BHUNJUN BHARDOWAJ & ANOR v THE FINANCIAL INTELLIGENCE UNIT

2023 SCJ 224

Record No. SCR No. 123183

THE SUPREME COURT OF MAURITIUS

In the matter of:

1. **Bhardowaj Bhunjun**
2. **Khemranee Bhunjun (Born Tokising)**

Applicants

v/s

The Financial Intelligence Unit

Respondent

INTERLOCUTORY JUDGMENT

This is an application under section 60 of the Asset Recovery Act for a Compensation Order following the issue of a Restriction Order on 8th November 2021 relating to properties belonging to the Applicants.

It is the case for both Applicants that they have, as a family, suffered loss and prejudice because of the operation of the said Restriction Order, and they seek compensation in the sum of Rs 10 million against the Respondent. The Court is also requested to grant any other Order that it may deem fit and proper in the circumstances.

Before the Court may embark onto an enquiry into the facts and the novel issues surrounding the grant of Compensation Orders under the Asset Recovery Act, it has to deal with two preliminary objections insisted upon by the Respondent at this initial stage, namely that:

(i) costs in two previous cases have not been paid so far by the Applicants, in B. Bhunjun & Anor v FIU (SCR 122636) set aside with costs on 17 January 2022 and B. Bhunjun v FIU (Chambers case S.N. 1152/2021), also said to have been set aside with costs but with no date provided.

(ii) no notice of the present application has been given to the Respondent as the Enforcement Authority.

A further preliminary objection dealing with the absence of bad faith on the part of the Respondent has been reserved for submissions at merits stage. A point on delay has been dropped at the outset.

The issue of unpaid costs

The Applicants, in their response to the preliminary objections, do not deny that costs have not been paid in two cases but they state that the reason is because of the recurrent Restraining and Restriction Orders granted to the Respondent. The Respondent, for its part, has only provided the case names and cause numbers, without any details of the exact nature of the cases, their history and their outcome.

In Court, Counsel for the Respondent submitted that since the cases are other Supreme Court cases there is no need for the Respondent to be more specific about them. It was also submitted, surprisingly, that there is no case law on the issue and that this Court should be guided by its own practice on the issue of non-payment of costs.

Counsel for the Applicant, on the other hand, referred to the decision of Balancy J. (as he then was) in **Kreshakumar Poonyth v Manilall Store Co. Ltd** [2013 SCJ 183] and argued that in the absence of evidence of all relevant facts, notably as to the nature of the cases, the amount of costs which the Respondent was entitled to recover and the action, if any, taken by the Respondent to recover its costs, this Court should not be hasty to stay these proceedings because of non-payment of costs by the Applicants in two other cases.

After careful consideration the Court finds the arguments of the Applicants on this issue to have merit, and this for the reasons which follow:

Article 130 of the Code de Procédure Civile lays down the rule that the losing party shall pay costs:

“Toute partie qui succombera sera condamnée aux dépens”.

The general rule remains that the "unsuccessful party" will be ordered to pay the costs of the "successful party". The principle that costs must be paid before the action is entered anew has always been upheld by our courts. In **Marie May Claudette Lanappe & Anor v Sampatee** **[2009 SCJ 149]** the Court referred to

> *"the broadness of the principle that makes payment of the costs awarded against a plaintiff in a previous case a condition precedent to his proceedings with a fresh action having substantially the same object".*
> **(underlining added)**

It was observed in that case that Mauritian case law on the issue of payment of costs goes as far back as 1864, and the principles are that costs must be paid before the action can be entered anew. Reference was made to **Ledeaut v Lousteau Lalanne & Ors** **[1864 MR 58]** where the Court said the following:

> *"Under different names, the remedy allowed to a Plaintiff, of going out of Court without having a judgment on the merits pronounced against him, when he finds that he cannot maintain his suit as laid, is generally admitted in all legal systems. It may be a Désistement as in France, a nonsuit in England and in this Colony or an abandonment of the action as in Scotland. The condition of such a proceeding is the payment by the Plaintiff of the costs incurred by the Defendant in the suit which by the fault of the former has come to a close without result, and in Scotland this second principle is carried so far that the abandonment of the suit is not allowed until these costs have been actually paid. A nonsuit invariably carries costs, and in this Court it has always been held that the costs must be paid as a condition precedent before the new action is allowed to proceed."*

The Court reviewed a number of cases on the issue, including **Bundhoo B v The State** **[2004 SCJ 249]** and **Goordial v Auckloo & Ors** **[1973 MR 80]**.

In considering the submissions before it, this Court is alive to the admission by the Applicants in their affidavit that, indeed, costs have not been paid in two other cases. However, after a review of the long line of authorities cited in Lanappe (above), it is clear that the principles to be applied are the ones given by the Court in **Goordial v Auckloo & Ors** **[1973 MR 80]** (Ramful and Moollan JJ.), sitting on appeal from the decision of a District Magistrate having refused an application to stay proceedings for non-payment of costs, as follows:

"…in the absence of any evidence – or a joint statement by Counsel as to agreed facts – showing the exact nature of the claim before the Supreme Court, the names of the parties, the circumstances in which the judgment was delivered, the amount of the costs which the appellant was entitled to recover, the action, if any, taken by the appellant to recover his costs, the reasons, if any, for which the costs had not been claimed, the judgment not enforced or the costs not paid, the only course open to the Magistrate was to refuse summarily the application for a stay of proceedings."

It is clear that in this particular case too the preliminary objection on the issue of costs has not been substantiated, neither on affidavit evidence nor through a joint statement by Counsel on the facts. It is not for this Court, on a preliminary objection of this nature, to call the files up from its Registry and ascertain the facts the Respondent wishes to bring forward. As matters stand, it cannot be ascertained that the previous costs are in respect of the same matter, or if the costs were taxed and there was a refusal to pay them.

In the absence of all the necessary facts and for the reasons given above, this Court declines to exercise its discretion to stay the proceedings because of alleged non-payment of costs in two other cases.

Notice under section 60(5) of the Asset Recovery Act

The second preliminary objection which the Respondent wishes upheld relates to the absence of notice before the application was entered. It was argued that the Public Officers' Protection Act ought to be applied together with the Asset Recovery Act and that one month's prior notice of the application ought to have been given to the Respondent, on pain of nullity.

For the purposes of this objection, reliance was placed on Section 60(5) of the Asset Recovery Act, which reads as follows:

"(5) An application under this section shall be made no later than 6 months after the date of the Restraining or Restriction Order or of the default and notice of the application shall be given to the Enforcement Authority."

I am invited by Counsel for the Respondent to interpret "notice" in section 60(5) as meaning "one month's previous written notice", just like in section 4(2)(a) of the Public Officers' Protection Act.

Again, after careful consideration, this Court considers the objection to be flawed. Section 60(5) of the Asset Recovery Act is, to all intents and purposes, a special provision. There is no indication from the legislator than one needs to read into these provisions the requirements of the Public Officers' Protection Act. Had it been the intention, it would be open to the legislator to state it unequivocally, as is often done. One can refer to section 22(2) of the Mauritius Revenue Authority Act for one such example -

> ***"22. Protection from liability***
>
> *(2) This section shall be in addition to, and not in derogation from, the Public Officers' Protection Act, and for the purposes of that Act, every member and employee shall be deemed to be a public officer or person engaged or employed in the performance of a public duty.*

Another such example is to be found in section 88(2) of the Financial Services Act 2007.

I see in the Asset Recovery Act no such provision, and am unable to read more than what is set out in section 60(5). As rightly submitted by Counsel for the Applicants who relied on the decision of the Court of Civil Appeal in **AAPCA (Mauritius) Ltd & Anor v Mauritius Revenue Authority** [2020 SCJ 297] (Caunhye CJ (as he then was) and Gunesh-Balaghee J), the maxim *generalibus specialia derogant* (special provisions override general ones), or the converse principle *generalia specialibus non derogant* (general provisions do not override special ones) would apply. The principle, as spelt out in **Effort Shipping Co. Ltd v Linden Management SA, The Giannis NK:**

> *"… is not a technical rule particular to English statutory interpretation. Rather it represents simple common sense and ordinary usage.", vide* Bennion, Bailey and Norbury on Statutory Interpretation Eighth Edition, paragraph 21.4.

I therefore find that section 60(5) is a special provision intended to govern the lodging of claims for Compensation Orders and its terms cannot be displaced by the general provisions of the Public Officers' Protection Act, where this has not been specifically provided for.

Being given that the present action is directed against the Enforcement Authority itself in this case (as opposed to any other person against whom compensation may have been sought), I find that the application as served constitutes sufficient notice which allows the Enforcement Authority to be aware of and respond to the Applicants' claim for compensation, as it has already done.

In the circumstances both preliminary objections are set aside. The matter is fixed for Mention before the Master and Registrar on Tuesday 13 June 2023 to be fixed for Merits.

S. Beekarry-Sunassee
Judge

02 June 2023

For Applicants : Mr O.D. Cowreea, Attorney at Law
Mr A. Aran, of Counsel

For Respondent : Mr N. Ramasawmy, Attorney at law
Miss V. Nursimhulu, of Counsel
Mr K. Rucktooa, of Counsel