



Republic of
Mauritius

THE SUPREME COURT OF MAURITIUS

Judges' Secretaries' Office

21st October 2021

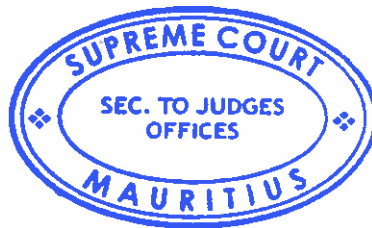
Sir/Madam,

**Re: SN 850/2021 – SBM Bank (Mauritius) Ltd v/s The Independent Commission
Against Corruption**

TAKE NOTICE that judgment in the above matter has been delivered by Hon. N.F. Oh San-Bellepeau, Judge, has been filed at the Registry of the Supreme Court. A copy is herewith annexed for your consideration.

Yours faithfully

**S. Charlot (Mrs)
Secretary to Judge**



To:

- 1. D Ghose-Radhakeessoon, Attorney-at-Law**
- 2. R Pursem, Senior Counsel**
- 3. D Nawjee, Attorney-at-Law**
- 4. M Roopchand, Bar-at-Law**
- 5. D Gunesh, Bar-at-Law**

Office of Hon N F Oh San-Bellepeau, Judge
6th Floor, New Supreme Court Building, Port Louis
Tel: PABX 2604100 Ext 7605
Direct: 2604114

SN 850/21

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

And in the matter of

Ex Parte:-

SBM Bank (Mauritius) Ltd

Applicant

JUDGMENT

1. This is an application lodged by Ms attorney D Ghose-Radhakeesoon on behalf of the applicant, for the stay of execution of a judgment [delivered by me in chambers on the 25th May 2021 in SN 1912/20] pending the determination of the appeal entered by the applicant against the judgment.
2. On the 9th August 2019 (more than two years ago), I issued an order directing the applicant bank (SBM) to disclose within one week to the respondent (ICAC) all data and information, documents and files in relation to 4 loans of a total value of USD 40.44 million granted by SBM to one of its clients.
3. The SBM thereafter came before me in chambers to pray for orders (i) restraining and prohibiting the ICAC from executing the disclosure order granted by me and (ii) to set aside the same disclosure order.



4. The gist of SBM's arguments at that time was that (a) the disclosure order issued on the 9th August 2019 did not state the provision of the law under which it was issued (b) the SBM was not favoured with any information in relation to the disclosure order at the time it was issued (c) the disclosure order was tainted with irregularity as it had been obtained *ex parte*, without the SBM being aware of material facts and (d) the disclosure order was in breach of SBM's sacrosanct duty of confidentiality towards its clients. In the same breath, SBM conceded that the ICAC did have the power to investigate money-laundering offences.
5. After considering all the evidence and the applicable legal principles, I found that a Judge in Chambers had the jurisdiction under precise legal provisions to issue such disclosure orders, and that under section 64(3)(h) of the Banking Act, the duty of confidentiality invoked by the SBM could not be absolute when the Judge ordered disclosure. I further concluded that since some of our statutes provided for a banker's duty of confidentiality to be lifted by an order from a Judge in Chambers under specific circumstances, and since disclosure orders were urgent measures meant to prevent the dissipation of assets and/or evidence, the presumption of regularity should apply to *ex parte* proceedings through which the disclosure order had been obtained, as sufficient facts must have been put before the Judge in Chambers at the time that the ICAC applied for the disclosure order. I therefore set aside SBM's application in a judgment delivered on the 25th May 2021.
6. The SBM has appealed against that judgment (the appeal having been fixed on the merits to the 13th June 2022) and the grounds of appeal read as follows¹:

Ground 1

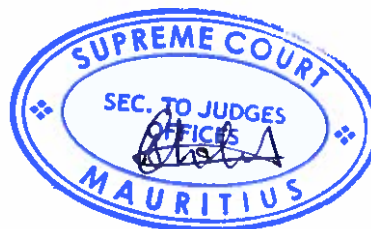
The Learned Judge erred in law when he concluded that the Disclosure Order was rightly granted in view of the evidence of the Respondent that: -

- (a) it was not inquiring into the affairs of the Appellant;*
- (b) that it was not inquiring into any offence committed by the Appellant; and*
- (c) that it was inquiring into potential offence by client of the Appellant.*

Ground 2

*The Learned Judge erred in law in failing to address his mind to the propriety of making an application *ex parte* behind the back of the Appellant in the circumstances of the case.*

¹ pp. 5, 16-17 of the brief.



Ground 3

The Learned Judge erred in law in failing to reach the conclusion that in the circumstances of the case, given the sacrosanct duty of confidentiality of the Appellant, the application ought to have been made in the presence of the Appellant.

Ground 4

The Learned Judge erred in law in concluding that the presumption of regularity was applicable to the ex parte proceedings lodged by the Respondent.

Ground 5

The Learned Judge failed to consider whether the conditions laid down under section 64 of the Banking Act 2004 were duly satisfied by the Respondent.

7. This application to stay execution of the judgment is based on the following grounds²:

- i. The applicant will suffer loss and prejudice if the judgment is made executory;
- ii. The grounds of appeal are not frivolous or unreasonable and they are arguable;
- iii. If a stay of execution is refused, it will render the applicant's appeal nugatory as there will be no live issue for the Appellate Court to determine;
- iv. No serious risk of injustice or irreparable damage will be caused to the respondent if the stay of execution is granted;
- v. The balance of convenience weighs heavily in the applicant's favour;
- vi. The applicant undertakes not to engage in any act which may defeat the purpose of the disclosure order granted on the 9th August 2019.

8. The ICAC responds with³ the following arguments:

- (i) SBM will not suffer any loss or prejudice if the judgment is rendered executory:
 - (a) as it will be abiding by a decision of the Supreme Court;
 - (b) the judgment is against the SBM, not its clients;
- (ii) SBM has not explained how it will incur loss or prejudice;
- (iii) The grounds of appeal are not serious;
- (iv) Serious risk of injustice and irreparable damage will be caused to society if the stay is granted;
- (v) The balance of convenience weighs in favour of ICAC in executing the judgment.

² p. 6 of the brief.

³ p. 22-23 of the brief.



9. Learned counsel for the applicant (SBM) submits that the court has a discretion in deciding whether to grant the application for a stay of execution of the judgment pending the determination of the appeal and that for the court to exercise such discretion in its favour, the SBM has to establish that it has '*good reasons*' to deprive the ICAC of the benefit of the judgment of the 25th May 2021. Such '*good reasons*' will be demonstrated if SBM establishes among other things that (a) the grounds of appeal are arguable, and not frivolous or unreasonable, so as to present a genuine chance of success on appeal, (b) irreparable harm and prejudice will be caused to SBM if the execution of the judgment is not stayed, (c) SBM is not making an abuse of the process of the court by unduly delaying the execution of the judgment and (d) the balance of convenience tilts heavily in SBM's favour.
10. SBM therefore contends that the grounds of appeal are arguable inasmuch as they pertain to issues of law and involve matters of a serious nature, such as the duty of confidentiality of a bank, the circumstances in which a governmental authority can be granted an *ex parte* disclosure order on confidential and sensitive information of bank customers behind the back of the bank, the applicability of the presumption of regularity, whether the specific conditions provided for under section 64 of the Banking Act 2004 were duly satisfied by ICAC to obtain a disclosure order against SBM customers, and whether, in the absence of any justification, an investigatory body could be issued an *ex parte* disclosure order against a bank in respect of an investigation regarding a client of the same bank.
11. The applicant further argues that irreparable harm and prejudice will be caused to it if the judgment is allowed to be executed as it would render its appeal nugatory since the disclosure order will consequently be enforced by the time the appeal is heard. SBM would thus have no remedy against the respondent if it succeeded on appeal.
12. The disclosure of SBM's customers' confidential information will moreover cause SBM to act in breach of its confidentiality duties towards its clients and the issues regarding a banker's duty of confidentiality will be left unanswered and "*shake the sacrosanct nature of confidentiality*"⁴ if the judgment is made executory.

⁴ p. 7 Additional Brief No. 1, para. 3.5(ii)c. of Mr Pursem's written submissions.



13. On the other hand, it is argued that little or no prejudice will be caused to the respondent as it will only have to wait for the determination of the appeal so that *"the execution of the Judgment will simply be paused up until determination of the Appeal, causing no harm or prejudice whatsoever to the Respondent"*⁵.
14. The respondent (ICAC) replies that the applicant bank cannot reasonably suffer any loss or prejudice caused by an alleged breach of the duty of confidentiality towards its clients since the SBM will simply be abiding by a decision of the Judge in Chambers. No prejudice can therefore be suffered by the bank if the judgment becomes executory, especially when the ICAC's investigation does not relate to the applicant's administration.
15. Mr Roopchand for the respondent further submits that the applicant has not explained how it would suffer loss and prejudice if the stay of execution of the judgment was refused⁶. It is further contended that should the stay of execution be granted, this would delay the investigation conducted by the ICAC and that an assessment of the parties' competing interests must result in favour of not granting the application for stay of execution of the judgment so as to allow the ICAC investigation to proceed in the public interest.
16. ICAC further argues that the grounds of appeal lodged by the applicant do not have any serious arguability and that the appeal does not therefore have a realistic prospect of success⁷, especially when an assessment of all the issues of facts and law has already been made in the judgment when dealing with the application for revocation of the order, and where it was concluded that the applicant's arguments had no merit.
17. The respondent also contends that there is no good reason which could tilt the balance in the applicant's favour as *"a stay should be granted only where there are good reasons for departing from the starting principle that the successful party should not be deprived of the fruits of the judgment in his favour ..."*⁸. The applicant had thus failed to demonstrate that there were 'good reasons' to prevent the respondent from enjoying the benefits of the judgment.

⁵ p .7 of Additional Brief No. 1, para. 3.6(i) of Mr Pursem's written submissions.

⁶ **Ex Parte S.M. Rashad Maudarbocus & Anor [2019 SCJ 118]**.

⁷ **Tranquille v Guilmot & Anor [2020 SCJ 287]**.

⁸ **Sir R. Jeewoolall v Hon. P.R. Berenger [1999 MR 75]**, quoting **Licotype-Hell Finance Lid v Baker (1992) ALL. E. R 887; Winchester Cigarette Machinery Ltd v Payne (No.2) The Times Dec. 15, 1993.**

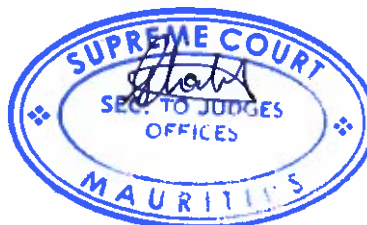


18. Learned counsel for the respondent also submits that the present application is vague and not supported by any evidence, so that it amounts to a further attempt to delay the respondent from obtaining the information and documents which the SBM had been ordered to disclose pursuant to the order dated the 9th August 2019.
19. Learned counsel on both sides have referred to the decision of **EX PARTE: S. M. RASHAD MAUDARBOCUS & ANOR [2019 SCJ 118]**, where R. Mungly-Gulbul J. reaffirmed the following principles in respect of an application for a stay of execution of a judgment pending an appeal:

"In an application for stay of execution, there are competing interests which have to be weighed. On the one hand the winning party should not, without good reason, be prevented from benefitting from the fruits of a judgment pronounced by the Judge after due process of law. Further, any potential abuse of the court process by an appellant in an attempt to delay the execution of the judgment, has to be kept to a minimum. On the other hand, the losing party should not as far as possible be deprived, in the exercise of his legitimate right to appeal against the judgment, of any possible outcome in his favour, on appeal.

An order for stay of execution is within the court's discretion and the Judge has to try as far as possible, to adopt the course that will best enable the appellate court to do justice between the parties whatever the outcome of the appeal."

20. As correctly put by Mr Pursem for the applicant, the burden is on the applicant (SBM) to establish 'good reasons' for depriving ICAC of the benefit of the judgment delivered on the 25th May 2021.
21. Since arguable grounds of appeal can amount to good reasons, I have considered whether the grounds lodged for the appeal are serious (i.e., not vexatious or frivolous). The grounds of appeal in this case question the findings reached in law and on the facts without however clearly indicating the basis for challenging the conclusions reached in the judgment. The grounds in effect amount to a mere rehash of arguments already thrashed out at first instance and on which I have already ruled. The grounds of appeal do not therefore appear to have any serious 'arguability'.



22. I have also not been satisfied that making the judgment of the 25th May 2021 executory will cause any prejudice to the SBM since it is not disputed that the ICAC inquiry is directed at the bank's customer and since our legal provisions provide for a banker's duty of confidentiality to be lifted in very specific circumstances and once a Judge in Chambers finds that a disclosure order is justified, as in the present case.
23. In this instance, it cannot be seriously disputed that the respondent first obtained a disclosure order before the Judge in Chambers on the 9th August 2019 and that the applicant has since then tried to have the disclosure order set aside without success.
24. Since a disclosure order is by its very nature an urgent process and is meant to prevent the dissipation of assets or evidence, I am of the view that more prejudice will be caused to the respondent should the judgment delivered on the 25th May 2021 be stayed pending the applicant's appeal (scheduled to be heard in June next year), especially when the SBM has not successfully demonstrated in any way what loss or prejudice it might suffer in the process. I accordingly find no reason to deprive the respondent of the benefit of a judgment confirming the validity of a disclosure order obtained and issued by a Judge in Chambers more than two years ago.
25. For these reasons, I decline to exercise my discretion in the applicant's favour and I set aside this application, with costs.
26. I certify as to counsel.

Chambers, this 21st October 2021



certified true
copy



N. F. Oh San-Bellepeau
Judge