ICAC v Augustin C. J.

2023 SCJ 345

Record No. 123182

THE SUPREME COURT OF MAURITIUS

In the matter of:

Independent Commission Against Corruption

Applicant

v

Christophe Jonathan Augustin

Respondent

JUDGMENT

These are committal proceedings brought by the Independent Commission Against Corruption ("the Commission") against one Christophe Jonathan Augustin ("the respondent") asking this court to declare that the latter has committed a contempt of court and to sentence him in such manner as the court thinks fit.

The background facts, as may be gleaned from the affidavits of a Senior Investigator of the Commission, relate to an attachment order ("the order") obtained on 25th July 2019 before a Judge in Chambers, on an ex parte basis, further to an application under sections 56(1) and (2) of the Prevention of Corruption Act. The respondent and several other persons suspected of being involved in drug trafficking and money laundering (through the acquisition and disposal of assets) were then the subject of an investigation. The order was renewed on 18th September 2019, 14th November 2019 and subsequently until 16th December 2021.

A number of properties, vehicles and horses, all listed out in the order, were attached in the respondent's hands. These properties included a portion of land of the extent of 29 perches situated at Roches Noires, then registered and transcribed in TV 201704/001280. It is not disputed in these proceedings that the respondent did, in November 2019, sell this property for the sum of Rs 1,400,000. The title deed is dated 15th and 21st November 2019. Emphasis is put on dates as the central issue in these proceedings revolves around precise dates and

whether the respondent knew of the order when he proceeded to sell the land attached in his hands by the court.

It is the case for the Commission that the respondent had notice of the clear and unambiguous terms of the order and could not pretend ignorance of the fact that the property in lite was attached. By selling to a third party an asset which had been so attached the respondent wilfully and intentionally interfered with the order made by the Honourable Judge sitting in Chambers and has, in so doing, embarrassed and hindered the court in the administration of justice.

The respondent's defence to these proceedings is that he was "never personally touched by the said attachment order dated 25th July 2019 which expired on 24th September 2019 as was the law at that time". He also questions the process whereby such orders are applied for and obtained in the absence of the other party, averring that the whole process runs counter to principles of natural justice. His stand remained through both his affidavits in these proceedings that he was never personally served with the order.

Both parties chose to rely on their affidavits and not call any oral evidence at the hearing.

The applicable law

The attachment order said to have been breached was applied for and obtained under section 56 of the Prevention of Corruption Act, which reads as follows:

> ***"56. Application for attachment order***
>
> *(1) Notwithstanding any other enactment, where a Judge in Chambers, on an application by the Commission, is satisfied that the Commission has reasonable ground to suspect that a person has committed an offence under this Act or the Financial Intelligence and Anti-Money Laundering Act, he may make an attachment order under this section.*
>
> *(2) An order under this section shall—*
>
> *(a) attach in the hands of any person named in the order, whether that person is himself the suspect or not, all money and other*

property due or owing or belonging to or held on behalf of the suspect;

(b) require the person named in the order to declare in writing to the Commission, within 48 hours of service of the order, the nature and source of all moneys and other property so attached; and

(c) prohibit the person from transferring, pledging or otherwise disposing of any money or other property so attached except in such manner as may be specified in the order.

(3) Where an order is made under this section, the Commission shall—

(a) cause notice of the order to be published in the next issue of the Gazette and in at least 2 daily newspapers published and circulated in Mauritius; and

(b) give notice of the order to—

(i) all notaries;

(ii) all banks, financial institutions and cash dealers; and

(iii) any other person who may hold or be vested with property belonging to or held on behalf of the suspect."

The features of an attachment order are also described in section 57:

"57. Features of attachment order

(1) An attachment order shall be served on each of the persons named in the order and on the suspect by an usher of the Supreme Court.

(2) Subject to subsection (3), an attachment order shall, unless revoked by a Judge in Chambers, remain in force for 180 days from the date on which it is made.

(3) An attachment order may be renewed for successive periods of 180 days on application made by the Commission, where the Judge in Chambers is satisfied that the Commission has obtained or is likely to obtain substantial new information relating to an offence under this Act or the Financial Intelligence and Anti-Money Laundering Act.

(4) Any period of time during which the suspect is absent from Mauritius, as certified to the Judge in Chambers by the Commission, shall not be reckoned as part of any period of validity of an attachment order."

It is not disputed in these proceedings that at the time the order was made (25th July 2019) it remained in force for 60 days and renewals were for successive periods of 60 days, until the amendment in the Finance (Miscellaneous Provisions) Act 2021 bringing this time frame to 180 days.

Because of the centrality of the issues of service and notice of the terms of the order to this case, I find it necessary to restate the principles governing notice in contempt of court applications.

Both parties agree, in line with the established case law before our courts, that to succeed in an application for contempt of court an applicant has to satisfy the court that –

(a) there is an order of the court or an undertaking;
(b) the terms of which are clear and unambiguous;
(c) proper notice of the terms has been given to the respondent; and
(d) there is a breach of the order/undertaking proved beyond reasonable doubt.

See, in this respect, **Kheeroo & Anor v Soodam** [2022 SCJ 152] and **S. Ahgun v P. Yew Him Fun** [2011 SCJ 197], relied upon by the respondent and **M. Beekarry v MRA** [2012 SCJ 500], on which case the Commission relies for its position before this court.

Where both parties do not agree, it is as to whether (c) and (d) above, especially (c), are conditions which have been fulfilled on the facts of this case.

Was the respondent given proper notice of the terms of the order?

The attachment order of 25th July 2019 could not be served on the respondent, as may be seen from the usher's return dated 9th August 2019, with the following note – "I was unable to locate [the respondent and another person] in as much as no good information could be gathered to locate them. In such circumstances, I have no alternative than to make this return of No Service".

The usher's return for the renewed order, in contrast, reads as follows: *"The foregoing Rule was duly served by me, the undersigned Court Usher upon 1.* ***Jean Christopher Augustin****, by leaving true and certified copies thereof, with his assistant found at 3rd floor, Goliva Court, St Jean, Quatre Bornes*" (Annex C to the Commission's affidavit).

This return is dated 10th November 2019, a few days before the sale of the attached property on 15th November 2019.

In his defence in these proceedings, the respondent takes the position that the service effected on 10th November 2019, before the sale, was not good service on him. Surprisingly however he goes on to state, in the same affidavit of 17th June 2022 relied upon in his defence, that service on his secretary at Goliva Court, on 31st January 2020, after the sale, was "personal" service. It is interesting to note, too, that service of the committal proceedings was made on the respondent's father in Vacoas on 12th May 2022 and the respondent was duly present in court as required on 23rd May 2022.

In addition to the above, the evidence on record is to the effect that:

(a) The Commission caused the order to be published in the Government Gazette and in two dailies, "Le Mauricien" and "Le Défi Quotidien" on 17th, 14th and 15th August 2019 respectively, as required under section 56(3) of the governing legislation.

(b) On 26th August 2019, the legal representatives of the respondent wrote to the Commission requesting for a copy of the attachment order, and this in the following terms:

> *"My client has reasons to believe that an attachment order has been made against his assets and/or assets used by him, and as such, he*

requests for particulars to be communicated to him, within 48 hours from receipt of this letter, of such attachment order, if any".

(c) The request was complied with by the Commission on 20th September 2019, with emphasis placed on the list of the assets which had been attached.

(d) There is continuity of legal representation (through the same Counsel) since then and the respondent at no point indicates in his evidence that his legal advisers failed to inform him of the response to their letter of 26th August 2019.

(e) Even though the reply of 20th September 2019 from the Commission makes no mention of renewal, there was service of the renewed order on 10th November 2019 by an usher of the Supreme Court, as required by section 57(1) of the legislation.

After anxious consideration, this court finds that the respondent's insistence on him to be personally served for contempt proceedings to lie is misguided and unjustified. Worse even, this is a classic case of ingenuity shown by a respondent to evade service on him.

The court sees from the documents produced in these committal proceedings that preparation for sale of the land was already ongoing in October 2019, when the land was surveyed with a view to effecting its sale. The respondent must have known, since August 2019 and thereafter, prior to the sale, that an attachment order has been granted on several of his properties, including the land he eventually sold, for all the reasons set out in (a) to (e) above, most formally prohibiting him from transferring, pledging or otherwise disposing of the assets so attached except by an order of a Judge in Chambers upon good cause shown.

Although service on the respondent was not personal, the court finds, on all the evidence before it, that the latter had proper notice of the terms of the attachment order in view of the many avenues through which notice of the terms of the order were given to him, including through his legal advisers who wrote on his behalf. This respondent's defence may be ingenious, but it is inadequate.

The respondent was at all times represented by attorney and counsel. I find that there is no reason for this court to come to the conclusion that the respondent's legal advisers did not carry out their professional duties in informing him, once the Commission replied to the

letter written on the respondent's behalf, of the existence of the order and of the likely consequences of disobeying it: **Hydropool Hot Tubs Ltd v Roberjot [2011] EWHC 121 (Ch.)**.

In addition to the above, it is worth recalling the case law on the subject in England prior to the principles governing service as a prerequisite to enforcement of a judgment or court order being embodied in R.S.C Order 45, r. 7, and the distinction drawn between prohibitory injunctions and mandatory injunctions when dealing with contempt of court. In the case of a prohibitory injunction (like here – not to sell or dispose of property attached), the court has clearly got power to make a committal order without any need for personal service of the order on the defendant. Of course there will have to be evidence that the defendant had notice and a defendant may be able to defeat an application for committal by establishing that he had a bona fide and reasonable belief that no injunction had in fact been granted. In the case of a mandatory injunction, however, personal service of the injunction is essential before a committal order can be made: see, in this respect, **Ronson Products Ltd v Ronson Furniture Ltd [1966] Ch. 603, at 616, United Telephone Co v Dale [1884] 25 Ch. D. 778**, and **the commentary thereon in "Injunction, Service and Committal", The Modern Law Review, Volume 40**.

As clearly stated in **Ronson Products Ltd** (above) –

> *"The distinction in law between an order to do an act and an order prohibiting an act is not, in my judgment, a merely historical or technical distinction. It depends upon practical considerations.*
>
> *If a man be ordered to do an act, so that his failure to do it may lead him to prison, justice requires that he know precisely what he has to do and by what time he has to do it.*
>
> *Different considerations apply where the undertaking or the order to be enforced is of a negative character. I do not believe the rule to be, and I shall not act upon the rule as it has been stated to me that in no case will the Court enforce obedience to its injunction by means of a committal to prison, simply upon the ground that the order has not been served, <u>when it appears beyond all doubt or dispute that the defendant is aware that the injunction has been granted and that it is the intention of the plaintiff to enforce it</u>."* (Underlining added)

This court, moreover, fully subscribes to the rationale for these principles explained in **United Telephone Co.** (above) in the following terms:

> *"The Court would be to a great extent incapable of doing its duty to itself … if it were to say that, with perfectly accurate knowledge of the order of the Court a defendant is at liberty to defy the Court's authority, and then come to the Court and say, "You cannot visit me for that breach of your order, because the order has not been served upon me". What is the necessity for serving an order upon a defendant, if he knows perfectly well without that service what it is which he is bound to obey?"* (Underlining added)

This is precisely the respondent's position. He clings to the fact that the order has not been personally served on him even though he must have known and did know about it since the day his legal advisers wrote to enquire on his behalf, if not earlier through the press notices. The publications, the letter from his advisers, the service by the Usher on 10th November 2019 all bear testimony to the fact that the respondent must have known and did know of the existence of the order and of its terms. I do not believe the explanations which have been put before the court, in view of their inconsistency. I have no doubt that the respondent has sought to evade service prior to the sale. As correctly submitted by Counsel for the Commission, the absence of personal service on the respondent should not be equated to an absence of proper notice of the terms of the order. This court finds that it is beyond all doubt that the respondent was aware of the terms of the order of 25th July 2019 and its renewal. See also in this respect, **Arlidge, Eady and Smith on Contempt, Fourth Edition, paragraph 15-21**.

By proceeding to sell the land attached by the order in the face of its clear and unambiguous terms, the respondent clearly breached the order and committed a grave contempt of court. This court finds the breach to have been proved beyond reasonable doubt. It is telling too that in his defence, in his second affidavit, the respondent takes issue with what he sees to be the delay by the Commission to complete its investigations quoad him. It is clear that he was not willing to wait.

This court takes a very serious view of the ingenuity and defiance shown by the respondent in effecting a sale outright of a property subject of an attachment order by the Judge in Chambers in the context of a criminal investigation into alleged drug trafficking and money laundering. There was no remorse shown and no apology during the committal proceedings, only a reliance on the absence of personal service and alleged absence of knowledge, which the overall circumstances give the lie to.

For all the above reasons I find that the applicant has established beyond reasonable doubt that the respondent has committed a contempt of court by deliberately flouting the order issued by the learned Judge in Chambers on 25th July 2019, as subsequently renewed.

Contempt of court applications, and the penalty they carry, are governed by section 18 C of the Courts Act. Our courts have time and again repeated that the rationale of both civil and criminal contempt is to uphold the effective administration of justice; "if a court lacks the means to enforce its orders and if its orders are disobeyed, not only will individual litigants suffer but the whole administration of justice will be brought into disrepute", **Khednee D. & Ors v Khednee M.** [1992 SCJ 336].

I gave the parties two opportunities to address me on the issue of sentence and in mitigation, on 11th August 2023 and today.

The Commission has submitted that a fine would serve the ends of justice in the event that the respondent were to be held to have committed a contempt of court. Counsel for the respondent, in mitigation on his behalf, has indicated that a small fine would be justified if he were to be found to be guilty of contempt.

This court is duty bound to point out that the Commission's stance on the penalty is surprising. If a sale is effected for monetary gain, in defiance of a court order, courts imposing fines as penalties for such behaviour will only serve to encourage defiance, instead of deterring it. The circumstances of this case are such that only a custodial sentence will meet the ends of justice, in view of the seriousness of the breach and the degree of misconduct involved.

The respondent, in mitigation, stated mainly that he is the sole bread winner and he has two children of 14 years and 2 years. He also stated that he does not agree with the court's finding and was not aware of the consequences of his actions.

In the recent case of **Omnicane Limited v Marie Liliane Tonta** [2023 SCJ 295], the court imposed a sentence of 3 months' imprisonment for contempt with respect to a sale of land done despite an interim order by the Judge in Chambers in July 2019, in the nature of an injunction, prohibiting the contemnor from selling, disposing of, mortgaging or encumbering the land. The court observed that it could not "overlook the wilful and deliberate flouting of a court order by the respondent, which is no doubt a serious matter", and added that a lenient sentence would send the wrong signal.

For all the above reasons, I order the respondent to undergo 3 months' imprisonment for contempt.

S. Beekarry-Sunassee
Judge

5 September 2023

For Applicant : **Ms B.M. Chatoo, Attorney at Law**
Ms P. Bissoonauthsing, of Counsel

For Respondent **:** **Mr J. Gujadhur, Senior Attorney**
Mr M. Hassamal, of Counsel