LEE WAI CHUNG L. L. C. & ANOR v THE INDEPENDENT COMMISSION AGAINST CORRUPTION

2021 SCJ 37

Serial No.: 252/2018

THE SUPREME COURT OF MAURITIUS
(Before the Hon Judge in Chambers)

In the matter of:

1. **Lee Lip Cheong Lee Wai Chung**
2. **Valerie Lee Kyook Teng Hin Voon**

Applicants

v/s

The Independent Commission Against Corruption

Respondent

In the presence of:

The Director of Public Prosecutions

Co-Respondent

JUDGMENT

On 31 October 2017, the officers of the respondent (hereinafter referred to as 'ICAC') carried out a search exercise at the premises of applicant No.1 situated at M43, La Tour Koenig, Pointe Aux Sables whereby a number of documents relating to applicant No.1's bookmaking activities were secured. On the same day, the ICAC carried out a further search at another property belonging to applicant No.1 situated at No. 9, De Courcy Street, Port Louis. The second search was carried out in the presence of applicant No.2 during which the following items were secured and seized namely 4 mobile phones and 3 pen drives belonging to applicant No.1 and 2 mobile phones belonging to applicant No.2.

All the documents secured from the first search were returned to applicant No.1 on 15 November 2017. The items secured from the second search were retained by ICAC.

On 13 December 2017, the request of applicant No.1 to ICAC to return the retained items was turned down. ICAC replied that it needed to seek legal advice regarding the said items.

The contention of applicant No.1 is that on 31 October 2017, the ICAC had no search warrant to carry out the second search at his property situated in Port Louis and that the seizure of the abovementioned items had been carried out unlawfully.

On 19 January 2018, ICAC made an *ex parte* application (SN 65/18) against both applicants under Section 14 of the Computer Misuse and Cybercrime Act 2003 for an Order to, *inter alia*, access, search and seize such data from the 4 mobiles phones and 3 pen drives of applicant No.1 and 2 mobile phones of applicant No.2. The Order prayed for was granted by Justice D Chan Kan Cheong on 22 January 2018 (the "Order of 22 January 2018").

On 27 February 2018, the said Order was served, in the form of a writ dated 23 January 2018, bearing Record No.116102, on the applicants. On the same day, the present application (SN 252/18) was lodged by both applicants. The interim injunction was declined by late Justice P Fekna. A summons was issued which was made returnable on the following day*, i.e* 28 February 2018, calling upon the respondent and co-respondent to show cause why the alternative prayer should not be granted.

On 28 February 2018, ICAC's Attorney at Law informed late Justice Fekna that searches were carried out on 27 February 2018, by virtue of the Order of 22 January 2018. On 01 March 2018, ICAC filed its first affidavit wherein it was averred that by virtue of the Order of 22 January 2018, the ICAC had, since 27 February 2018, already started the exercise of examining the said 6 mobiles phones and the 3 pen drives secured on 31 October 2017 and that the said exercise was also being carried out on 01 March 2018.

On the same date, after hearing preliminary arguments from legal advisers on both sides, an Interim Order in the nature of an injunction was granted by late Justice Fekna restraining and prohibiting the respondent from opening, having access to or retrieving data from any of the items which are in its possession, and which were secured from the applicants*,* pending determination of the issue of law concerning the legality of the seizure of the items*.*

The applicants filed an amended proecipe dated 7 March 2018 with regard to the conversion of the interim injunction issued, in the present matter, into a perpetual writ of injunction pending the hearing and determination of the main case as already entered by the applicants.

The applicants also lodged a Judicial Review dated 4 April 2018 praying, *inter alia*, that the seizure and the continued detention of the items be declared unlawful and ICAC be prohibited from accessing, searching and seizing such data from the said items but the said Judicial Review was withdrawn.

The respondent has now raised a preliminary objection in law, moving that the present application be set aside, which reads as follows:

> *"the Honourable Judge in Chambers is not the appropriate forum to determine the issues raised in the present matter as it would be tantamount to usurping the functions of the Criminal Trial Court."*

The applicants are objecting to the above preliminary objection. Written submissions have been filed on behalf of the applicants and the respondent. The co-respondent is concurring with the submissions of the respondent.

Miss Bissoonauthsing, appearing for ICAC, submitted that the issue is not in relation to jurisdiction of the Judge in Chambers but the latter not being the appropriate forum to determine the issues raised. She referred to the case of **Sharma v Brown-Antoine & Ors [2006] UKPC 57** and submitted that there are issues of law which should be dealt with in the same set of proceedings as the criminal action.

She explained that the respondent proceeded on the basis of consent of the applicants when making the search securing the 6 mobile phones and 3 pen drives but when consent was withdrawn, the respondent sought an Order from the Judge in Chambers so that the respondent cannot be said to have acted unlawfully or illegally. She referred to the case of **The DPP v Beeharry** [2018 SCJ 242] as an example where the Criminal Court routinely deals with the issue of stay of proceedings. She highlighted that this is an evidence gathering exercise enabling the respondent to have access to the relevant data and there is a Judge's Order authorising the respondent to have access to the data. If the present application is granted, the crucial step of the investigation would be seriously jeopardized. The issue of having access to data relates to evidence which needs to be best addressed in the course of a criminal trial on the issue of admissibility.

Mr Glover S.C. replied that the applicants' case is that the ICAC officers searched their premises on the basis that they had a search warrant. They searched the first place at La Tour

Koenig and having found a title deed they came to know that there was another property. They did not reveal to applicants that they did not have any warrant to search the second house, did not seek their approval or inform them of their rights but proceeded with the second search as well. It is only when counsel stepped into the case that ICAC realized that there was an issue with the exhibits. They made an application before the Judge in Chambers to get an Order so as to try to circumvent the fact they had initially breached the law.

He submitted that the Judge in Chambers was the proper forum and proper jurisdiction in order to vindicate the applicants' rights under the Prevention from Corruption Act. ICAC should have had a search warrant before carrying out any search exercise so that the issue of consent having been given by the applicants is irrelevant. Mr Glover S.C. submitted that if this application is not granted, ICAC will be allowed to continue its illegal acts under the umbrella of the Order of 22 January 2018. He added that the Order of 22 January 2018 was granted following an application which was made *ex-parte* and the learned Judge was not favoured with applicants' point of view.

I have duly considered the amended proecipe, the affidavits filed and the documents in support thereof as well as the submissions of learned Counsel appearing on both sides.

The case of **The Director of Public Prosecutions v Beeharry J & Ors** [2018 SCJ 242] clearly illustrates that trial Courts, hearing a criminal case, routinely determine issues relating to illegality in the conduct of any investigation which may lead to a stay of proceedings.

Moreover, in **Ramdawon P (Dr) v Bhuheekhan N & Ors** [2012 SCJ 457], Justice E Balancy, as he then was, sitting at Chambers, made the following pertinent remarks:

> *"As rightly pointed out by Counsel for the Council, the grant of such an interlocutory injunction would defeat the whole purpose of the law – the Medical Council Act – in conferring upon the Council powers to investigate complaints, and this consideration must have significant preponderance in the balance. The dicta in Dookhony v The Commissioner of Police* [2002 SCJ 182]*, Gaffoor v The Commissioner on Drugs and Money Laundering Assets and Anor* [2002 SCJ 283] *and Gaffoor v The Commissioner on Drugs and Money Laundering Assets and Anor* [2005 SCJ 140]*, quoted by Counsel for the Council, appear to me to be quite pertinent in that connection. Although those cases were concerned with the impropriety of injunctive orders which would unjustifiably stifle police action, the principle behind the dicta is equally applicable, in my view, to all*

institutions which have, by law, a function to fulfil, and which should not be unduly hampered in the fulfilment of such a function. The applicant cannot expect, by the simple device of lodging a civil case in Court, to obtain an interlocutory order from the Judge in Chambers preventing the Medical Council from exercising a function devolving upon it by law pending the determination of the civil case."
(emphasis added)

It is to be noted that the applicants have already lodged a main case [*vide* SCR 117694 – 1/607/18] praying for the Court to, *inter alia*, declare and decree that the searches and seizures effected by the ICAC on 31 October 2017 at the premises of the applicants to be unlawful and the detention of all the items seized and retained to be also illegal.

I find that the respondent cannot be debarred, at this stage, from proceeding with its investigation process and the issue of admissibility of evidence is to be best addressed by the trial Court. I uphold the submissions of the respondent to the effect that if the final order prayed for in the present matter is granted, that will indeed be tantamount to embarking on issues relating to the admissibility of evidence. As rightly held by the Appellate Court in the case of **Independent Commission against Corruption v Ramdoyal K & Anor** [2011 SCJ 44]:

"Court is only concerned with the propriety of the summons and not with questions relating to the admissibility of any item of evidence which the witness may be called upon to give. Such questions can only be properly decided by the trial Court within the context of the case before it.

It is clear to us, upon applying the above principles, that, although the Learned Judge was ultimately right to reject the application inasmuch as no sufficient cause had been shown why the two "summons to witness" should be set aside, she however erred in examining questions which pertained to the admissibility of evidence, notably the disclosure of evidence having regard to the obligation of confidentiality arising under section 81(2) of the Act. Upon adopting that erroneous approach, she unduly made pronouncements on issues which should have been left to be decided by the trial Court, including the interpretation and application of section 81(2) of the Act."
(emphasis added)

For all the above reasons, the preliminary objection as raised by the respondent is upheld and the present application is set aside. With Costs.

I certify as to Counsel.

The interim writ issued in the present matter on 01 March 2018 is hereby discharged.

R. D. Dabee
Judge

04 February 2021

For Applicants:	Mr N Appa Jala, SA Mr G Glover, SC Mr A K Ujoodha, of Counsel
For Respondent:	Me S Sohawon, Attorney at law Me P Bissoonauthsing, of Counsel Miss N S Pottaya, of Counsel Mrs A Parsooramen, of Counsel
For Co-Respondent:	Mr M Lallah, Chief State Attorney Mrs A Ramano-Egan, Ag Assistant DPP Miss P D Mauree, Principal State Counsel