SBM BANK (MAURITIUS) LTD v THE INDEPENDENT COMMISSION AGAINST CORRUPTION

2021 SCJ 159

Serial No. 1912/20

IN THE SUPREME COURT OF MAURITIUS

[Before the Judge in Chambers)

In the matter of:-

SBM Bank (Mauritius) Ltd

Applicant

v

The Independent Commission Against Corruption

Respondent

JUDGMENT

1. On the 9th August 2019, I issued an order in chambers, directing SBM Bank (Mauritius) Ltd to disclose to the respondent within one week "*all data, information and documents and files in relation to (i) four import loans of the total value of USD 40.44 million were provided by SBM Bank (Mauritius) Ltd to Renish Petroleum FZE, a company registered in the United Arab Emirates (UAE) and wholly owned by one Mr Hiteshkumar Chinubhai Mehta, towards the payment to a supplier by the name of Prime Energy FZE for the supply of fuel oil to Lanka IOC PLC; (ii) a loan of 27 million USD granted to Pabari Investment Group by the said local bank; and (iii) a loan granted to Welwyn Co. Ltd, having as directors, Messrs Kaushik Pabari and Rajesh Pabari which are kept and stored in a computer system by the bank*."

2. The applicant now moves for orders (i) restraining and prohibiting the respondent from executing the above disclosure order and (ii) disclosing and setting aside the disclosure order.

3. The applicant bank avers that the disclosure order does not state the provision of the law under which it was issued and that at the time that the bank was served with the order, it was not favoured with any information in relation thereto, including the affidavit filed in support of the disclosure order.

4. The applicant further contends that the disclosure order is tainted with irregularity and it seeks to prevent the respondent from executing the order and to have it discharged "*on the ground that it has been made ex parte without full disclosure having been made to SBM of all the material facts*", and since the principles under the *audi alteram partem* rule were not followed.

5. It is argued that the applicant's duty of confidentiality towards its clients is sacrosanct and of vital importance for public confidence in the bank, as well as for the banking industry, since section 64 of the Banking Act imposes a strict duty of confidentiality and non-disclosure of information regarding the affairs of bank clients.

6. The applicant bank nonetheless concedes that the respondent has the jurisdiction under the Financial Intelligence and Money-Laundering Act to investigate a money-laundering offence but it avers that in the instant case there is no evidence of any such offence.[1]

7. It is submitted that the disclosure order is vague as it does not specify the period for which the "*data, information and documents and files*" are required, and that in the absence of information regarding the offence under investigation the applicant bank is in no position to comply with the disclosure order. To allow its execution would therefore amount to the respondent being given powers which are too wide and which are not statutorily defined.[2]

8. The applicant further reveals that it gave a declaration to the police on the 27th July 2018 against Renish Petroleum FZE and that the matter is under investigation. It had already disclosed information to the police and was prepared to disclose "*other material information to the police*[3]" should there be such a request.

9. The applicant thus questions the process through which the application for disclosure was made behind its back and claims that it was not favoured with the affidavit filed in support of the application. It also avers that it would expose itself to civil litigation and negative press coverage if it were to comply with the disclosure order.

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[1] Paragraph 26 of the applicant's first affidavit.
[2] Paragraph 28 of the applicant's first affidavit.
[3] Paragraph 30 of the applicant's first affidavit.

10. The investigation would consequently cause irreparable harm and prejudice to the bank's good reputation and it was likely to seriously undermine public confidence in the applicant.

11. It is the applicant's case that it is therefore "*urgent and necessary*" that the order prayed for prohibiting and preventing the respondent from executing the disclosure order be granted, the more so since all material facts were not disclosed at the time of the *ex parte* application lodged by the respondent.

12. The applicant sums up its case by averring that the "*ICAC has failed to show why it sought information about the clients of SBM without ensuring that SBM is given the opportunity to assist the court*"[4] and that the bank was left in the dark as to why the respondent "*should have been allowed to go on a fishing expedition behind its back*".[5]

13. It maintains that it has a duty of confidentiality towards its clients and that it is not aware whether the disclosure order was issued pursuant to section 64 of the Banking Act and whether the conditions laid down under these provisions have been satisfied.

14. The respondent resists the present application to set aside or discharge the disclosure order and it avers that this application is frivolous and vexatious since the investigation does not involve the applicant or any matter pertaining to its administration. It avers, among other things, that it should not be hindered in the proper discharge of its statutory duty of investigating into an alleged offence of money laundering, especially when it was duly authorized to do so by an order of the Judge in Chambers.

15. The respondent submits that there is no need to disclose any information to the applicant as the affidavit containing all the facts in respect of the disclosure order application were meant for consideration by the Judge in Chambers only, and the order was granted once the Judge was satisfied that the required threshold had been reached and that the investigation was conducted in strict confidentiality as per the requirements of the law[6].

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[4] Paragraph 8(d) of the applicant's second affidavit, p. 62 of the brief.
[5] Paragraph 9(c) of the applicant's second affidavit, p. 63 of the brief.
[6] Paragraph 12 of the respondent's first affidavit, p. 55 of the brief.

16. The respondent insists that the investigation is not presently directed at the applicant but that it concerns the applicant's clients under the Banking Act.

17. It further avers that notwithstanding the duty of confidentiality provided for under section 64 of the Banking Act, such duty can be subject to a Judge's order to disclose information, as in the present matter, and especially where it concerns a criminal investigation conducted in the public interest. The applicant was therefore being of bad faith and it could not hinder the respondent's investigation.

18. I have considered all the affidavit evidence. The applicant essentially submits that the respondent's application before the Judge in Chambers for disclosure of information against its clients should have been made *inter partes*.[7] Reference is made to the decision in **Foondun M. S. v Banque des Mascareignes and Another** [2019 SCJ 58], where it was underlined that information pertaining to a bank customer's affairs could only be disclosed within the strict parameters of "*statutory exceptions and subject to the fulfillment of all the statutory conditions*" under section 64 of the Banking Act. In the present case, the applicant submits that it was never made aware of the enactment under which the respondent had sought the disclosure order.

19. Mr Pursem SC for the applicant further cites **Tournier v National Provincial and Union Bank of England (1924) 1 K.B. 461**, and he concedes that the duty of confidentiality of the bank is qualified "*where disclosure is under compulsion by law, where there is a duty to the public to disclose, where the interests of the bank require disclosure or where the disclosure is made by the express or implied consent of the customer*."

20. Learned counsel however suggests that the respondent's approach, which was to apply for the disclosure Order "*in the back*" of the applicant bank, "*simply indicates that the Applicant is automatically considered as hostile while the Respondent is empowered to stamp on the basic rules of fairness at the same time putting at risk the sacrosanct nature of a banker's duty of confidentiality.*"[8]

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[7] Paragraph 5 of Mr Pursem's written submissions, p. 88 of the brief.
[8] Paragraph 61 of Mr Pursem's written submissions, p. 95 of the brief.

21. Mr Pursem thus confirmed during the hearing that the applicant's main complaint is that the application for the disclosure order was made in the applicant's absence. He does not dispute that under section 64 of the Banking Act there are derogations to usual issues of confidentiality although he insists that no good reason was given by the respondent for making an application for disclosure in the bank's absence.

22. On the other hand, the respondent maintains in its submissions that the bank's duty of confidentiality is not absolute and that this duty cannot be used to hide potential illegal or criminal acts, so that an order for disclosure will override a bank's duty of confidentiality.

23. I have thus also considered the submissions of counsel on both sides. Section 13 of the Computer Misuse and Cybercrime Act 2003 indeed provides that where the disclosure of data is required for the purposes of a criminal investigation or the prosecution of an offence, an investigatory authority (i.e., any body, such as the police, lawfully empowered to investigate any offence) may apply to the Judge in Chambers for an order compelling any person to submit specified data in that person's possession or control which is stored in a computer system.

24. Over and above this, section 64(3)(h) of the Banking Act, clearly spells out that the duty of confidentiality relied upon by the applicant is not absolute since it shall not apply where the Court or a Judge orders the disclosure of information. Section 64(9) of the same enactment provides that the respondent can apply to the Judge in Chambers for an order of disclosure. As fairly conceded by learned counsel for the applicant himself therefore, any duty of confidentiality which the applicant bank may owe to its customers is not absolute.

25. It was indeed highlighted in **Foondun M. S. v Banque des Mascareignes and Another** [2019 SCJ 58], that information pertaining to a bank customer's affairs can only be disclosed in the strict parameters of "*statutory exceptions and subject to the fulfillment of all the statutory conditions*" under section 64 of the Banking Act.

26. Mr Pursem for the applicant also aptly referred to **Norwich Pharmacal Company v Commissioners of Customs and Excise [1973] 3 WLR 164**, where Lord Reid explained that when a person gets mixed up through no fault of his own in the tortious acts of others so as to facilitate their wrongdoing, that person "*comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers.*"

27. The following passage from Lord Denning's decision in **Norwich Pharmacal**, is relevant:

> "*This new jurisdiction must, of course, be carefully exercised. It is a strong thing to order a bank to disclose the state of its customer's account and the documents and correspondence relating to it. It should only be done when there is a good ground for thinking the money in the bank is the plaintiff's money – as for instance, when the customer had got the money by fraud – or other wrongdoing – and paid it into his account at the bank. The plaintiff who has been defrauded has a right in equity to follow the money. He is entitled, in Lord Atkin's words, to lift the latch of the banker's door: see* ***Banque Belge pour l'Etranger v. Hambrouck [1921] 1 K.B. 321, 355****. The customer, who has prima facie been guilty of fraud, cannot bolt the door against him. Owing to his fraud, he is disentitled from relying on the confidential relationship between him and the bank: see* ***Initial Services Ltd. v. Putterill [1968] 1 Q.B. 396, 405****. If the plaintiff's equity is to be of any avail, he must be given access to the bank's books and documents – for that is the only way of tracing the money or of knowing what has happened to it: see* ***Mediterranea Raffineria Siciliana Petroli S.p.a. v. Mabanaft G.m.b.H.*** *(unreported). So the court, in order to give effect to equity, will be prepared in a proper case to make an order on the bank for their discovery. …*". [Underlining added].

28. Learned counsel for the applicant however argues that this "*duty to assist*" presupposes that "*the Bank in this case must be apprised of the application and given an opportunity to make representations before the Judge*"[9].

[9] Paragraph 36 of Mr Pursem's written submissions, p. 92 of the brief.

29. Mr Pursem further submits that "*the general rule would be that a Court should refrain from granting an order to disclose information on a bank customer's affairs on an ex parte basis unless any of the Bankers Trust Co Events* [reference being made to **Bankers Trust Co v Shapira [1980] 1 WLR 1274**] *arise or it is urgently necessary to prevent injustice or if the customer is present before the court to make representations*."[10]

30. In the case of **Li Soop Hon Li Tung Sang & Co Ltd v Barclays Bank Plc & Others** [2014 SCJ 242], Chan Kan Cheong J. referred to **Bankers Trust Co v Shapira [1980] 1 WLR 1274**, where the Court of Appeal had applied the principles set out in **Norwich Pharmacal Company**, and held that "*though the court could not lightly use its powers to order disclosure of full information touching the confidential relationship of banker and customer, such an order was justified even at the early interlocutory stages of an action where plaintiffs sought to trace funds which in equity belonged to them and of which there was strong evidence that they had been fraudulently deprived and delay might result in the dissipation of the funds before an action came to trial; and that in the new and developing jurisdiction where neutral and innocent persons were under a duty to assist plaintiffs who were the victims of wrongdoing, the court would not hesitate to make strong orders to ascertain the whereabouts and prevent the disposal of such property*."[11] [Underlining added].

31. Since the provisions referred to earlier clearly provide that a banker's duty of confidentiality can be lifted by an order from a Judge in Chambers under certain circumstances, and as the authorities aptly referred to by learned counsel for the applicant indicate that such disclosure orders are urgent measures which can be used to prevent the dissipation of property and/or evidence, the presumption of regularity must prevail and be applied to the *ex parte* proceedings lodged by the respondent in the present matter. I must therefore conclude that sufficient facts must have been disclosed at the time that the respondent applied *ex parte* to the Judge in Chambers in order to warrant the issue of the disclosure order in the first place.

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[10] Paragraph 46 of Mr Pursem's written submissions, p. 94 of the brief.
[11] Page 4 of the Judgment in Li Soop Hon Li Tung Sang & Co Ltd v Barclays Bank PLC & Others [2012 SCJ 242]

32. There is also no merit in the argument that the order was flawed simply because the Rule issued by the Master and Registrar did not indicate the provision of the law under which the order was made since there is no such requirement under the law and the Judge in Chambers must have been satisfied that the application for disclosure was made under the relevant provisions.

33. In the light of these considerations, and since the duty of confidentiality owed by the applicant to its clients is not absolute and it is not disputed that the respondent is conducting a criminal investigation in the public interest, the order of the 9th August 2019 must manifestly override the duty of confidentiality owed by the applicant to its clients, so that the information requested by the respondent under the disclosure order must be provided.

34. There could also be no requirement for the respondent to inform the applicant under which section of the law the disclosure order was made, especially after the applicant has acknowledged that the Supreme Court had already observed in its ruling regarding the present matter that "*it is common ground that the application was made ex parte before the Judge in Chambers, under section 64 of the Banking Act, upon an investigation by the respondent into an alleged money laundering offence.*"[12]

35. I therefore find that the applicant has been unable to establish that the disclosure order obtained by the respondent *ex parte* was not justified. For all the given reasons, this application is set aside, with costs.

I certify as to counsel.

N. F. Oh San-Bellepeau

Judge

Chambers, this 25th May 2021

[12] Paragraph 33 of Mr Pursem's written submissions, p. 92 of the brief.

For Applicant	**:**	**Mrs D Ghose-Radhakeesoon, Attorney-at-Law** **Mr R Pursem, Senior Counsel and Ms M Jeetah of Counsel**
For Respondent	**:**	**Ms D Nawjee, Attorney-at-Law** **Mr K Roopchand, of Counsel**