ENL LIMITED & ANOR v THE FINANCIAL SERVICES COMMISSION & ORS

2022 SCJ 110

Record No. 120382

THE SUPREME COURT OF MAURITIUS

In the matter of:

1. **ENL LIMITED (in the rights of ENL LAND LTD)**
2. **ROGERS AND COMPANY LIMITED**

Applicants

v.

1. **THE FINANCIAL SERVICES COMMISSION**
2. **INDEPENDENT COMMISSION AGAINST CORRUPTION**
3. **NEW MAURITIUS HOTELS LTD**
4. **SWAN LIFE LTD**

Respondents

JUDGMENT

This is an application for conditional leave to appeal to the Judicial Committee of the Privy Council (JCPC). It follows a decision dated 21 July 2020 of the Supreme Court in which the applicants as well as the third and fourth respondents styled as third parties, were put out of cause. This has led to the present application as well as two other separate applications from the third parties who all wish to appeal to the Privy Council, the latter 2 are dealt with in separate judgments.

Briefly the facts leading to this application are sourced in an *ex parte* application granted by a Judge in Chambers on the 14th of June 2018 to the second respondent ("ICAC"). The order compelled the first respondent, the Financial Services Commission ("FSC") to disclose to the ICAC, "*all data, information, documents and files relating to the New Mauritius Hotels Ltd*

matter". This *ex parte* application was made by the ICAC and directed to the FSC. The FSC then lodged a motion (referred to as the "main case") asking the Court to set aside the order of the 14th of June 2018 or alternatively to direct the ICAC to answer certain queries. The prayers of this action were directed towards the ICAC and the FSC entered it "in the presence of" the third parties (which are 4 companies: 3rd respondent ("NMH"), applicant no. 1 ("ENL"), 4th respondent ("Swan") and applicant no. 2 ("Rogers") as referred to earlier). The ICAC then moved the Court to put out of cause all of the third parties. It is worth mentioning that by this stage the FSC was pressing only one prayer, (as it had communicated all other information requested) to set aside the order for the communication of a report. The Court delivered a ruling on the 21st of July 2020 granting the motion to put the third parties out of cause.

It is this decision which is not to the satisfaction of the applicants and for which they seek conditional leave to appeal to the Judicial Committee.

The applicants are seeking leave firstly as of right under section 81(1)(b) of the Constitution. Secondly, in the alternative with the leave of the Court under section 81(2)(a) of the Constitution that the question involved in the appeal is one that, by reason of its great general or public importance, ought to be submitted to the Judicial Committee.

Appeal as of right.

This is set out in the following manner in section 81(1)(b):

> **81(1)** An appeal shall lie from decisions of the Court of Appeal or the Supreme Court to the Judicial Committee as of right in the following cases -
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> … …
>
> (b) where the matter in dispute on the appeal to the Judicial Committee is of the value of Rs.10,000 or upwards or where the appeal involves, directly or indirectly, a claim to or a question respecting property or a right of the value of Rs.10,000 or upwards, final decisions in any civil proceedings;
>
> … …

It is not in dispute that two of the conditions for an appeal as of right under section 81(1)(b) of the Constitution are satisfied in the present matter, namely 1) that there were civil proceedings between the parties and 2) that the decision is final with respect to the applicants as third parties in the matter.

The difficulty which the applicants need to surmount relate to whether the dispute on appeal involved directly or indirectly a claim or a question respecting property or relating to the right of the value in excess of Rs.10,000.

According to the submissions of Applicant No.1 ("ENL"), the financial threshold is met as the prejudice suffered exceeds Rs 10,000. They relied on the case of **Jacpot Limited v the Gambling Regulatory Authority [2018] UKPC 16** which decision indicates that it is not necessary for there to be a money claim; the condition can be satisfied if the appeal involves a question respecting a right above the prescribed value; where the argument is made by reference to an alleged right of the requisite value and the nature of that right needs to be identified. The submissions of Applicant of No.2 ("Rogers") were similar to ENL in this respect, and further relied on the case of **Jacpot** citing the case of **Royal Hong Kong Jockey Club v Miers [1983] 1 WLR 1049** which held that the alleged right of requisite value was incapable of valuation in monetary terms. ICAC on its part, submits that no appeal lies as of right under section 81(1)(b) of the Constitution as the matter in dispute is neither of the value of Rs 10,000 or upwards nor does the appeal involve, directly or indirectly a right of that value. Moreover, the applicant has not particularised how they valued their prejudice which is based on mere apprehensions.

In the Privy Council Appeal judgment of **Jacpot**, at the end of paragraph 7, the Judges emphasised that in an application as to whether an appeal is available as of right: "*the provisions governing appeals as of right, normally need to be strictly construed*."

Both the motion paper in the main case and the *ex parte* order relate to the communication of data, information or documents which are in possession of the FSC. This is the subject matter in the main cases. What the applicants are putting forward is the apprehended consequences of such a communication of the information to the ICAC as being the matter in dispute worth more than Rs 10,000. We have not found any claim that the data, information or documents in question belong to any of the third parties. It has however been contended by the applicants at paragraph 10.2 of their affidavit that *it is undisputed that the prejudice which ENL and Rogers claims* (sic) *to be suffering is worth a substantial amount of money which definitely exceeds Rs.10,000.* This purported ground of appeal which improperly contains such a reference in this manner, even if considered, is not a valid argument.

We do not agree that "undisputed" prejudice brings it within the meaning intended under section 81(1)(b) of the Constitution. There has also been the contention that the consequences of the proceedings may have a reputational damage and affect their share prices negatively which would necessarily be in excess of Rs.10,000. This was however by way of submissions which were offered both before the Supreme Court and the present bench. We consider that this condition has not been satisfied. We are of the view that to adopt the reasoning of the applicants on this score would be to apply an incorrect interpretation.

We are of the view that in the recent decision of **Sholay D. v The Permanent Secretary, Ministry of Gender Equality and Family Welfare** [2021 SCJ 372] the correct application of the "value" issue was reached by the Court. The judgment concerned an application for leave to appeal to the Judicial Committee of the Privy Council for the return of a minor child to England and Wales. Though it was conceded that an appeal did not lie as of right under section 81(1)(b) of the Constitution, it was contended that the right at stake was not capable of being valued in monetary terms but that it would cost more than Rs.10,000 to comply with the order to send the minor child back to England. The Court found that the matter before the appellate court was in relation to the return of the minor child under the Convention on the Civil Aspects of International Child Abduction Act and was not in respect of the right of the value of Rs.10,000 or in relation to a property. The Court therefore found that section 81 (1)(b) of the Constitution did not find its application in that case.

In comparing, albeit two very different subject matters, on the one hand the repatriation of a minor child in **Sholay** to the present matter which relates to information and/or reputational damages; in both instances we find that these do not concern "*directly or indirectly, a claim to or a question respecting property or a right of the value of Rs 10,000 or upwards*".

The information for all intents and purposes belong to the FSC even if it may be about the third parties. We therefore find that section 81(1)(b) of the Constitution does not apply in this case.

Great general and public importance

This point is relied upon in the alternative and section 81(2)(a) of the Constitution reads as follows:

(2) An appeal shall lie from the decision of the Court of Appeal or of the Supreme Court to the Judicial Committee with the leave of the Court in the following cases -

a) where in the opinion of the Court the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to the Judicial Committee, final decisions in any civil proceedings;

… …

We find it appropriate to remind ourselves what the judgment in the main case relates to at this stage, namely the "right" of a party to be involved in proceedings as a third party. This is a decision on procedure.

Under section 81(1)(d) of the Constitution the application relies on four heads under the first one, the applicants seek to place before the Privy Council the fundamental issue at stake in the "main case" as can be seen in paragraph 11.1 of the applicant's affidavit dated 06 August 2020:

11.1 "The case concerns the circumstances in which an investigatory agency – here, ICAC – can obtain from the Court in secret, and without disclosing even the legal basis relied upon for the purported order, an order requiring another party to produce documents or information concerning a third party, and the circumstances in which the third party can challenge such an order. The scope of such powers is of great public interest and importance; and the Court's decision in this case of particular interest as it is irreconcilable with general principle and with previous Supreme Court authority, namely Ex Parte ICAC which held that in the circumstances of a similar application ICAC had no entitlement to proceed ex parte but instead had to proceed on notice. The law and constitutional rights at stake here, and what they require by way of procedure to protect the rights of parties such as the third parties, are of fundamental importance and basic aspects of the rule of law are raised."

The issue however raised here is the circumstances under which an investigatory agency can obtain from the court "in secret", an order requiring another party to produce documents or information concerning a third party and the circumstances under which the third party can challenge such an order.

This is further illustrated by the submissions (ENL devoted most of its written submissions on this aspect) which were offered to us by the applicants as well as the FSC and other "third parties". A great deal of emphasis was made as to the powers of the ICAC and extensive references to the Prevention of Corruption Act (POCA) as well as the Financial Intelligence and Anti-Money Laundering Act (FIAMLA). Submissions have also been offered as to whether the ICAC is entitled to obtain *ex parte* orders after referring to the following judgments: **Manraj & Ors v ICAC** [2003 MR 41], ***ex parte* ICAC** [2006 SCJ 2] and **SBM Bank (Mauritius) Ltd v ICAC** [2021 SCJ 159]. The applicants have submitted that these show 3 diverging views of the Supreme Court. We have to draw the attention of all learned Counsel that these 3 judgments are not binding on a 2-Judge bench as they are all decisions of a single Judge sitting in chambers. Without in any way determining or diminishing the validity of the issues raised, we however must not lose sight of the fact that the very questions which the parties seek to raise before the Judicial Committee, indirectly, have not been considered and pronounced upon in the impugned ruling. Therefore, the Judicial Committee will not have the benefit of any decision of the Mauritian Court on the subject matter. The present application seeks to by-pass this stage. A distinction needs to be made between a party being able to contest an *ex parte* order, the procedure to be adopted and being included "in presence of" in a case entered by the FSC, which is in the matter at hand. It is also apposite to note that the FSC has partly complied with the order and as such cannot be seen as challenging the "obtaining in secret …" (as characterised by the applicants) of the order of June 2018 even though learned Senior Counsel has indicated that the legal basis of the order of the Judge in Chambers is contested. A perusal of the ruling of 21 July 2020 reveals that in fact the FSC is seeking clarifications and precisions of the order given by the Judge in Chambers because of vagueness and uncertainty of its terms (the Judge in Chambers order). The cursus with regard to motion papers, is that if the respondent or third party wishes the Court to grant a prayer, a separate motion paper has to be entered. It is not similar to a plaint with summons whereby in a plaint with summons the defendant can make a counter-claim. Even if the applicants were to remain as third parties in the main case, it is not open to them to raise the issue of the ICAC pursuing the *ex parte* route being wrong in law. We find that this is not a fit manner in which the question can be considered and is therefore not appropriate as a question of "*great general or public importance or otherwise"*. We therefore refuse leave on this aspect.

The second head of the application is under paragraph 11.2 of the same affidavit, where the applicant contends that:

> 11.2 Further, "the judgment departs from the normal and settled rules on the joinder of parties under Mauritian law, such as **Canarapen v Anne** [1999 SCJ 293], in which it was recognised that parties who "have an interest in the matter" can be joined, and other cases accepting that a party is an interested party if he can demonstrate "*un intérêt personnel, légitime et suffisant*", including "*un intérêt future et conditionnel*"."

This head specifically refers to the judgment of **Canarapen** which is a judgment of a Judge in Chambers and needs to be placed in context given the specific reliance on this judgment by the applicants. In **Canarapen**, Balancy J. (as he then was) as the Judge in Chambers was considering an application for an interlocutory injunction regarding a nuisance in the vicinity of the applicant's residence. The application before Balancy J. was entered "in the presence of" Commissioner of Police, the Permanent Secretary of the Ministry of Health and the Permanent Secretary of the Ministry of Environment and Quality of Life and this judgment in question was considering their respective motions to be put out of cause as there was no cause of action against them and no averment that they had acted in breach of their statutory duties. The judgment considers *assignation en déclaration de jugement commun, autorité de la chose jugée* and rule 56 of the Rules of the Supreme Court 1903. Balancy J refers to the practice in Mauritius which "*appears to have allowed the joinder of parties who otherwise have an interest in the matter*". Nowhere in the judgement of **Canarapen** do we find reference to "*un intérêt personnel, légitime et suffisant*."

We have noted in the written submissions for ENL that references to two other cases are made in conjunction with that of **Canarapen**, namely **Pierre Louis O & anor v Speville J C & ors** [2015 SCJ 11] and **Rochecouste v Bissett** [2017 SCJ 11]. We have also considered the written submissions of Rogers who contends that the impugned ruling has departed from and is inconsistent with, the approach taken in previous caselaw (specifically referring to the case of **Canarapen**).

We find it appropriate to reproduce paragraph 43 of the written submissions of the ENL which states the following:

> *43. What these cases show is that all that is required is that a party must have an interest in the case. What this means is that the party must have "un intérêt personnel, légitime et suffisant (…)". It is further the case that "Un intérêt future et conditionnel peut suffire pour autoriser l'intervention" may suffice for a party to intervene in the case or to remain as a party to a case.*

The case of **Pierre Louis** relates to a leave to intervene in the case lodged by way of plaint with a summons. The judgment refers to Articles 339 to 341, 175 and following of the Code of Civil Procedure as well as rule 56 of the Supreme Court Rules and considers the conditions precedent to a party being permitted to intervene in the main action. It is in this judgment that the words "*un intérêt personnel, légitime et suffisant*" are used and it is worth mentioning, in the context of an application for an "*intervention"*. The motion entertained by the Judges in the main case as well as the circumstances are different from the above cited judgments.

We therefore find that there is no departure from a set practice as contended by the applicants and that there is no issue of great, general public importance. We refuse leave on this aspect of the application.

We propose to deal with the last two heads together. The third head is set out in paragraph 11.3 which reads as follows:

> 11.3 the normal rules are not applied when an investigatory agency asserts that the presence of the interested parties would prejudice its investigation. There are no rules articulated or legal test as to the constitutional right of access to justice and the regulators purported interest in the protection of the confidentiality of its investigation.

To a certain extent this ground overlaps with the first ground found in paragraph 11.1 in that it is seeking to attack the procedure by which ICAC obtained its order from the Judge in Chambers in June 2018. Yet again we need to refer to our earlier remarks that the decision of the Judges in the main case relate to the presence of the third parties in a motion paper by the FSC in relation to communication of the affidavit in support of the *ex parte* application, as well as certain clarifications which sought a report commissioned by it.

The main case is whereby the FSC, which has carriage of proceedings, is contesting the order to communicate a report commissioned by it to investigate into transactions involving the third parties as stated earlier. If the FSC decides to withdraw the application or to communicate the report, the third parties who wish to remain "in presence in the proceedings" will not be able to prevent this and they have no prayers which they can make to the Court within the confines of the present main case as "IPO third parties". As a result of the impugned ruling, the applicants may have not been able to use the present route but this by no means deprives them of using the available alternative procedures to exercise their "constitutional right of access to

justice" in seeking to overturn the protection of confidentiality of the investigation invoked by the ICAC.

The fourth head is to the effect that a wrong precedent is established by the judgment in as much as third parties should have no say on an application by another party to be put out of cause.

It has been contended that ENL and Rogers would be deprived of the right of access to justice. We do not agree with this contention and it is a factor which has its importance in this application to appeal to the JCPC, as we repeat, the third parties have other means and procedures which they can pursue in relation to the order of the Judge in Chambers of 14 June 2018. The ground that "The rights would be severely affected by the actions of a state agency with no competence in the relevant field (Financial Services) which fly in the face of actions already taken by the relevant regulator (the FSC)" is speculation and pre-emptive as the ICAC does not have the same duties and goals as the FSC even if there may be an overlap. We also need to bear in mind that the ICAC is at the investigative stage.

Finally, in relation to rule 19(2) of the Supreme Court Rules 2000 which allows the Master or the Court to decide upon whether a party 1) who has been improperly joined can be struck out or 2) a party ought to have been joined, is a matter of discretion for that Court to exercise depending on the circumstances of each case.

The applicants seek to press under the heading of section 81(2)(a) of the Constitution that the question involved in the appeal is one that, by reason of its great general or public importance, ought to be submitted to the Judicial Committee.

The applicants have other judicial avenues open to it to raise the issues on which they are seeking indirectly a pronouncement from the JCPC.

We therefore find after a consideration of the present application that the grounds which are sought to be raised before the Privy Council, the issue before the Court in the main case, the caselaw referred to by the applicants (**Canarapen**) and the alternative routes available, that this is not a fit case for which conditional leave to appeal to the Privy Council should be granted.

With regret we have noted that the written submissions (which have been resorted to more and more during Covid-19 conditions prevailing in the country) have ventured into areas not covered by the grounds of appeal sought to be placed before the Privy Council. We would

remind all legal practitioners that this practice is not appropriate and not to be condoned and that Senior Counsel should exercise scrupulous care.

For the reasons given above, leave is not granted and the application is set aside with costs.

R. Teelock
Judge

J. Benjamin G. Marie Joseph
Judge

24 March 2022

Judgment delivered by Hon R. Teelock, Judge

For Applicant No. 1:	Mr U. K. Rugobur, Attorney at Law Mr P. Doger de Speville SC and Mr S. Dabee, of Counsel
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For Respondent No. 1:	Ms Z. I. Salajee SA Mr D. Basset SC together with Mr J. G. Basset and Mr H. Dhanjee of Counsel
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