working relationship between the two. She did not agree that the Bank is bound by the Procedure Agreement at the *Seventh Schedule*. Mrs Pillay, referring to the letter dated 28 October 2019 (Document E), stated that it states that the Bank decided to adopt the Procedure Agreement for the purposes of discussion. It is not the stand of the Bank that it was bound by the Procedure Agreement and this is why it is clearly written '*adopt*'. The Bank did so in a spirit of good industrial relations between itself and the Union. The Bank wanted to discuss the agreement, receive views and this is why the word '*adopt*' has been used. She confirmed that no Procedure Agreement was sent with Document B to the Bank.

Mrs Pillay was questioned by the Disputant's Trade Union Negotiator. She notably stated the Union is not recognised despite management having had meetings with them. She is aware that management only works with a recognised Union in relation to a Procedure Agreement. Management did not invite the Union, the Union submitted the Procedure Agreement for discussions. She was also referred to the Procedure Agreement produced as Document A₁ and recognised that it came from the Bank. It is the draft agreement of the Bank. It is not the stand of the Bank. It has been sent by the Bank but the document has been written in accordance with the Procedure Agreement. She did not agree that the Bank admits recognising the Union. On being referred to the preamble (Article 2 at page 3 of Document A₁), she could not say who are the parties to the agreement. The parties to the discussions of the draft Procedure Agreement were the Bank and the Union.

Mrs Pillay was moreover referred to the letter dated 24 January 2019 (Document J) and stated that the letter was issued by the Bank as it is duly signed by its Secretary. On being asked where is the header of the letter, she replied that it is a copy of the letter. She disagreed that the letter is a fabrication for the purpose of this case. She further stated that the word 'adopt' in the letter dated 28 October 2019 (Document E) means that the Bank is adopting the Procedure Agreement for the purpose of discussions. The employees are not bound by the agreement. She agreed that the Union submitted adaptations and there were no meetings thereafter. There is no Procedure Agreement provided by the law. Upon being referred to an email dated 24 August 2021, she was aware that the Bank gave office space to the Union within its premises. The office was given in a spirit of good industrial relations. The Bank always agreed to discuss matters and when this request arose, the Bank acceded to it. Although the Union is not recognised, it can engage into negotiations with the Bank.

In re-examination by Counsel for the Respondent, Mrs Pillay notably stated that the original of the letter dated 24 January 2019 (Document J) was sent to the Union and it is a filed copy of this letter which has been produced.

SUBMISSIONS OF THE PARTIES

Mr N. Gopee, on behalf of the Applicant Union, notably submitted that the Union has been operating since 1976 and has had recognition under the *Industrial Relations Act* and under the *Act*. He referred to *section 108* of the *Act* whereby once a union is recognised, this continues irrespective of whether the law has been amended. The employer cannot ask the Union to apply for recognition anew unless same has been revoked. There has been no Procedure Agreement in the past. The Applicant has not been able to trace out certain documents as the initial letter of recognition. A Procedure Agreement has now been made mandatory by the legislator. There is a Procedure Agreement between the parties and the employer is not abiding by certain provisions, notably Articles 4, 5 and 7.

Mr N. Gopee further submitted that the Respondent has not produced any document to substantiate its stand that the Union does not have recognition. A number of documents have been submitted confirming recognition although implicitly. Otherwise, no meetings would have been held with an unrecognised Union. An award of the Permanent Arbitration Tribunal was contested before the Supreme Court and this is just and sufficient reason to believe that the Union is recognised.

Mr R. Pursem SC, on the other hand, notably referred to *section 51* of the *Act* in relation to the Procedure Agreement whereby the question of recognition is central. He submitted that there is no iota of evidence to show that the Bank had, prior to the enactment of the *Act*, agreed to recognition. There is no evidence from Mr Rughoobar to this effect. The burden of proof lies on the Union since it is seeking to enforce the Procedure Agreement set out in the *Seventh Schedule* of the *Act*. The Union has failed to establish that there is recognition and the Procedure Agreement is not binding on the Bank. Although the Bank has been discussing with the Union for several years, the fact remains that there are not recognised. The Bank's position is that they are not bound by the Procedure Agreement as they have not recognised the Union. The stand of the Bank was to adopt this for the purpose of discussions.

In reply, Mr N. Gopee notably submitted that it is very difficult to have direct evidence produced in terms of a letter from the Employers stating that they are recognised. *Section 51* of the

Act applies only to recognised Trade Unions. You should first have recognition and it is only then that management proceeds with discussions on a Procedure Agreement. The issue that the Union is not recognised does not therefore hold good with management proceeding to discuss a legal document. Despite that no documentary evidence was produced to show that the Union has recognition, the Union is recognised. Circumstantial evidence has been produced to substantiate their stand on recognition.

THE MERITS OF THE APPLICATION

The present application has been entered by the Applicant Union pursuant to section 51 (8) of the Act. The Union, in its application letter dated 26 October 2021, claims that the Bank is not complying with Articles 5 (5), 7 (1) and 4 (1) of the Procedure Agreement under the Seventh Schedule of the Act, which is in force under section 108 (1)(b) of the Act.

Section 51 (8) of the Act provides for an order for a party to comply with the provisions of a Procedure Agreement upon an application to the Tribunal, where that party has failed to do so. The Applicant Union has, in its Statement of Case, notably averred that there is no Procedure Agreement between itself and the Respondent nor has there ever been one in the past and that both parties are bound by the Procedure Agreement under the Act (vide paragraph 4). It should be noted that the Union has also averred that it is recognised by the Respondent as the sole bargaining agent for employees in its bargaining unit.

Where a Union has been recognised prior to the coming into effect of the *Employment Relations (Amendment) Act 2019* (the "*Amendment Act*") and no Procedure Agreement is in force, the Union and the Employer shall be regulated in accordance with the Procedure Agreement set in the *Seventh Schedule* to the *Act (vide section 108 (2)* of the *Act)*. *Section 108 (1)(b)* of the *Act,* which has been referred to by the Applicant Union in its application, would not therefore apply in the present matter inasmuch as there was no Procedure Agreement in force between the parties prior to the commencement of the *Amendment Act* on 27 August 2019 (*vide Proclamation No. 34 of 2019*).

The Applicant Union is seeking to require the Respondent to comply with certain provisions of the Procedure Agreement found at the *Seventh Schedule* of the *Act*. This Procedure Agreement

may be binding between the two by virtue of *section 108 (2)* of the *Act*. This *section* notably provides as follows:

108. Savings and transitional provisions

...

(2) Where a trade union or a joint negotiating panel has obtained recognition from an employer before the commencement of the Employment Relations (Amendment) Act 2019 and no procedure agreement is in force, the employer and the trade union or the joint negotiating panel, as the case may be, shall be regulated in accordance with the procedure agreement set out in the Seventh Schedule.

Although the Applicant Union claims to be recognised by the Respondent under the repealed *Industrial Relations Act* and now under the current legislation, the Respondent has vehemently denied that the Applicant Union has ever been recognised. In this regard, the following may be noted from paragraph 2 of the Respondent's Statement of Case:

- 2. The Respondent denies the statement made by the Applicant and avers that:
 - (a) the Applicant has never applied for recognition as per the procedure provided for under section 36 (2) of the Employment Relations Act (ERA) or the now repealed Industrial Relations Act for that matter; and
 - (b) the Applicant has never been recognised or granted recognition as a trade union with sole bargaining agent for employees in its bargaining unit.

The Tribunal has also noted, from a letter dated 24 January 2019 (Document J) addressed to the Union, that the Bank claims that the latter has not yet applied for recognition. The salient aspects of this letter may be noted as follows:

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- 2. The Bank of Mauritius Employees Union (the Union) has not yet applied for recognition for bargaining in terms of the Employment Relations Act

('the Act'). It would hence be more appropriate if, in the first instance, the Union would apply to the Bank for recognition as a bargaining agent under the Act.

It must be noted that Mr N. Gopee, when questioning the Bank's representative, notably raised the possibility that this aforementioned letter is a fabrication as it bore no letterhead. This was denied by the latter. It should be noted that the said letter was produced by the Union's President himself, when questioned by the Respondent's Counsel, who had no qualms that the letter be produced. Mr Rughoobar never raised any issue of fabrication in relation to this letter. Moreover, Mrs Pillay clarified that original of this letter was sent to the Union and that the one produced is only a filed copy. The Tribunal cannot therefore lend any weight to Mr N. Gopee's contentions that this letter has been fabricated for the purpose of the present application.

In reply to the letter dated 24 January 2019, the Union asserted by letter dated 30 January 2019 (Document K) that there was no statutory requirement for the Union holding recognition under the previous legislation to apply for recognition under the new law. The Union moreover stated that it obtained recognition before the commencement of the *Act*.

The pertinent issue before the Tribunal in this matter would therefore be whether the Applicant Union has been recognised by the Respondent. If such is the case, the Procedure Agreement at the *Seventh Schedule* of the *Act* would apply to the parties at hand.

Mr Rughoobar has notably relied on the draft Procedure Agreement (Document A₁) produced where it is mentioned that the Union has recognition as a sole bargaining agent. It must however be borne out that, when cross-examined, he did recognise that it was the Union that initiated discussions regarding the Procedure Agreement by letter dated 14 January 2019 (Document M). He also stated that as per the letter dated 22 February 2019 (Document A), the Bank had provided its comments with respect to the draft submitted by the Union.

The Union then replied on 10 May 2019 (Document B) and Mr Rughoobar acknowledged that no document was submitted with this letter to the Bank although he had earlier stated that the aforesaid letter enclosed the Union's counter proposal (Document B₁) to the Procedure Agreement submitted by the Bank. It further transpired, when the Union's representative was being cross-

examined, that the aforesaid Procedure Agreement (Document B₁) was annexed to a letter dated 10 December 2019 (Document P) emanating from the Union.

Article 3 of the Procedure Agreement (Document A₁) notably states the Bank recognises the Union as sole bargaining agent within the bargaining unit represented by the latter. It must be noted that this Procedure Agreement was a draft as per its covering letter dated 22 February 2019 (Document A) from the Bank. This letter was in reply to the Union's letter dated 14 January 2019 (Document M) whereby a draft Procedure Agreement was submitted to the Bank.

It therefore clear that there were discussions between the two parties on a draft Procedure Agreement but there is no evidence on record to show that the draft Procedure Agreement was ever finalised or signed by the two parties. In fact, this is consistent with Union's averments in its Statement of Case to the effect that there is no Procedure Agreement between the parties and that they are bound by the one to be found at the *Seventh Schedule* of the *Act*. The contents of the draft Procedure Agreement, notably Article 3 regarding recognition, cannot therefore be deemed to be binding on the parties.

Mr Rughoobar also stated that management of the Bank has had several meetings with the Union in substantiating the latter's recognition. These meetings have not been denied by the Bank, whose representative was adamant that the Union is not recognised despite the meetings with management. The Tribunal noted that the mere fact of having had meetings does not necessarily imply that the Union is recognised. It would therefore be unreasonable to conclude that the Union has recognition as they have had several meetings with management in the past.

Furthermore, as per Mr Rughoobar himself in cross-examination, the Union was well aware of the Bank's stand regarding the issue of recognition as per the letter dated 24 January 2019 (Document J). This is despite the discussions which took place between the two parties on the Procedure Agreement following this letter.

Mr Rughoobar moreover produced a Supreme Court Judgment in the matter of *Bank of Mauritius v The Permanent Arbitration Tribunal, in presence of: - Bank of Mauritius Employees Union* [1999 SCJ 317] in support of his contention that the Union was recognised. Although it is clear that the Applicant Union was a Co-Respondent in the judicial review proceedings being sought of the then Permanent Arbitration Tribunal's ruling, nowhere in the judgment has it been mentioned that the Union is recognised by the employer. It should also be noted that there was no requirement under the former *Industrial Relations Act* for a Union to be recognised in order to report an industrial dispute. This is in contrast to the current legislation where only a recognised trade union may report a labour dispute to the President of the Commission of Conciliation and Mediation on behalf of any party to the dispute (*vide sections 2* and *64 (1)* of the *Act*).

Mr Rughoobar also referred to an award of the then Permanent Arbitration Tribunal, bearing reference *RN 242* in 1991, from which he claims that the Union's recognition could be implied. A perusal of same reveals that the award was in relation to an industrial dispute referred jointly by the Union and the Bank under *section 78* of the *Industrial Relations Act 1973*. It should be noted that a union need not be recognised in order to report or to even refer jointly an industrial dispute under the provisions of the repealed *Industrial Relations Act*. Likewise, the Tribunal cannot reasonably deduce from the said award if the Union is recognised or not nor imply anything from same.

The Union has also raised the fact that it has been accorded office space within the Bank's premises to carry out its activities in August 2021. This has not been denied by the Bank, whose representative stated that this was done in a spirit of good industrial relations. She also stated that the Bank has always been willing to discuss and acceded to this request when it arose. Despite having noted that the Applicant Union was granted office space by the Respondent, it would be unreasonable for the Tribunal to infer that the Union bears recognition as a bargaining agent due to this fact.

An extract of the Respondent's Annual Report of 2020 (Document Q) was also produced in support of the Union's contentions that it is recognised. The extract mentions that a 'Christmas Gifts for Children' event was organised at the initiative of the Applicant Union and the Employee Welfare Committee. However, there is no mention in the extract produced that the Union is recognised by the Bank. The Tribunal thus cannot make any reasonable inference as to whether the Union is recognised from this document.

The Tribunal has also noted the evidence of the Bank's representative to the effect that the Union is not recognised as it has never been able to produce its recognition in writing to the Bank; and that there is no record from the Bank whereby it has recognised the Union. The submissions of the Union's Negotiator to the effect that there is no direct evidence from the Employer that the

Union is recognised have also been considered. Mr N. Gopee however did submit that recognition could be implied from the documents that have been produced.

In view of the above, the Tribunal cannot be convinced by the material evidence adduced as to whether the Union is recognised. In the absence of any substantial evidence demonstrating the Union's recognition, the Tribunal is not prepared to hold that the Union holds recognition as a sole bargaining agent or otherwise with the Bank in the present matter.

The Tribunal has moreover noted the gist of the contents of the Bank's letter dated 28 October 2019 (Document E) as follows:

The Bank of Mauritius ('Bank') has, after careful consideration of the Employment Relations Act (as amended), decided to adopt the Procedure Agreement set out in the Seventh Schedule of the Employment Relations Act (as amended) subject to such adaptations and modifications as may be necessary.

In this connection, the Bank of Mauritius Employees Union is kindly requested to provide the Bank with their proposal, if any, with respect to the adaptations and modifications of the Procedure Agreement set out in the Employment Relations Act (as amended) for consideration by the Bank.

Could it therefore be said that the Respondent has accepted the Procedure Agreement to be found at the *Seventh Schedule* of the *Act*? As per a careful reading of the reproduced aspects of this letter, it can be noted that the Bank decided to adopt the agreement subject to adaptations and modifications as may be necessary and invited the Union to submit a proposal with respect to these adaptations and modifications for its consideration.

A reply dated 10 December 2019 (Document P) was thereafter addressed to the Bank, whereby the Union attached a draft Procedure Agreement with proposed adaptations and modifications. The Union, therein, asked for an urgent meeting to finalise same. It would therefore stand to reason that the parties had not yet finalised the adopting of the Procedure Agreement at the *Seventh Schedule* of the *Act* due to the adaptations and modifications as may have been deemed to be necessary.

As per section 51 (2)(a) of the Act, the modifications and adaptations must be agreed between the employer and the recognised trade union. As there is no evidence as to any agreement on the adaptations and modifications by the parties being finalised, it would appear that the Bank had not accepted the aforesaid Procedure Agreement. This stance may also be noted from the Bank's representative who stated that the agreement is not binding.

It would however be academic for the Tribunal to decide on whether the Procedure Agreement (at the *Seventh Schedule* of the *Act*) would be binding on the two parties in view of its finding that the Applicant Union is not recognised as a bargaining agent by the Bank. As previously noted under *section 108 (2)* of the *Act*, recognition of the Union is required for the parties to be regulated by the Procedure Agreement set in the *Seventh Schedule* to the *Act*.

The Tribunal would however observe that the Bank has embarked upon an unnecessary and futile exercise in engaging into discussions with the Union regarding the subject of the Procedure Agreement. Although the Bank claims to have acted in a spirit of good industrial relations, the Applicant Union has been given a false hope that a Procedure Agreement may exist between the parties as has been evidenced by the letters exchanged between the two. It cannot be overlooked that the primary responsibility for the promotion of good employment relations rests with management (*vide paragraph 27* of the *Code of Practice* of the *Act*) and management must be cautious in its approach when dealing with unions at the workplace.

In the circumstances, given that the Applicant Union has not been found to be recognised by the Bank, the Tribunal cannot therefore grant an order requiring the Respondent to comply with Articles 5 (5), 7 (1) and 4 (1) of the Procedure Agreement set in the *Seventh Schedule* of the *Act*.

The present application is therefore set aside.

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SD Shameer Janhangeer (Vice-President)

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SD Marie Désirée Lily Lactive (Ms) (Member)

SD Feroze Acharauz (Member)

SD Ghianeswar Gokhool (Member)

Date: 10th February 2022