

THE FINANCIAL SERVICES COMMISSION v **INDEPENDENT COMMISSION**
AGAINST CORRUPTION & ORS

2020 SCJ 164

Record No. 116957

THE SUPREME COURT OF MAURITIUS

In the matter of:-

The Financial Services Commission

Applicant

v.

Independent Commission Against Corruption

Respondent

In the presence of:

1. New Mauritius Hotels Limited
2. ENL Land Ltd
3. Swan Life Ltd
4. Rogers and Company Limited

Third Parties

RULING

This is a motion by the respondent for the Third Parties to be put out of cause.

The background to the motion is as follows. In an *ex parte* application made to the Judge in Chambers on 14 June 2018, the respondent sought and obtained on the same date an order compelling the applicant to disclose to the respondent *all data, information, documents and files* pertaining to the *New Mauritius Hotels Ltd (NMH) matter* enumerated under items (i) to (vi) of the Order dated 14 June 2018.

The applicant in turn lodged an application by way of motion supported by affidavit against the respondent wherein it is seeking from this Court for an order to set aside the Order of 14 June 2018 or alternatively to direct the respondent to answer with precision its queries set out in paragraph b (i) to (iv) of its motion paper. The applicant is also

seeking a stay of the Order dated 14 June 2018 pending the decision of its application. The application has been made in the presence of the Third Parties.

The motion of the respondent is resisted by the applicant and the Third Parties.

The grounds upon which learned Counsel for the respondent is relying in support of his motion to put out of cause the Third Parties are threefold and are as follows:

- (1) An investigation is being carried out by the respondent involving the Third Parties in strict confidentiality in line with section 81 of the Prevention of Corruption Act. There is a possibility that the Third Parties be considered as potential witnesses or suspects in the course of the investigation. Allowing the Third Parties to participate in the present proceedings will enable them to “*peep*” into the respondent’s investigation.
- (2) The applicant does not require the presence of the Third Parties to raise any issues pertaining to its application for the Court to effectively and completely adjudicate upon.
- (3) The Third Parties will have the opportunity of raising either in the course of the criminal investigation, or, before the trial court, if there is a prosecution, any issues they deem fit to raise.

The gist of the submissions of learned Counsel for the respondent in support of his motion is that the *ex parte* application was made in connection with an on-going criminal investigation involving the Third Parties. The data, information, documents and files, subject matter of the Order dated 14 June 2018, pertain to the Third Parties to whose knowledge are the data, information, documents and files subject matter of the Order. There is a likelihood that in the course of the criminal investigation the Third Parties may be considered as potential witnesses or suspects. Allowing them to participate in the application entered by the applicant against the respondent would enable them to *peep into the investigation* of the respondent. In addition, so submitted learned Counsel, the presence of the Third Parties to the present application would only defeat the whole purpose of the *ex parte* application, and, the Order dated 14 June 2018. The respondent would also be defeated in its task of carrying out its investigation in confidentiality in accordance with the provisions of the Prevention of Corruption Act.

Learned Counsel added that the presence of the Third Parties to the present application has become even more objectionable in view of the motion of learned Senior Counsel for the applicant for communication of the proceedings in the *ex parte* application. We open a parenthesis here to point out that the motion which learned Counsel is referring to was made at the sitting of 12 February 2020 by learned Senior Counsel for the applicant. Learned Counsel for the respondent objected to the motion and insisted that his motion regarding the Third Parties made at the sitting of 9 July 2018 and reiterated at the sitting of 23 July 2018 be first heard and determined before any motion made by the applicant is heard. After we heard the submissions of all Counsel in support of their respective motions, we ruled that the motion of learned Counsel for the respondent, i.e. that the Third Parties be put out of cause, should be heard and determined first (vide Ruling dated 12 February 2020).

Learned Counsel also referred to paragraph 4 of the respondent's affidavit dated 25 February 2019 which contains an averment to the effect that the applicant has communicated to it the necessary data, information, documents and files listed under items (i), (iii) to (vi) of the Order dated 14 June 2018, and, to the applicant's reply thereto in its affidavit dated 25 March 2019. Learned Counsel contended that the applicant's reply amounts to an admission of paragraph 4 of the respondent's affidavit. Learned Counsel then referred to paragraph 5 of the respondent's affidavit of the same date which in a gist is to the effect that the only remaining document which the applicant has failed and is refusing to communicate concerns an interim report which is the subject matter of item (ii) of the impugned Order and which is allegedly in the applicant's possession and custody. It is the view of learned Counsel that the production of the said interim report is the only remaining live issue between the applicant and the respondent. The applicant is legally represented and is fully capable of addressing the issue regarding the interim report without the assistance or presence of the Third Parties, should the need to do so arise before this Court. Consequently, the Third Parties' presence to the present application is unjustified and unwarranted. Learned Counsel relied on the decision in **A. Wochit and Ors v M. Adhin and Ors** [\[2009 SCJ 275\]](#) in support of his submissions.

Learned Counsel also added that any grievances which the Third Parties may have on the issue of the interim report can be adequately dealt with in the course of either the criminal investigations or criminal proceedings in the event of a criminal prosecution of the Third Parties. The trial court would be the proper forum for the Third Parties to canvass issues that may arise regarding the interim report. Learned Counsel has for that

matter referred us to a decision of the Privy Council in **The Honourable Satnarine Sharma v Carla Browne Antoine and Ors (Trinidad and Tobago) [2006] UKPC 57**

In reply to the above, learned Senior Counsel for the applicant relied on the contents of the Order dated 14 June 2018 and to the data, information and documents and files particularised/itemised in the said Order and submitted that they pertained to the Third Parties and are confidential to the latter. The applicant was therefore duty bound to join the Third Parties to the present application as they are concerned by the Order. Consequently, so he submitted, the Third Parties have been properly joined to the present application and their presence “*before the Court is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter.*” Learned Senior Counsel relied on Rule 19(2) of the Supreme Court Rules 2000 and **Canarapen v Anne [1999 SCJ 293]**.

The intervention or joinder of parties to a cause or matter is governed by Rule 19 of the Supreme Court Rules 2000 (SCR 2000). Rule 19 (2) of the SCR 2000 which is of relevance to the present motion provides that:

- “(2) *The Master or the Court may, at any stage of the proceedings, on the application of any party and on such terms as may appear to the Master or to the Court to be just, order that the names of a party who –*
- (a) has been improperly joined be struck out;*
 - (b) ought to have been joined, or whose presence before the Court may be necessary in order to adjudicate upon and settle all questions involved in the case be added.*”

The essence of Rule 19(2)(b) of SCR 2000 is that the Court will permit only necessary and proper person(s) or legal entity(ies) who has an interest in the matter to be made a party to the proceedings in order to enable it to reach an effectual and complete determination of the questions or issues arising in the proceedings.

Now, in **Cellplus Mobile Communications Ltd v Gellé and Ors [2001 MR 193]** it was held that:

“It is a cardinal principle that only interested parties need be joined as parties to a case. This applies both to a matter heard by a judicial authority in the exercise of its original jurisdiction as well as one exercising appellate jurisdiction.”

The question therefore for our determination is whether the Third Parties have been properly joined in the application lodged by the applicant against the respondent following the Order made by the Judge in Chambers on 14 June 2018. Are they interested parties and is their presence necessary for a proper determination of the issues upon which this Court will eventually be called upon to adjudicate? In answering these questions the prayers sought in the motion paper and the applicant's averments in support thereof as per its first affidavit assume their importance.

At paragraphs 8, 9 and 10 of its first affidavit, the applicant makes the following averments in support of its application to set aside or vary the Order of the Judge in Chambers. The paragraphs read as follows:-

- “8. *The Applicant has not been communicated with a copy of the affidavit filed by the Respondent pursuant to which the Honourable Judge sitting in Chambers issued the aforesaid Order and, in the circumstances, the Applicant is not aware of the ‘matter’ and/or the ‘offence’ which is being investigated and/or the grounds upon which the disclosure of the documents and/or information referred to at paragraph 5 above are being sought.*
9. *The Applicant states that whilst it has no objection to the Respondent carrying out an investigation whether following a complaint and/or on its own initiative and whilst acknowledging the powers of the Respondent under sections 50, 51 and 52 of the Prevention of Corruption Act, to examine any person and search certain premises, it is important to ascertain what is the scope of the Respondent's investigation which should not be in the nature of a fishing expedition. It is also important that the requirements of the Respondent be defined with precision without any ambiguity.*
10. *The Applicant states that it is unable to comply with the aforesaid Rule being given that the terms of the Order made by the Honourable Judge on 14 June, 2018 in case bearing Serial No. 1062/2018, are vague and uncertain, the more so as:*

 - a. *With regards to items (i) and (ii) of the Rule, namely- ‘Minutes of proceedings of the Board meetings held at the Applicant in relation to the Third-Party No. 1 matter’ and ‘Report of Committees which made preliminary enquiries in the matter’, the Applicant is unaware of the ‘matter’ which is being referred therein. Hence the word ‘matter’ must be defined.*
 - b. *With regards to item (iii) of the Rule ‘Correspondences (letters and emails) received from and addressed to stake holders, including*

but not limited to the Third-Parties'; the Respondent must state (i) who the stakeholders are and (ii) the time period and the subject matter of the said correspondences.

- c. *With regards to items (iv) and (v) of the Rule, namely 'A list of all private pensions plans administered by Third Party no. 3 as at February, 2016 and their underwriting conditions' and 'all documents required to be filed by Third Party No. 3 in accordance with Private Pension Act, Rules and Regulations as well as the Financial Services Act 2007'*
- (i) *The Rule does not specify the date reckoning from which the said documents and correspondences referred to therein are being sought, and*
- (ii) *these documents relate to confidential information which the licensee, Third Party no. 3, is required to file with the Applicant, and*
- d. *With regards to item (vi) of the Rule, 'All records kept by the Applicant in relation to Third-Party No. 1 for the years 2015, 2016 and 2017' the Respondent seems to be embarking into a fishing expedition."*

Hence the reasons for its prayers that the Order be either set aside or varied by directing the respondent to provide particulars of–

- (i) the 'matter' referred to at item (i) of the Order,
- (ii) the identity of the stakeholders, the period of time and subject matter of the correspondences referred to at item (iii) of the Order,
- (iii) the correspondences and/or emails, documents including the private pension plans filed by the third party No. 3 referred to under items (iv) and (v) of the Order, and
- (iv) document/s referred to at item (vi) of the Order.

Notwithstanding the averments at paragraphs 8, 9 and 10 it is apparent from a reading of the affidavits of the applicant and the respondent that the applicant has now partly complied with the Order of the learned Judge in Chambers to the satisfaction of the respondent save for item (ii) of the Order. Issues between these two parties have accordingly been considerably narrowed down. It is also apparent from the respondent's affidavits that item (ii) of the Order of the Judge in Chambers relates to the report of Mr Taukoordass or the **Interim Report** as it is referred to in the respondent's

affidavits. This is the only document the production or disclosure of which the respondent is seeking from the applicant. This report which is allegedly in the custody of the applicant is now at the heart of the dispute between the applicant and the respondent and is to all intents and purposes the only remaining live issue and dispute between these two parties.

As correctly submitted by learned Senior Counsel for the applicant, the applicant has the carriage of proceedings. So, it is for the applicant to satisfy us that the joinder/presence of the Third Parties to the application it has lodged against the respondent is necessary and justified in order to enable us to effectually and completely adjudicate upon and settle whatever questions are now left for our determination bearing in mind the nature of the applicant's prayers and our observations regarding the dispute which is now left between the applicant and the respondent.

To fortify their submissions regarding the presence of the Third Parties, qualms have been expressed as to the validity/legality of the Interim Report which, according to the Third Parties, the respondent cannot and should not use. On that score it has been stated that the Interim Report is tainted with illegality as it has been unlawfully obtained. The Third Parties are also challenging the appointment by the applicant of the Special Investigator who has drawn up the Interim Report.

The question is would it be appropriate in an application of this nature for us to allow the Third Parties to canvass and thrash out before us all these issues and for us to pronounce on them? We do not think so. They are to all intents and purposes issues raised prematurely and before the wrong forum. It is not within our remit in this particular application and at this stage to embark on such matters. We believe that these are issues which should be left to be appropriately dealt with before the appropriate forum at the relevant stage.

Other reasons such as the apprehension of the Third Parties that the investigation into the *NMH matter* by the respondent might be unlawful; that they may be exposed to adverse press coverage which in turn may be a blow to their business reputation; that their position would be profoundly affected should they be denied the opportunity of participating and having their say to the present application have also been advanced but which have left us unconvinced that the joinder of the Third Parties is necessary and warranted.

- For Respondent** : **Mr S. Sohawon, Attorney at Law**
Mr M. Roopchand, of Counsel
Mr T. Naga, of Counsel
Mr K. Beeharry, of Counsel
- For Third Party No. 1** : **Mr G. H. De Froberville, Attorney at Law**
Mr A. Moollan, Senior Counsel
Mr A. Moollan, of Counsel
- For Third Party No. 2** : **Mr U.K. Ragobur, Attorney at Law**
Mr P. Doger De Speville, Senior Counsel
Mr S. Dabee, of Counsel
- For Third Party No. 3** : **Mr G. Ng Wong Hing, Senior Attorney**
Mr R. Pursem, Senior Counsel
- For Third Party No. 4** : **Mr T. Koenig, Senior Attorney**
Mr S. Moollan, Q.C