

**HACK L A P v THE FINANCIAL INTELLIGENCE UNIT**

**2020 SCJ 319**

**In Chambers**

**Record No. 2011/2019**

**IN THE SUPREME COURT OF MAURITIUS**

**In the matter of:-**

**Luc Allan Penny Hack**

**Applicant**

**v**

**The Financial Intelligence Unit**

**Respondent**

**In the Presence of:**

- 1. Investec Bank (Mauritius) Ltd**
- 2. SBM Bank (Mauritius) Ltd**
- 3. Afrasia Bank Ltd**
- 4. Yuvraj Thaccoor**

**Co-Respondents**

**JUDGMENT**

The applicant is the director of Black River Trust Company Ltd which is under the administration of co-respondent No. 4. The respondent is the enforcement authority under the Asset Recovery Act (“ARA”). On 28 March 2017, on an application made by the respondent, an Order was made by Mrs. Justice Manna (the original Order), directing that a number of accounts in co-respondents No. 1 to 3 (the “co-respondent banks”) not be disposed of or otherwise dealt with. The Order was subsequently varied by Mrs. Justice Manna on 15 November 2017. On 26 March 2018, late Mr. Justice O. B. Madhub issued an Order extending the Restriction Order dated 28 March 2017 for a period of 3 years. The present application is for rescinding the Order dated 26 March 2018 made by late Mr. Justice O.B. Madhub.

The respondent has raised a preliminary objection to the application on the ground that –

- “(a) Black River Trust Company Ltd (“the company”) has been placed under administration and co-respondent No. 4 was appointed as administrator of the company with effect from 20 September 2017;
- (b) the power to begin legal proceedings in respect of the company is vested with the administrator of the company;
- (c) the applicant has failed to aver whether he has obtained the written approval of the administrator pursuant to section 224(2)(a) of the Insolvency Act before lodging the present proceedings;
- (d) the applicant has failed to show how he is affected by the Restriction Order.”

Co-respondent No. 4 has also joined in the objection of the respondent to the effect that the applicant has no locus standi to initiate the present action, given that the company is under administration.

The submission of learned Counsel for the applicant was twofold. Firstly, she submitted that the police officer who swore the affidavits on behalf of the respondent did not produce any evidence to show that he was authorised to represent the respondent and to affirm affidavits on its behalf. This was made a live issue in the affidavits of the applicant but was not addressed by the respondent. She relied on the case of **The Flacq Fair Merchants Association v The Moka/Flacq District Council** [\[2012 SCJ 244\]](#) in support of her argument that the preliminary objection raised by the respondent and co-respondent No. 4 should be set aside solely on this ground.

In the case of **Flacq Fair Merchants(supra)**, the applicant who was seeking an injunction had failed to adduce satisfactory evidence to prove that Mr. Bundhun who had sworn the affidavit on its behalf had been duly mandated to represent the applicant. The respondent had also expressed strong doubt that Mr. Bundhun was really the president of the applicant association. The Court observed that the above circumstances would have been enough to reject the application.

I propose to deal with this issue straightaway as it can be easily disposed of. Both the respondent and the co-respondent (who has not put in any affidavit) have argued that ex facie the affidavits of the applicant, he has failed to show that he has

the necessary locus standi to enter the present application. I propose to proceed to determine the present application solely on the basis of the affidavits of the applicant, the attached documents and the written and oral submissions of Counsel and Attorney. There is accordingly no need for me to consider whether the affidavits of the respondent may be relied upon at this stage.

Secondly, learned Counsel for the applicant submitted that the applicant has the necessary locus standi since he is the director of Black River Trust Company Ltd (the "company") which has under its management, the bank accounts. It was her contention that the applicant remains the director of the company with all the mandatory duties and obligations even though the company is under the administration of co-respondent No. 4. She further argued that by virtue of section 160(1) of the Companies Act, the applicant is bound to act with due care, diligence and skill in the interests of the company failing which he may be held personally liable.

I must here observe that the applicant has failed to aver in his affidavits that the company is a management company or that the bank accounts are under its management. In fact, the applicant's affidavits contain no averment regarding the business carried out by the company. In addition, a perusal of the affidavits filed before the learned Judge who granted the original Order reveal that the accounts subject matter of the Restriction Order were in the name of legal entities other than the company.

For his part, learned Counsel for the respondent argued that the applicant has failed to establish that he has the locus standi to enter the present action and to show that the company has any interests in the accounts subject matter of the Order. It was his submission that even if I were to find that the company had any interest in the bank accounts, the applicant still did not have any locus standi to enter the present action since the company was being administered by co-respondent No. 4. It was his contention that under the Financial Services Act, it was only co-respondent No. 4 who could have entered the present action.

He further submitted that the applicant could only have been an "affected person" in two circumstances i.e. either where the applicant purported to enter this application on behalf of the company, in which case, he would have to demonstrate his entitlement to do so, or he could be an "affected person" in his personal name, in which case he would have to show that he is personally affected. It was the

contention of Counsel that neither of the above conditions were met in the case at hand.

In support of his contention that the applicant does not have the required locus standi to enter the present action, learned Senior Attorney for co-respondent No. 4 argued that the applicant is not an affected person within the purview of section 31(1) of the ARA, the affidavits on record do not show that the bank accounts subject matter of the Restriction Order are either held by the applicant or are in the name of the company. Further, there is nothing in the applicant's affidavit which suggests that those bank accounts are under the management of the company.

Since the present application has been made under sections 29 and 31 of the ARA, I find it relevant to set out the said sections.

**“29. Exclusion of property from Order**

*Where a person who has an interest in property that is the subject of a Restriction Order applies to the Judge to exclude his interest from the Order, the Judge shall grant the application where he is satisfied that –*

- (a) *the property is not proceeds, an instrumentality or terrorist property;*
- (b) *the applicant was not, in any way, involved in the commission of the offence in relation to which the Restriction Order was made;*
- (c) *where the applicant acquired the interest before the commission of the offence, the applicant did not know that any person would use, or intend to use, the property in or in connection with the commission of the offence; or*
- (d) *where the applicant acquired the interest at the time or after the commission of the offence, the interest was acquired in circumstances which would not arouse a reasonable suspicion that the property was proceeds, an instrumentality or terrorist property.*

**31. Variation and rescission of Order**

- (1) *Any person affected by a Restriction Order* *may apply to a Judge for the variation or rescission of the Order.*
- (2) *The Judge –*
  - (a) *may vary or rescind the Order where necessary in the interests of justice; or*
  - (b) *shall rescind the Order where the proceedings concerned are concluded.*

*(3) Where a Restriction Order in respect of immovable property is varied or rescinded, the Judge shall direct the Registrar-General to cancel or, as the case may be, amend any restriction endorsed by virtue of that Order on the title deed of the immovable property, and the Registrar-General shall give effect to any such direction and declare the respective rights of every person who acquired an interest in the property on or after the day on which the Order was made and before the day on which it was varied or rescinded.”*

Although, the application has been made under both the above sections, it is clear from the prayer and the averments in the applicant’s affidavit that his application does not fall within the ambit of section 29. The issue that I must next consider is whether the application falls within the purview of section 31. Under the said section it is incumbent on the applicant to establish that he is a person affected by the impugned Order.

I have set out below, in a gist, the averments in the applicant’s affidavits which are relevant for the purposes of the present application. The applicant has averred that –

1. he is a director of the company which is under the administration of co-respondent No. 4 and that he is an interested and affected party in the present application;
2. notice of the original Order dated 28 March 2017 was served on directors of the company in accordance with section 27(5)(a) of the ARA;`
3. the company sought and obtained a variation of the Order dated 28 March 2017;
4. an Extension Order was granted on 26 March 2018;
5. no notice of the Extension Order dated 26 March 2018 was given to the applicant or any interested parties known to the respondent;
6. he is an affected party because-
  - (a) “he is legally bound to act with care, diligence and skill in the interests of the company in accordance with section 160(1) of the Companies Act, failing which he may be liable for any loss incurred”;
  - (b) “it is in the interests of the company that its clients and the bank accounts subject of the Extension Order are unfrozen more so as there is no valid reason in the circumstances and interests of justice for the Restriction Order to continue”; and

- (c) “failure on the part of the Applicant as Director to act or take legal action may lead to loss to the Company and its clients and thereafter personal liability”;
7. co-respondent was publicly appointed administrator by the Financial Services Commission with regard to the whole business activities of the company pursuant to section 48(1) of the Financial Services Act and not pursuant to the Insolvency Act;
  8. he has represented the applicant in cases before the Supreme Court in a judicial review application and a plaint with summons.

The applicant can either claim to be an affected person in his own name or as a director in the name and on behalf of the company. For the applicant to enter proceedings in the name of the company, he should have proceeded by way of a derivative action. In this regard, it is apposite to refer to section 170 of the Companies Act. Section 170 provides-

**“170. Derivative actions**

*(1) Subject to subsection (3), the Court may, on the application of a shareholder or director of a company, grant leave to that shareholder or director to—*

- (a) bring proceedings in the name and on behalf of the company or its subsidiary; or*
- (b) intervene in proceedings to which the company or any related company is a party for the purpose of continuing, defending, or discontinuing the proceedings on behalf of the company or its subsidiary, as the case may be.*

*(2) Without prejudice to subsection (1), in determining whether to grant leave under that subsection, the Court shall have regard to—*

- (a) the likelihood of the proceedings that may follow;*
- (b) the costs of the proceedings in relation to the relief likely to be obtained;*
- (c) any action already taken by the company or its subsidiary to obtain relief;*
- (d) the interests of the company or its subsidiary in the proceedings being commenced, continued, defended, or discontinued, as the case may be.*

*(3) Leave to bring proceedings or intervene in proceedings may be granted under subsection (1), only where the Court is satisfied that either—*

- (a) the company or related company does not intend to bring, diligently continue or defend, or discontinue, the proceedings, as the case may be; or*

(b) *it is in the interests of the company or its subsidiary that the conduct of the proceedings should not be left to the directors or to the determination of the shareholders as a whole.*

(4) *Notice of the application shall be served on the company or its subsidiary.*

(5) *The company or related company—*

(a) *may appear and be heard; and*

(b) *shall inform the Court, whether or not it intends to bring, continue, defend, or discontinue the proceedings, as the case may be.*

(6) *Except as provided for in this section, a shareholder or director of a company is not entitled to bring or intervene in any proceedings in the name of, or on behalf of, a company or its subsidiary.”*

I have carefully considered the affidavits and the attached documents; it is neither the applicant's contention nor is there any evidence before me to suggest that the applicant's case is a derivative action. At any rate, even if the application had been made on behalf of the company (which is clearly not the case), the Order which the applicant is seeking to rescind is one which prevents the co-respondents' bank from disposing of, or otherwise dealing with, a number of accounts held at the said banks. There is no evidence before me that the company is the one that held those accounts or managed those accounts.

In the light of the above, the applicant can only have made the present application in his own name. Pursuant to section 31 of the ARA, it was incumbent on the applicant to show that he is an affected person in his own name. In this regard, the applicant stated that he is a director of the company and that he is an affected person because-

- (a) he is legally bound to act with care, diligence and skill in the interests of the company in accordance with section 160(1) of the Companies Act, failing which he may be liable for any loss incurred;
- (b) it is in the interests of the company that its clients and the bank accounts subject of the Extension Order are unfrozen more so as there is no valid reason in the circumstances and interests of justice for the Restriction Order to continue; and
- (c) failure on the part of the Applicant as Director to act or take legal action may lead to loss to the Company and its clients and thereafter personal liability.

The applicant has not stated that he has any personal interest in the accounts held at the co-respondent banks. Further, the averments which are before me show that the applicant has claimed to be an affected person solely on the basis that he is a director of the company and is an affected person because he is legally bound to act in the interest of the company and its clients failing which he may be liable for any loss incurred and that if he does not act or take legal action he will be personally liable for any loss that may be suffered by the company.

However, the applicant has himself averred that the company is under the administration of co-respondent No. 4 and he has also annexed a copy of the public notice given when co-respondent No. 4 was appointed as administrator of the company. The said notice which is dated 20 September 2017, clearly states that co-respondent No. 4 is appointed as administrator in relation to the **whole of the business activities** of the company pursuant to section 48(1) of the Financial Services Act. [emphasis added]. The following extracts from section 48 of the Financial Services Act are of interest-

**“48. Appointment of administrator**

(1) *Subject to subsection (2), the Commission may appoint a person as an administrator in relation to **the whole or part of the business activities** of a person whose licence has been suspended, revoked or otherwise terminated.*

(2) ....

(3) ....

(4) *Where the Commission appoints an administrator under subsection (1), it shall give notice in writing of the appointment to the person whose licence has been suspended, revoked or otherwise terminated.*

(5) ***The administrator shall manage the whole of the business entrusted to his administration and for the purpose of doing so—***

(a) *shall comply with such directions given to him by the Commission under subsection (6);*

(b) *shall manage the business honestly and in good faith and shall exercise care, diligence and skill that a reasonable person would exercise in comparable circumstances.*

(6)...

(7)...

(8)..." [emphasis added]



It is clear from a reading of section 48(5) above that it is the administrator who has the responsibility of managing the **whole of the business of the company**. In the case at hand, the administrator was appointed as from 20 September 2017 and the present application was only lodged in November 2019.

Now, it is trite law that as from the date of his appointment it is for the administrator to look after the interests of the company and to bring any legal action on behalf of the company. The applicant can obviously not be held responsible for any acts or omissions which occur during the time when the company is under the administration of the administrator.

It has also been argued on behalf of the applicant that since he was served a copy of the original Restriction Order dated 28 March 2017, he is an affected person. In this regard, it is apposite to note that section 27(5)(a) provides as follows-

*“(5) (a) Where a Judge makes a Restriction Order, the Enforcement Authority shall, within 21 days of the making of the Order or such longer period as the Judge may direct, give notice of the Order to every person known to the Enforcement Authority to have an interest in property which is subject of the Order and such other persons as the Judge may direct.”*

Pursuant to section 27(5)(a), notice of a Restriction Order has to be given to every person having an interest in the property which is the subject of the Order. The original Restriction Order was made on 28 March 2017. At that time the company was not yet under administration and the applicant was served the notice as director of the company. However, the applicant himself has averred that no notice of the Extension Order was given to him when the said Order was granted on 26 March 2018. The above buttresses the contention of the respondent and co-respondent No. 4 that as from 20 September 2017 the company was under the administration of co-respondent No. 4 and as such could only be represented for the purposes of legal proceedings by the administrator. Since the company was under administration there was no need for the Extension Order to be served on the appellant or on the company. Pursuant to section 48(5) of the Financial Services Act, as from 20 September 2017 the **whole of the business of the company** was entrusted to the administration of co-respondent No. 4. Therefore the Extension Order dated 26 March must have been served not on the director of the company but on co-respondent No. 4, the administrator.

I must pause here to observe that not only has the applicant failed to substantiate that he has any interest in the accounts which are the subject matter of the impugned Order but he has also failed to disclose whether the licence of the company was suspended, revoked or terminated. It is only on reading the public notice annexed to his affidavit which states that the administrator was appointed pursuant to section 48(1) of the Financial Services Act, and on reading the said section which provides that the Financial Services Commission appoints an administrator in relation to the whole or part of the business activities of a person whose licence has been suspended, revoked or otherwise terminated, that I am having to infer that the licence of the company must have been suspended, revoked or terminated. Further, in the judgment delivered by Mrs. Justice Manna when she varied the original Restriction Order it is stated that the licence of the company was suspended on 30 March 2017. However, the applicant has failed to disclose the above information in his affidavit. No doubt the above is a material fact which should have been disclosed when seeking the intervention of the Judge in Chambers.

To conclude, I find that there is before me only the mere averment that the applicant is an interested person and that he is an affected person. He has utterly failed to establish how he is affected by the impugned Order either in his name or as a director of the company.

In the light of the above, I uphold the preliminary objection that the applicant has failed to show how he is affected by the Restriction Order. I therefore set aside the application with costs.

I certify as to Counsel.

**Chambers, this 9 December, 2020**

**K.D. Gunesh-Balaghee  
Judge**

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**For Applicant : Mrs B.R. Ventakasamy Attorney-at-Law**

**For Respondent** : **Mrs D. Luchmun, of Counsel**  
: **Ms A. Mohun, State Attorney**  
: **Mr Y. Alimohamed, State Counsel**  
**For Co-respondent No. 2** : **Mr A. Robert, Senior Attorney**  
**For Co-respondent No. 3** : **Mr T. Koenig, Senior Attorney**  
**For Co-respondent No. 4** : **Mr R. Bucktowonsing, Senior Attorney**