NEW MAURITIUS HOTELS LTD v INDEPENDENT COMMISSION AGAINST CORRUPTION

2022 SCJ 111

Record No. 120383

THE SUPREME COURT OF MAURITIUS

In the matter of:

New Mauritius Hotels Ltd.

Applicant

v.

Independent Commission Against Corruption

Respondent

In the presence of:-

1. **The Financial Services Commission**
2. **ENL Ltd**
3. **Swan life limited**
4. **Rogers and co Ltd**

Co-respondents

JUDGMENT

The applicant is applying for a conditional leave to appeal to the Judicial Committee of the Privy Council ("JCPC") against the ruling of the Supreme Court dated the 21st of July 2020 in the matter of the Financial Services Commission ("FSC") versus the Independent Commission against Corruption ("ICAC") bearing Record No. 116957 ("the main case"). It is also praying for a stay of the said proceedings.

The applicant is seeking to pursue ten grounds of appeal against this judgment before the Judicial Committee (vide paragraphs 10.1 to 10.10 of the affidavit of the applicant dated 06 August 2020). It is the applicant's contention that an appeal lies as of right against the said

judgment pursuant to section 81(1)(b) of the Constitution. In the alternative, the applicant is of the view that with the leave of the court, an appeal lies against the said judgment by reason of its great general or public importance and should be submitted to the Judicial Committee.

The facts leading to this application are initiated by way of an *ex parte* application granted by a Judge in Chambers on the 14th of June 2018 to the respondent ("ICAC"). It compelled the first co-respondent the Financial Services Commission ("FSC") to disclose to the ICAC, "*all data, information, documents and files pertaining 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 to the ICAC and the FSC entered it "in the presence of" the third parties (which are four companies namely the applicant ("NMH"), 2nd respondent ("ENL"), 3rd respondent ("Swan") and 4th respondent ("Rogers")). 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 in its motion paper, (as it had communicated all other information requested) namely to set aside the order for the communication of an interim 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 from this decision for which the applicant seeks conditional leave to appeal to the Judicial Committee.

<u>Leave sought under section 81(1)(b) of the Constitution, appeal as of right.</u>

This section reads as follows:

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 –

… …

(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 applicant as a third party in the matter.

The difficulty which the applicant has to overcome is 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. The applicant addresses this issue in its motion paper and affidavit by alluding to "considerable harm and prejudice" caused to it and the serious prejudice suffered by it as specifically mentioned in an affidavit dated 10th of June 2019 and filed in the main case whereby it had been exposed to adverse press coverage which in turn may be a blow to its business reputation and that the prejudice it claims to be suffering is worth a substantial amount of money which is well in excess of Rs.10,000.

The applicant refers to the case of **Royal Hong Kong Jockey Club v Miers (1983) 1 WLR 1049** in which Lord Scarman held that "*it was necessary first to identify the nature of the specific civil rights involved in the appeal, and then to determine the value of that right*". The applicant submits that it is the specific civil right of being shut out of civil proceedings which directly impact and prejudice its right in relation to a regulatory investigation. The applicant refers to its commercial, business and reputational prejudice caused by adverse press coverage and the fact that it is one of the largest listed companies on the stock exchange of Mauritius. The prejudice flows directly from the impugned ruling and exceeds Rs.10,000 in reputational damage. The written submissions of the applicant then venture into adducing evidence as to losses exceeding Rs.10,000 by referring to drops in share prices.

It is also submitted that the cost of legal representation to "defend a baseless, wholly speculative and abusive investigation by a regulatory body…" exceeds Rs. 10,000.

Finally it also submits that investors including global investors would lose confidence in the applicant and shy away from investing in it. The applicant seeks to address the above submission relating to prejudice of more than Rs.10,000 by linking it to a submission made before the court in the main case by ICAC that there may be a future interest depending on the outcome of the investigation.

As can be seen from the above, the applicant is basing itself on surmises relating to the outcome of the investigation and its effect on the applicant company which may lead to reputational damage.

In the Privy Council Appeal judgment **Jacpot Limited v the Gambling Regulatory Authority 2018 UKPC 16**, at the end of paragraph 7, the law lords 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*."

Now 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. We have not found any claim that the data, information or documents in question belong to any of the third parties. The question is whether the subject matter of the motion paper should be considered as representing property or a right of the value of Rs.10,000 or upwards. Namely the data, information and the interim report which in fact belongs to the FSC. The contention of the applicant relates to the potential consequences of the outcome of the investigation after the respondent obtains the information in the interim report.

We do not agree that this contention of the applicant brings it within the meaning intended under section 81(1)(b) of the Constitution. We consider that this condition has not been satisfied, we are of the view that such a contention would be stretching its interpretation beyond the limit.

A good illustration of what a property or right for the purpose of section 81(1)(b) should mean is found in the recent decision of **Sholay D. v The Permanent Secretary, Ministry of Gender Equality and Family Welfare** [2021 SCJ 372] where the correct application of the "value" issue was reached by that 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.

Though the two situations are different, a parallel can be drawn between the return of a minor child as in the above case and communication of information and report in the present case, to lead us to conclude that neither can be equated to a right in relation to a property of Rs 10,000 or upwards.

In this matter before us, we hold the view that the matter which was before the Supreme Court for consideration did not concern the right of the value of Rs.10,000 or in relation to a property. It rather concerned whether information in the possession of the FSC should be communicated to the ICAC. 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.

Leave sought under section 81(2)(a) of the Constitution – great general or public importance.

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 at this stage to remind ourselves that the judgment in the main case relates to the “right” of a party to be involved in proceedings (which is an application made by way of a motion paper) as a third party and that it is in relation to an order directed to the FSC to communicate information and documents in its possession albeit about the applicant.

A perusal of the different grounds of appeal is required in the context of the involvement of the applicant as being a party "in the presence of" in the proceedings whereby the FSC is now contesting the order of the judge in chambers in relation to the communication of the interim report. The motion of the FSC is two pronged: 1) the setting aside of the *ex parte* order or 2) a variation of the order. From the judgment of the Supreme Court it can be extracted that the only document remaining for the production or disclosure from the applicant, is an interim report of Mr. Taukoordass.

The first ground (10.1) complains that the court did not consider that the ICAC had obtained the order under the Computer Misuse and Cybercrime Act 2003 and not under the Prevention of Corruption Act ("POCA"). It also had not established its jurisdiction under the POCA or that there was any disclosable corruption offence. An overview of the situation in the main case shows that in fact this point was not relevant to be considered at the time but is one which remains to be raised by the applicant and then be duly considered. This ground is misguided as this was not the matter which the court in the main case had to decide upon within the precincts of the motion to exclude the applicant as a third-party.

The applicant seems to be under the impression that it was entitled to move for prayers by way of its affidavit in the main case (see heading D. PRAYERS paragraph 63). We note that it states that it supports the prayer of the FSC to set aside the judge's order, it also prays that the court should not grant one of the prayers of the FSC, namely the variation of the said order.

In a plaint with summons, a defendant can enter a counterclaim against the plaintiff, if ever the plaintiff were to withdraw his claim, the court could still consider the counterclaim of the defendant against the plaintiff. There is no equivalence for a motion paper. It is not the cursus at the Supreme Court for a motion paper for a respondent, co-respondent or third-party to be able to riposte with its own prayers. Any motion emanating from a party is initiated by a separate motion paper, supported by an affidavit. A respondent or co-respondent or third party would not necessarily have the same motion paper containing the exact prayers as that of the applicant. Such a situation within the confines of one matter would immediately give rise to procedural and practical difficulties in court. The applicant is in fact seeking to contest whether the ICAC is able to obtain an *ex parte* order from a judge in chambers, it seems to contend that all such applications to a judge in chambers should be made *inter partes*.

In the written submissions of the applicant at paragraph 58, reference is made to the fact that "the judicial committee's intervention is required because the judgment is at odds with earlier pronouncements of the Supreme Court to the effect that the ICAC may not seek disclosure orders *"behind the back"* of necessary parties. The law in this area is fragmented by the judgment and requires harmonisation by the Judicial Committee." With due respect we disagree with this contention by the applicant. The applicant has referred to 3 cases relating to *ex parte* orders made to Judges in Chambers (**Manraj v ICAC** [2003 SCJ 75], **Ex parte ICAC** [2006 SCJ 2] and **SBM Bank (Mauritius) Ltd v ICAC** unreported). These decisions are not binding on a bench of 2 Judges and in any event have not been considered in open court or by a bench of two judges, we are of the view that a request for harmonisation by the Judicial Committee is debatable and premature. Without in any way determining or diminishing the validity of the issues raised, we 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 main case or by any bench of 2 Judges of the Supreme Court. Therefore, the Judicial Committee will not have the benefit of any decision of the Supreme Court on the subject matter. The present application seeks to leapfrog this stage. Nor are we of the view that the applicant would have necessarily been able, even if it remained as a third party in the main case, to contest the propriety and/or procedure of the ICAC obtaining the *ex parte* order from a judge in chambers for the procedural reasons given earlier relating to motion papers.

The FSC, despite having communicated other information to the ICAC, has stated through its Senior Counsel appearing before us that the legality of the order is contested. It has called into question whether the ICAC is entitled to obtain information as the POCA is not referred to in the Financial Services Act 2007 ("FSA"). We note that the issue of confidentiality under section 83 of the FSA has been adverted to in the affidavit of the FSC in the main case.

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 that the FSC has partly complied with the order. A perusal of the ruling of 21 July 2020 reveals that 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 FSC is not challenging the "*ex parte* procedure" as such but calls into question the scope of the respondent's investigation, (in its words which should not be a fishing expedition), it requires precision without any ambiguity and invokes its inability to comply

because of the vague and uncertain terms of the judge's order of 14 June 2018. The FSC also requires clarification as to reference as to who are the "stakeholders" and the time period of correspondences requested.

In fact a reading of all of the grounds of appeal and the submissions offered to us, show that the applicant is seeking to challenge the very procedure and ability of the ICAC to apply for such orders be it under the Computer Misuse Act or even the POCA, which we have already highlighted above, is misguided in the present context. This issue has permeated all of the intended grounds of appeal to the JCPC in this matter as well as the submissions offered to us. We do not find it appropriate to grant leave on this ground for all of the reasons given above.

Grounds 10.2, 10.6, 10.7 and 10.8 all refer to and relate to an Interim Report made by/under the aegis of the FSC.

As stated earlier above, it is the communication of the interim report which is the remaining document in the main case. The applicant seeks to assert its right as a third party in the main case to challenge and attack the interim report (it is referred to as "flawed evidence" in ground 10.7 (ii) and "invalid" in ground 10.6) in a bid to prevent reputational damage and harm to the company. The ICAC is seeking the communication of this interim report and it is premature to surmise that it will definitely be the basis or used for any potential prosecution, the matter is still at the stage of investigation and is not yet in the public domain. The FSC which is the instigator of the report, is the appropriate party to contest its communication to the ICAC in the main case which is yet to be heard. The applicant is seeking to prevent the ICAC from having access to this interim report for the purposes of its investigation. In fact the applicant correctly states that its interests are distinct from those of the FSC (ground 10.5 i), this submission reveals the crux of the problem whereby the carriage of proceedings are by the latter. It is also pertinent that the applicant has other means of redress to contest the communication of the interim report (or to vindicate its rights *vide* ground 10.2). It also has other means and opportunities to contest the contents of the interim report if it is ever used in a court case. With respect to "*departing from settled authority of the Supreme Court as regards the propriety of ICAC to obtain disclosure orders without good cause shown*", (10.7 i), this would seem to be referring to the three judgments of different judges in Chambers which has already been dealt with above in relation to ground 10.1.

We fail to see the question of great general or public importance.

We are of the view that the above grounds raised show yet again the misapprehension of the applicant as to what the court in the main case has to consider and decide upon. We do not find that any of these grounds in the context of the present application and the main case our questions of great general or public importance.

Grounds 10.3 and 10.4 relate to the legal test to be applied for the applicant to be a party in the main action based on: *intéret personnel, légitime et suffisant* and the future interest in any ICAC prosecution. Though it has not been specifically referred to in the written submissions of the applicant we take the above to refer to the case of **Canarapen v Anne** [1999 SCJ 293] which in turn refers to **Pierre Louis v Speville** [2015 SCJ 11] and **Rochecouste v Bissett** [2017 SCJ 11]. 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 339-341, 175 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. In the present matter the applicant is joined as third party in a motion paper whereas in the case of **Pierre Louis**, it was an application to intervene in a plaint with summons.

Ground 10.5 refers to the rights and interests of the applicant which are distinct from that of the FSC and the applicant's affidavit evidence and submissions in the main case. The applicant contends that its right and/or interest are directly engaged in the application in the main case.

Demandes reconventionelles has not been addressed in the written submissions of the applicant and we therefore find that we need not consider same.

Ground 10.9, given its nature, would involve the present court 1) closely considering the applicant's evidence and its submissions (this ground also refers to the submissions of the other parties) before the court in the main case and then 2) considering whether the judgment reached a conclusion without providing any or sufficient reasons in the light of the said submissions. However in the written submissions of the applicant (paragraph 56) this has been dealt with brevity in the following manner:

> "*First it is respectfully submitted that the judgment marks a departure from the requirements of justice and disregards the principles of due process and natural justice of the applicant in that the judgment failed to give reasons and/or sufficient reasons for disregarding the applicant's affidavit evidence and submissions; it most respectfully submitted* (sic) *that the judgment reaches an erroneous conclusion without having regard to the submissions of the application. It is incumbent on any adjudicatory body to give reasons for its decisions and the applicant is unable to know whether its submissions have been considered and, if they have been considered, why they have been disregarded by the court. A loosing* (sic) *party has the right to know why it has lost."*

The statement of principle of what is the duty of an adjudicatory body has been correctly stated in the above extract. However it fails to cross-refer to which exact evidence in its affidavit (comprising of 63 paragraphs) and submissions it is referring to. We are therefore left to surmise that the reference is to the heading Press Reports and Communiqués or alternatively most of the affidavit: paragraphs 10 to 53.

As we have been left in the dark as to exactly what this ground of appeal entails and what is the question of great and general public importance or what is the evil precedent etc., we are of the view that we cannot consider this ground and that leave should not be granted.

The final ground 10.10 takes issue with the fact that the learned judges decided to put the third parties out of cause before the legal basis for the order was explained by the ICAC to the court. This ground carries on to state that the motion to bring up the record in respect of the application made before the judge in Chambers, should have been brought up before the court adjudicated on any other issues.

This would in effect mean that litigants would dictate to the court which motions and which decisions should be heard, in which order and that the court has no say, or discernment, discretion or power in exercising its judicial function. In Mauritius we have the adversarial system whereby each party puts forward its point of view supported by legal submissions and this is decided upon by the court. As stated earlier on, the issue before the judges in the main case related to whether the third parties were procedurally correctly included in the manner they were. This was an important preliminary issue which had to be decided upon. Again it bears repeating that the parties especially the applicant and the other third parties in the main case

have sought to orientate the court (both the present matter and in the main case) to consider the legal basis and procedure under which the ICAC sought the *ex parte* order. Yet again we have to repeat that the parties opposing the order of the judge in chambers have other avenues and procedures available to them.

In **Sabapathee v The State** [1995 SCJ 276] Balancy SPJ (as he then was) considered earlier authorities and made the following observations:

> […]
>
> This Court is called upon to perform a screening exercise so as to ensure that only deserving questions of great importance are submitted for the consideration of the law lords. This implies, in our view, that the question to be so submitted must be seriously arguable, that it should involve a question of law and that it should be of great importance for the jurisdiction concerned.
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> [Emphasis added]
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> […]

We do not find that this ground raises any issue of great general or public importance and we do not agree with the characterisation that an evil precedent has been set by the judgment we are concerned with.

We have to however state that all of the concerns and issues which have been raised by the applicant and which have found their way into the grounds of appeal may come under the umbrella of appropriate alternative legal proceedings. The applicant therefore has alternative remedies which it can avail itself of to obtain due consideration of its concerns, submissions and prayers. This consideration which we have borne in mind together with all the reasons given above relating to the various grounds of appeal, have led us to the conclusion that this application is not a fit one for which leave should be granted by this court. 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:	Mr G. Huet de Froberville, Attorney at Law Mr A. Moollan SC, together with Mr A. Adamjee, Mr A. Moollan, of Counsel
For Respondent:	Ms N. Seetaram, Attorney at Law Mr M. Roopchand together with Mr T. Naga of Counsel
For Co-Respondent No. 1:	Ms Z. I. Salajee SA Mr D. Basset SC, together with Mr J. G. Basset & Mr H. Dhanjee of Counsel
For Co-Respondent No. 2:	Mr U. K. Ragobur, Attorney at Law Mr P. Doger de Speville SC together with Mr S. Dabee of Counsel
For Co-Respondent No. 3:	Mr U. K. Ragobur attorney Mr S. Moollan QC
For Co-Respondent No. 4:	Mr G. Ng Wong Hing SA Mr R. Pursem SC together with Ms M. Jeetah of Counsel