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

2020 SCJ 230

Record No. 119176 – 5A/261/19

THE SUPREME COURT OF MAURITIUS

In the matter of:-

SBM Bank (Mauritius) Ltd

Applicant

v

The Independent Commission Against Corruption

Respondent

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JUDGMENT

On 23 August 2019 the applicant was served with a Rule of an Order dated 9 August 2019 delivered by the Judge in Chambers, upon an *ex-parte* application made by the respondent. The Disclosure Order directed the "*SBM Bank (Mauritius) Ltd do disclose to the Applicant all data, information and documents and files in relation to:-*

(i) four import loans of the total value of about USD 40.44 million 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.*"

On 29 August 2019, the applicant wrote to the respondent requesting an extension of 10 days from receipt of its letter to allow consideration of the Order by the applicant's Board of Directors. The respondent acceded to this request.

On 23 September 2019, the applicant, by way of motion and affidavit, applied for:–

(A) an Order granting a stay of execution of the Disclosure Order; and

(B) an Order ordering the Disclosure Order be discharged and set aside in its entirety; and/or

(C) any other relief which the Court may deem fit and proper in the circumstances of the case.

The respondent is resisting the present motion and has raised the following preliminary objections:-

(a) by making the present application with the prayers contained therein, the applicant is in fact appealing or seeking to review the Order made by the Judge in Chambers;

(b) the present application is frivolous and vexatious inasmuch as the information prayed for in the order is in respect of loans granted by the applicant as a banker; and

(c) the applicant should not be hindered in the proper discharge of its statutory duty of investigating into an alleged money laundering offence, the moreso, as it has been duly authorised by the Order made by the Judge in Chambers.

On the first limb of the preliminary objection, learned Counsel for the respondent has submitted that the applicant has not adopted the proper procedure to challenge the order of the Judge in Chambers which was made on an *ex parte* application. By making the present motion the applicant is asking this Court to discharge the Order and is tantamount to a disguised appeal. Also, learned Counsel has submitted that the applicant is seeking a review of the Order as applicant contends that there are numerous new facts which could have led the Judge in Chambers to decide otherwise.

Learned Counsel for the respondent has further submitted that in view of the prayers sought in the present application, and according to the practice and cursus adopted by the Supreme Court, the applicant should have made an application to the Judge in Chambers and the matter as far as possible ought to be decided by the judge who has made the Disclosure Order.

Learned Senior Counsel for the applicant has, on the other hand, submitted that since the Disclosure Order was made on an *ex parte* application, the applicant could not appeal against such Order. It is further submitted that the Disclosure Order is tainted with such irregularity on account of material facts which were not placed before the Judge in Chambers at the time the learned Judge was called upon to decide on the *ex-parte* application.

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. Also, it is not disputed that the applicant was served with the Disclosure Order only and it was not communicated with the affidavit in support of which the Disclosure Order was made.

Section 73 of the Courts Act provides that a Judge may, whether in term time or in vacation, grant an injunction subject to a motion to the Court to set aside the injunction, and the Court may then set aside or validate it.

In **Hon P. Nababsing & Ors v Hon P. R. Bérenger & Ors** [1994 SCJ 7], it was held that although a right of appeal had been specifically provided against the decision of the Judge in Chambers by virtue of section 69(1)(a) of the Courts Act, "*section 73 clearly retains its specific identity and purpose, enabling this Court to intervene in relation to a decision of a Judge granting either an interim or interlocutory injunction. This has all the more to be so since there is no right of appeal against an interim order of injunction, as it is not final.*" The Court went on to state that the powers and duties of the Court when hearing an appeal from a Judge's decision is much wider than those it exercises on an application under section 73.

In **J. M. Seblin v A. Dulloo** [2011 SCJ 4], it was observed that "*while that section (section 73) appears to provide an alternative to the appeal procedure provided by section 69(1)(a) of the Act, it is limited to what it has itself termed as an "injunction".*" The Court found no reason to construe section 73 beyond the ambit of an injunction. Finally, the Court noted

that since the amendments to the Courts Act, all challenges of a decision of a Judge in Chambers have been by way of appeal under section 76A and the Court ruled that "*the proper procedure to be adopted to contest any decision of the Judge in Chambers is by way of appeal and not by way of motion supported by affidavits.*" It is trite law that an appeal shall lie when the decision of the Judge in Chambers is final following inter parties proceedings.

In **The Honourable Attorney-General v European Investment Ltd & Anor** [2009 SCJ 98]; the Court considered the nature of orders made *ex parte* by a Judge in Chambers and observed that "*in our view, an intrinsic feature of orders made ex parte by a Judge in Chambers is that it is not necessary final and may be revised inter partes by the same judge, or where he is no more available, by another Judge sitting as Judge in Chambers. The point to be borne in mind here is that in an application for an order made ex parte to be discharged on the ground that material facts were not placed before the Judge in Chambers, the correctness of the decision made ex parte is not being challenged as such, and the applicant is simply saying that the learned Judge in Chambers should determine the question anew now that he is in presence of all the material facts.*" Also, the Court emphasised that a Judge in Chambers is not *functus officio* after he has decided an ex parte application such that he can reconsider the same question *inter partes* and that by so doing a Judge in Chambers would not effectively sit on appeal against his previous decision. Finally, the Court concluded that "*this function has, as a matter of practice, been repeatedly assumed by the Judge in Chambers in Mauritius such that it may be considered to be part of the cursus curiae of the Supreme Court."*

On the strength of the above pronouncements, with which we agree, we hold that the applicant has adopted the wrong procedure by way of motion to challenge the Disclosure Order made by the Judge in Chambers on an *ex parte* application. The applicant should have made an application *inter partes* before the Judge in Chambers and aver by way of affidavit evidence all the relevant and material facts that would call for a revision or discharge of the Order. The present application is a disguised appeal of the decision of the learned Judge by way of motion. Accordingly, we uphold the first limb of the preliminary objection raised by the respondent.

Learned Senior Counsel for the applicant has submitted that the Court should adopt a less technical and more flexible approach to the objection raised by the respondent in the light of the Judicial Committee decision in **M. Toumany and J. Mullegadoo v M. Veerasamy [2012 UKPC 13]**. As stated in **Sport Data Feed Ltd v Stevenhills Ltd** [2014 SCJ 401], the above

pronouncement was made "*where mistakes appear in the documentation as to which appellate jurisdiction of the Supreme Court has been involved"* and where the Judicial Committee viewed that those mistakes could and should "*be identified and corrected … as soon as practicable"* such that the Court would then "*proceed without delay to deal with the substantive issues raised before it on the merits*".

The present application is far from a simple technical mistake or a minor procedural error which can be readily corrected. In the absence of significant material on record, this Court is unable to effectively exercise its appellate function.

In the light of our conclusion, we need not consider the other points raised in the preliminary objections.

For the above reasons, we set aside the application. With costs.

M. I. Maghooa
Judge

M. J. Lau Yuk Poon
Judge

29th September 2020

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Judgment delivered by Honourable M.I Maghooa, Judge

For Applicant	**:**	**Mrs D Ghose-Radhakeesoon, Attorney-at-Law** **Mr R Pursem, SC together with** **Ms M Jeetah, of Counsel**
For Respondent	**:**	**Mr S Sohawon, Attorney-at-Law** **Mr M Roopchand, together with** **Mr K Beeharry, of Counsel**