

SWAN LIFE LTD v THE FINANCIAL SERVICES COMMISSION & ANOR

2022 SCJ 112

Record No. 120384

THE SUPREME COURT OF MAURITIUS

In the matter of:

Swan Life Ltd

Applicant

v.

- 1. The Financial Services Commission**
- 2. Independent Commission Against Corruption**

Respondents

In the presence of:

- 1. New Mauritius Hotels Limited**
- 2. ENL Ltd**
- 3. Rogers & 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 proceedings.

The background of facts is that an *ex parte* application was granted by a Judge in Chambers on the 14th of June 2018 to the second respondent (“ICAC”). It compelled the first 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 (“Swan”), co-respondents nos. 1, 2 and 3 (“NMH”, “ENL” and “Rogers” respectively)). The ICAC 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, (as it had communicated all other information requested) to set aside the order for the communication of a Report. However at the hearing, learned Senior Counsel for the FSC informed us that “the illegality of the Judge in Chambers’ order was still a live issue”. The Court delivered a ruling on the 21st of July 2020 granting the motion to put the third parties out of cause. It is this decision which the applicant wishes the Judicial Committee to adjudicate upon.

The applicants are seeking leave firstly as of right under section 81(1)(b) of the Constitution. Secondly, in the alternative with the leave of the Court under section 81(2)(a) of the Constitution that the question involved in the appeal is one that, by reason of its great general or public importance, ought to be submitted to the Judicial Committee.

Appeal as of right.

This is set out in the following manner in section 81(1)(b):

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 disputed 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.

The difficulty which the applicant has to overcome relates as to whether the dispute on appeal involves directly or indirectly a claim or a question respecting property or relating to the

right of the value in excess of Rs.10,000. We therefore have to identify what is the property or the right in dispute in the main case before the Supreme Court. A perusal of the motion paper of the main case (Annex A of the affidavit of the applicant dated 06 August 2020), whereby the FSC sets out questions and seeks clarifications from the ICAC and these refer to information, correspondences, emails, documents, data, private pension plans and records. It also transpires from a further reading of the impugned ruling that the main case file and the present application's brief as well as the written submissions, that it is an "interim report" of Mr Takoordass which is contested.

Now the above section means that it is the person appealing who must have a claim or property in question worth more than Rs. 10,000. It cannot mean that any party in any case could have an appeal as of right by invoking an issue which is not the subject matter of the proceedings (here the main case). This would be casting the net too wide. In the present matter, the applicant has raised the fact that it will suffer reputational damage as well as a potential loss in share value. It is not because it was submitted upon or even included in the affidavit of the applicant that it transforms the case into one of exploring its reputational damage.

The Privy Council Appeal judgment **Jacpot Limited v the Gambling Regulatory Authority 2018 UKPC 16**, which was referred in submissions before us, states at the end of paragraph 7, 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.*"

Both the motion paper 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.

We are of the view that in the recent decision of **Sholay D. v The Permanent Secretary, Ministry of Gender Equality and Family Welfare [2021 SCJ 372]** the correct application of the "value" issue was reached by the Court. The judgment concerned an application for leave to appeal to the JCPC, 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.

Similarly in this matter before us, we hold the view that the matter which was before the Supreme Court for consideration did not concern the applicant's 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 belongs to the FSC even if it may be about the applicant. We therefore find that section 81(1)(b) of the Constitution does not apply in this case. Leave is therefore not granted as of right to the applicant.

Great general and public importance

This point is relied upon in the alternative and 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;
 -

In filtering the application for leave to appeal to the Judicial Committee, this court has to consider the grounds of appeal put forward whilst bearing in mind whether "there has been a clear departure from the requirements of justice or for instance where a substantial and grave injustice has been done, whether by a disregard of the forms of legal process, violation of the principles of natural justice, or otherwise". We also have to consider whether what occurred in this particular case deprives the applicant "of a fair trial or the protection of the law or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in the future." (*vide Sabapathie v The State* [\[1995 SCJ 276\]](#)), as submitted by learned Counsel for the applicant who in his written submissions, has quoted the above extract.

From a perusal of the papers, it transpires that the FSC in its application in the main case, is not contesting the procedure or the fact that the ICAC could obtain an *ex parte* order from the judge in chambers. What it is contesting is whether the correct statute was utilised, whether the documents being sought and contended to be confidential to the FSC could be communicated to the ICAC given the provisions of the Financial Services Act (“FSA”). The FSC (which has carriage of proceedings) is also seeking clarification and explanations given the vagueness and generality of the order of the judge in chambers. It is clear that the interests and points raised by the FSC do not coincide with those of the applicant and that each party has different aims. During submissions learned Senior Counsel for the FSC however stated that for him the legality of the order was also in question in the main case.

It is of note that in the written submissions, the applicant has focused on the following questions of law which it submits amount to a great and general importance in the present matter:

- (a) The circumstances under which a third party gets a challenge and *ex parte* order granted to ICAC, an investigatory authority, when the said order requires another party to produce documents or information on the third party; and
- (b) The legality of such *ex parte* orders.

The written submissions have not dealt separately with each of the grounds of appeal the applicant wishes to raise before the Judicial Committee and we too, therefore propose to deal with them in the same manner.

The applicant has emphasised greatly the point that it has an interest in the outcome of the application in the main case, it has also referred to cases whereby “interested parties” are included in the proceedings. However the cases cited by the applicant are not authorities for an automatic right to be included in proceedings solely on the basis that it has an interest or will be affected by the outcome. We do not agree with the submission of learned Senior Counsel (see paragraph 17 of his written submissions) that “a party should necessarily be joined to an action if that party has an interest in the matter. If that party has an interest in the matter, this will automatically mean that the court will have to hear that party in order to be able to *effectually and completely adjudicate upon and settle all the questions involved in the cause or matter.* (*Canarapen v Anne; Rule 19 Supreme Court Rules 2000*)”.

The applicant has submitted that the approach taken by the learned judges in the main case will have far-reaching implications given its blatant contradiction with the established principles of joinder of parties in Mauritius. We respectfully disagree with this submission.

The above submission refers to the judgment of **Canarapen v Anne** [\[1999 SCJ 293\]](#) which is a judgment of a Judge in Chambers and needs to be placed in context given the specific reliance on this judgment by the applicant. In **Canarapen**, Balancy J. the Judge in Chambers was considering an application for an interlocutory injunction regarding a nuisance in the vicinity of the applicant's residence. It was entered "in the presence of" Commissioner of Police, the Permanent Secretary of the Ministry of Health and the Permanent Secretary of the Ministry of Environment and Quality of Life and the judgment was considering their respective motions to be put out of cause as there was no cause of action against them and no averment that they had acted in breach of their statutory duties. The judgment considers *assignation en déclaration de jugement commun, autorité de la chose jugée* and rule 56 of the Rules of the Supreme Court 1903. Balancy J refers to the practice in Mauritius which "*appears to have allowed the joinder of parties who otherwise have an interest in the matter*".

An important distinction needs to be made from cases between two private parties (such as a local authority) and where often "in presence of" a public authority is included as the latter has information in its possession and which can enlighten the court. This is the case even if there are no prayers against such a third party. It is also salient that the third party in such cases does not come with its own claim or prayers against the other protagonists in the matter. This is what NMH, ENL, Swan and Rogers have sought to do as third parties in the main action.

The motion entertained by the Judges in the main case as well as the circumstances are different from the above cited judgments.

As already stated above the aims of the FSC in the main action are not necessarily the same as those of the third parties and the court in the main case has to pronounce itself on the action of the party which has initiated the proceedings. The applicant and other third parties cannot within the precincts of a motion paper raise separate issues in the manner they have done. This is a misconception that the applicant has and which is formulated in ground 10.10. There are other avenues to deal with the issues the applicant seeks to raise.

The argument of the applicant to remain as a party in the main case has as its foundation, the illegality of the *ex parte* proceedings as well as the status of the interim report.

This has permeated all of the grounds of appeal and the submissions that because the applicant has an interest in the matter the judges in the main case should have allowed it to remain as a party.

As stated earlier on, the issue before the judges in the ruling 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, the other third parties in the main case have sought to orientate the court (both the present 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.

[Emphasis added]

[...]

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.

Upon the consideration of all the grounds of appeal and the submissions of the applicant we do not find that the applicant has been able to establish that there is a question of great general or public importance. We note that the applicant has alternative avenues to raise the issues it has sought to do in the present application.

For the reasons above, leave is not granted and 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. Ng Wong Hing SA
Mr R. Pursem SC together with Ms M. Jeetah of Counsel

For Respondent No. 1: Mr J. Gujadhur SA
Mr D. Basset SC together with
Mr J. G. Basset and Mr H. Dhanjee of Counsel

For Respondent No. 2: Ms N. Seetaram, Attorney at Law
Mr M. Roopchand together with Mr T. Naga of Counsel

For Co-Respondent No. 1: Mr G. Huet de Froberville, Attorney at Law
Mr A. Moollan SC together with
Mr A. Adamjee and Mr A. Moollan of Counsel

For Co-Respondent No. 2: Mr U. K. Rughoobur, Attorney at Law
Mr P. Doger de Speville SC together with
Mr S. Dabee of Counsel

For Co-Respondent No. 3: Mr U. K. Rughoobur, Attorney at Law
Mr S. Moollan QC