BOOLELL S. v THE INDEPENDENT COMMISISON AGAINST CORRUPTION & OTHERS

2023 SCJ 53

Record No. 112284

IN THE SUPREME COURT OF MAURITIUS

In the matter of:-

Satyajit BOOLELL

Applicant

v

1. **The Independent Commission Against Corruption**
2. **The Ministry of Housing and Lands**
3. **The Senior Chief Executive of the Ministry of Housing and Lands**

Respondents

In the presence of:-

The Attorney General

Co-Respondent

RULING

The applicant is in an application for judicial review seeking the following prayers:

"*(A) [ ]an Order in the nature of a certiorari*

(a) so as to quash or otherwise reverse the decision by the Senior Chief Executive of the Ministry dated 06 July 2015 to refer the Sun Tan matter to ICAC for investigation, purportedly pursuant to section 45 of the Prevention of Corruption Act (POCA) on the grounds that the decision is unlawful, ultra vires, procedurally improper, irrational and unreasonable; and

(b) to bring before the Supreme Court all the records and files relating to the decisions of the ICAC to proceed with further

investigations under purportedly under section 46(3) POCA (ii) to convene Applicant to ICAC Headquarters and (iii) to require Applicant to make a statement under warning in order to have the said decisions quashed, reversed and or set aside as the Supreme Court shall deem fit on the grounds that the said decisions are unlawful, ultra vires, unfair, irrational, unreasonable, procedurally improper and made for improper motives.

(B) [ ] an order in the nature of a prohibition so as to prohibit ICAC from (i) proceeding with further investigations under section 46(3) POCA (ii) convening Applicant to ICAC Headquarters and (iii) requiring Applicant to make a statement under warning.

(C) [ ] such other orders that the Supreme Court shall deem fit to make in the circumstances of the case." (sic)

Leave to apply for judicial review was granted on 22nd June 2017.

In May 2022, after respondents had filed their first affidavit, learned Senior Counsel for the applicant moved in terms of the contents of a written motion filed as set out below:

"*A. The Applicant moves this Honourable Court for an Order of Disclosure directing Respondent No. 1 to provide, by way of a further affidavit, full and accurate explanations of the facts averred by the Applicant in his affidavit dated 29 June 2017, for the Applicant and his legal advisers to consider, as they are duty bound to, whether there is sufficient merit to justify continuing the claim for judicial review, and to assist the Court in eventually deciding the relevant issues, to wit:*

1. *In relation to the existence of reasonable grounds to suspect that the Applicant may have exercised some "form of violence, or pressure by means of threat" upon late Mr Oozeer, the then Permanent Secretary Respondent No. 1, to state whether:*

   (i) the latter has expressly denied, in his deposition to Respondent No. 1 that the Applicant had exercised any form of pressure, let alone "any form of violence, or pressure by means of threat" on him; and

   (ii) in Respondent No. 2's files secured by Respondent No. 1, there is any minute or entry that the Applicant had at any point allegedly exercised pressure on an officer of the Respondent No. 2, let alone "any form of violence, or pressure by means of threat".

2. *In relation to the alleged materiality of the withdrawal of the letter dated 10 February 2012 of Respondent No. 2, to state whether Respondent No. 1 maintains its stand, given that Mr Ramloll has since confirmed, by way of affidavit dated 3 September 2015, that he had had sight of the said letter and the said "legal advice 2008" prior to issuing his legal advice.*

3. *In relation to the allegation that Sun Tan was treated on "more advantageous terms", to state:*

   (i) *since when Respondent No. 1 is aware of the fact that Respondent No. 2 has, since 2018, issued Sun Tan Hotels P.T.Y Ltd with a new lease on terms that are consistent with the representations made by the directors of Sun Tan in 2011;*

   (ii) *whether Respondent No. 1 has considered whether this development is consistent with the rationale put forward by Respondent No. 2 to justify the referral of 6 July 2015; and*

   (iii) *whether Respondent No. 1 has reconsidered any of the inferences drawn from its alleged preliminary investigation; and, if so, what is the outcome of such reconsiderations.*

B. *The Applicant moves the Honourable Court for an Order striking out the parts of Respondent No. 1's pleadings, which contain statements which are unnecessary and/or made vexatiously, to wit: paragraphs 21, 23 (a) to (i), 29, 37, 38, 41, 41(a)(i), 41(a)(ii), 41 (iii), 41, 48, 64(i), 66(iii), 86(e), 87, 101 and 105 of the affidavit dated 5 May 2022.*

C. *The Applicant moves the Honourable Court for an Order of Disclosure directing Respondents Nos. 2 & 3 to provide, by way of a further affidavit, full and accurate explanations of the facts averred by the Applicant in his affidavit dated 29 June 2017, for the Applicant and his legal advisers to consider, as they are duty bound, whether there is sufficient merit to justify continuing the claim for judicial review and to assist the Court in eventually deciding the relevant issues, to wit:*

1. *The circumstances which led the Respondents Nos. 2 &.3 to consider entering into a new lease with Sun Tan Hotels P.T.Y Ltd after the referral of 6 July 2015;*

2. *Who, or what, prompted the consultations with the State Law Office;*

3. *The matters in relation to which Respondent No. 2 consulted the State Law Office; and*

4. *The extent to which the terms of new lease issued in 2018 are consistent with the representations made by the directors of Sun*

Tan Hotels P. T. Y Ltd in 2011 and/or the legal advice of Mr Ramloll.

D. The Applicant moves the Honourable Court for an Order striking out the parts of Respondents Nos. 2 & 3's pleadings which contain statements which are unnecessary and/or made vexatiously, to wit: paragraphs 21(b); 27(v), 27(vii) and 27 (viii) of the affidavit dated 24 March 2022." (sic)

We have duly considered the submissions of Counsel for all the parties.

The motion to strike out certain statements from the respondents' affidavits

Learned Senior Counsel for the applicant contended that the affidavits exchanged between the parties constitute pleadings for the purpose of this motion on the basis of Rule 22 of the Supreme Court Rules 2000 (SCR). He argued that there can be no controversy about the applicability of Rule 15(1) of the SCR relating to the striking out of pleadings to affidavits exchanged in judicial review proceedings initiated by way of motion. He relied on a string of electoral petitions which he contends show that Rule 15(1) of the SCR applies to affidavits.

He contended that in **Boodeemiah N. and 38 Ors v Mauritius Revenue Authority [2014 SCJ 153]**, the learned Judge regrettably observed that a distinction should be made between cases initiated by way of motion and affidavit, on the one hand, and by plaint with summons, on the other because this observation cannot be reconciled with Rule 22 of the SCR. Learned Senior Counsel for the applicant conceded that, although the court is entitled to regulate proceedings and intervene when rules are not being followed, it will only exceptionally exercise its powers under Rule 15 of the SCR.

He appreciated that the matter at hand constitutes judicial review proceedings and the court is being invited to strike out paragraphs in the respondents' affidavits in rebuttal of the applicant's affidavit filed 5 years back. However, he maintained that the present application is a fit one for the court to intervene and order the respondents to strike out the paragraphs as being irrelevant and/or vexatious being given that the applicant would be unduly prejudiced with these averments which have no bearing on the decisions being challenged or which have been fully rebutted in previous proceedings or which cannot be substantiated in subsequent proceedings.

In support of his argument, learned Senior Counsel for the applicant argued that there are exceptional circumstances in this case in that (i) the applicant is challenging respondent No.

3's decision to refer the Sun Tan matter to respondent No. 1 on account of his alleged involvement, as Director of Public Prosecutions; (ii) the respondents strongly resisted the prayer to make a previous interim order interlocutory as well as the application for leave to apply for judicial review; and (iii) the respondents have displayed levity by ventilating theories without scrutiny and without a diligent and impartial investigation, amongst others. As such, those exceptional circumstances warrant the granting of the motion to strike out the disputed parts of the respondents' affidavits, which would require the applicant to get involved in a dispute wholly outside the real issues arising from his application and to deal with averments which have been made only to embarrass him. Therefore, the averments made at the aforesaid paragraphs are vexatious and unnecessary.

Learned Senior Counsel for the applicant added that these submissions equally apply to respondents Nos. 2 and 3, save for the fact that the respondents Nos. 2 and 3 do not have the authority to suggest to the respondent No. 1 whether or not further investigation should be conducted.

While agreeing that the averments found in an affidavit are pleadings and are therefore subject to Rule 15 of the SCR, learned Counsel for respondent No. 1 argued that the statements which the applicant alleges to be unnecessary and/or made vexatiously cannot be viewed in isolation. He submitted that all the averments made in the affidavit provide this court with a full background of the impugned decision. He further highlighted that at any rate, the averments made by the respondent No. 1 can be rebutted by the applicant by way of a second affidavit.

For his part, learned Senior Counsel for the respondents Nos. 2 and 3 argued that the prayer of the applicant in relation to the decision of the respondent No. 2 relating to the referral is otiose as this step has been taken and the preliminary investigation has already been completed. To that extent, the present motion either to strike out part of the affidavit of the respondents Nos. 2 and.3 or to supplement that affidavit by a further affidavit for the further investigation, is irrelevant.

Learned Senior Counsel for the respondents Nos. 2 and 3 also submitted that even if the applicant is successful as regards his motion to strike out the paragraphs, the documentary evidence would still stay on record and there is no prayer to expunge the documentary evidence

namely the National Audit Report which forms part of the Court record. He also argued that the motion for striking out paragraphs in an application for judicial review cannot be paralleled to electoral petitions where evidence has not been adduced yet. He submitted that the grounds for striking out paragraphs 21(b), 27(v), (vii) and (viii) are thus frivolous.

Learned State Counsel for her part submitted that affidavit evidence is not subject to Rule 15 of the Supreme Court Rules 2000 and pursuant to Rule 22 of the SCR, affidavits would constitute 'pleadings' only where Part IV of the SCR is concerned. Apart for this, affidavits cannot be construed as pleadings for the purpose of these Rules. Hence, it would not be legally sound to rely on Rule 15 of the SCR in the present matter.

Ms Ombrasine also referred to **Halsbury's Laws of England, Fourth Edition, Volume 17: Evidence, paragraph 315**, wherein it is stated that the court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive. She also referred to **Blackstone's Civil Practice 2005**, **paragraph 33.6** dealing with striking out of an application.

At the very outset, it is apposite to reproduce Rules 22 and 15 of the SCR. Rule 22 of the SCR reads:

> *"These rules shall apply to any proceedings initiated before the Court by way of motion or before a Judge by way of proecipe* ***as if*** -
>
> (a) *a reference to the plaintiff was construed as a reference to the applicant;*
>
> (b) *a reference to the defendant was construed as a reference to the respondent;*
>
> (c) ***the affidavits exchanged between the parties constituted the pleadings in the case****."* (Emphasis is ours)

and that Rule 15 of the SCR reads

> "*(1) Where* ***any pleading*** *contains a statement which is-*
>
> *(a) unnecessary;*
>
> *(b) made vexatiously; or*

> *(c) made with unnecessary proxility,*
>
> *the court or the Master may strike out the pleading or amend it with or without costs."* (Emphasis is ours)

Although Rule 22 of the SCR states that the affidavits are to be treated "*as if*" they were pleadings, it is paramount to point out that there is a clear difference in nature and substance between applications by way of motion paper and affidavit and a plaint with summons. A motion is a prayer supported by an affidavit which contains sworn evidence whereas a plaint with summons contains only averments which are made by a party and which need to be subsequently proved in court by adducing sworn evidence.

Late Justice Fekna fully explained this difference in the case of **Hurnam D. v Jugnauth P.K. & Anor [2019 SCJ 216]**:

> "*…there is a **difference of substance** between the procedure referred to as a Motion and Affidavit, on the one hand, and a Plaint with Summons, on the other hand. A Motion is a prayer addressed to the Court for judicial redress of a problem and, that **prayer is supported by the sworn evidence of the applicant contained in an affidavit**. As opposed to that, a Plaint with Summons is directed against an opposing party (a defendant) from whom the plaintiff asks for a specific remedy. The **plaint contains mere averments which are made against the opposing party which are not tantamount to evidence**. **The averments have to be proved subsequently in Court during the hearing by adducing sworn evidence in support of the said averments.**"* (sic) (Emphasis is ours)

To mark the difference in nature of the two actions, he went on to add:

> *"An action by way of Plaint with Summons ensures a fair trial to the defendants who would have the opportunity of applying for particulars of the Plaint. However, it is not entirely clear how this right would be respected in practice if a Motion and Affidavit were to be treated as pleadings in a civil action*." (sic)

In the light of the above, we do not consider that affidavits are pleadings akin to averments in plaints or petitions. Further, we do not agree with the submissions of learned Senior Counsel for the applicant that the string of election petitions referred to above supports his contention that Rule 15 of the SCR applies to affidavits in judicial review proceedings. The pleadings which were struck out in the above electoral petitions consisted of averments which

had yet to be proved by adducing evidence while we are here concerned with the striking out of statements found in sworn affidavits which have already been filed on record.

Learned Senior Counsel for the applicant has not referred to any case where the Supreme Court has struck out averments found in affidavits in judicial review applications. However, we note that in so far as the question of striking out of affidavits is concerned, in England **paragraph 315 of Halbury's Laws of England Fourth Edition Volume 17** provides that the court may order any matter which is scandalous, irrelevant or otherwise oppressive to be struck out of any affidavit.

Even if we were to follow what obtains in England or consider that Rule 15 applies to the striking out of affidavit evidence, we cannot overlook that the striking out of pleadings is a drastic step which requires the party seeking such a remedy to satisfy the court that such a measure is called for. As stated in **Jugnauth A K v Ringadoo R D N [2005 SCJ 239]-**

> "*A pleading will not, however, be struck out if it is merely demurrable; it must be so bad that no legitimate amendment could cure the defect. The jurisdiction to strike out a pleading should be exercised with extreme caution and only in obvious cases* – **vide Halsbury, Laws of England Vol 36 (1) Pleading at paragraph 81".**

In the case at hand, the applicant has failed to establish that the statements found in paragraphs 21, 23(a) to (i), 29, 37, 38, 41, 41(a)(i), 41(a)(ii), 41(iii), 48, 64(i), 66(iii), 86(e), 87, 101 and 105 of the affidavit dated 5 May 2022 of respondent No. 1 and those found at paragraphs 21(b), 27(v), 27(vii) and 27(viii) of respondents Nos. 2 and 3's affidavits dated 24th March 2022 are scandalous, irrelevant or oppressive. Further, although the applicant contends that the statements made in the above paragraphs of the affidavits referred to above are unnecessary and/or have been made vexatiously, we find that he has failed to establish that this is the case. On the contrary, as rightly submitted by learned Counsel for the respondent No. 1, we find that the said paragraphs help the court to have a full background leading to the impugned decisions.

Taking all the above into consideration, we refuse to grant the prayers sought under paragraphs B and D of the motion.

The motion for disclosure

As far as the motion requiring the respondents Nos. 1 and 2 to make a full and fair disclosure of certain matters is concerned, learned Senior Counsel for the applicant argued that such disclosure is fully warranted on account of the exceptional circumstances in this case; the respondent No. 1's express undertaking in its affidavit dated 18th March 2022 to provide relevant facts and internal process regarding its investigation and finally the duty of candour owed by all parties as observed in the case of **Peerless Limited v Gambling Regulatory Authority and Others [2014] PRV 49.**

Learned Senior Counsel for the applicant stated that there is no case providing for such disclosure orders in judicial review proceedings in Mauritius and he invited this court to review the outdated practice in Mauritius and make an authoritative pronouncement on this matter of great public importance. To buttress his arguments, learned Senior Counsel for the applicant invoked English law and precedents, citing the cases of **R v Lancanshire County Council, ex p Huddleston [1986] 2 All ER 941** and **Tweed v Parades Commission for Northern Ireland [2006] UKHL 53** which sets out the test as being "*whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly."* He submitted that the respondents' affidavits are fundamentally flawed inasmuch as the respondents have lamentably failed in their obligation to assist the court by making a full and fair disclosure of all facts and matters.

Learned Counsel for the respondent No. 1 (ICAC) noted that there is no duty of standard disclosure in judicial review proceedings. However, a respondent whose decision or action is being challenged by way of judicial review owes a duty of candour to give a true and comprehensive account of the decision-making process.

He submitted that an order for disclosure can only be made where there is some material before the court which suggests that the averments in the affidavit are inaccurate, inconsistent or incomplete in a material respect. He argued that this is not the case here and only those matters that occurred prior to ICAC's decision should be considered and whatever has taken place afterwards is not relevant. It is not for this court to ascertain whether there has been a criminal offence.

He argued that a perusal of the order dated 14th July 2015 reveals that the respondents were restrained and prohibited "*(i) from investigating the applicant in potential offences in breach of sections 9 and 13(2) of the POCA; and (ii) from requiring the applicant to call at the office of respondent No.1*." Learned Counsel for the respondent No. 1 contended that an investigation cannot be carried out piecemeal and requires the taking of statements from a number of persons which is why the whole investigation is being stayed.

Learned Counsel argued that in any event, the ICAC has amply disclosed all such material facts and circumstances in its affidavit so as to enable the court to determine the merits of this application for judicial review. The ICAC could not have investigated any further being given the injunction and the application for judicial review proceedings. It is not for this court to decide whether there has been an offence under Section 9 of the POCA. This court only has to determine whether the impugned decisions of the ICAC to refer the matter for further investigation; to convene the applicant for enquiry and to require him to give a statement under warning, are unlawful, unreasonable and irrational. The granting of disclosure orders would not help the court, in any manner whatsoever, to make a determination in respect of the prayers of the applicant.

He argued that the order being sought by the applicant regarding a statement of late Mr. Oozeer, if any, or any minute of the respondent No. 2 to show that pressure was exercised, would not help the court make a determination on the prayers of the applicant. In any case, the test of necessity has not been met and the applicant is only on a fishing expedition.

It was his contention that the respondent No. 1 cannot state and should not be compelled to state, at this stage, whether it is maintaining its stand concerning the withdrawal of the letter dated 10th February 2012 inasmuch as its investigation has been stayed in the light of the injunction. The motion of the applicant is misconceived inasmuch as the ICAC is not duty bound to aver in its affidavit whether its stand regarding any particular issue has changed. This clearly goes beyond the duty of candour and disclosure laid upon the respondent No. 1.

The terms of the new lease obtained by Sun Tan in 2018 has not been investigated into. The respondent No. 1 has disclosed in its affidavit all material facts and circumstances which it has obtained during its preliminary investigation pertaining to the issue of indemnity payment of

Sun Tan. The court, now, has to determine whether at the time the decision was taken for further investigation, such a decision was legal, rational and justified.

Learned Senior Counsel for the respondents Nos. 2 and 3 for his part argued that the claim for disclosure contradicts the motion to strike out paragraph 27(vii) of their affidavits. He stated that the issue concerns the renewal of some 100 leases and not only the lease which is the subject of the present complaint and the respondents Nos. 2 and 3 have stated same by way of affidavit evidence. He added that there is no contradiction or waiver and the only important fact is that an offence under criminal law cannot be waived. Furthermore, the material issue is not the renewal of the lease in 2018 but the situation of conflict in which the applicant had placed himself initially. Learned Senior Counsel contended that this motion for disclosure is a smokescreen to shift the focus from a breach of the POCA in respect of the first lease to the renewal of that lease subsequently. The merits or otherwise of the renewal of the lease has nothing to do with the allegation of the breach of POCA. In any event, the renewal of the 100 leases occurred in 2018 post this application for judicial review and is, therefore, irrelevant to the determination of the present proceedings.

Learned State Counsel for the co-respondent, Miss Ombrasine, submitted that the applicant is seeking a disclosure of matters which are arguably intrinsic and internal to the respondents Nos. 2 and 3. Their disclosure, if ordered, may verge on a breach of legal professional privilege as it would require the respondents Nos. 2 and 3 to disclose interactions with legal advisers, beyond what is already on record.

Learned State Counsel further observed that judicial review applications are governed by RSC Order 53 and Rule 8 of RSC Order 53 which particularly provides for applications for disclosure, further information, cross-examination. She submitted that whilst an application for disclosure may be made under Rule 8 of RSC Order 53, the general rule is for an application to be made in a forum other than the one tasked to consider the application for judicial review unless the court directs otherwise.

Learned State Counsel also submitted that the wordings of the motion and its purport are akin to an interrogatory or '*interrogatoire sur faits et articles*', which falls under another specific procedure available under Rule 36 of the SCR and Articles 324 and 336 of the Code de Procedure Civile (*vide* **Adebiro O.J. v Collendavelloo I.L. & Ors [2021 SCJ 348]**). According

to her, there is, therefore, a need to comply with the set procedure for '*interrogatoire sur faits et articles*' as laid down in **Thondrayen P. v The State Bank of Mauritius Ltd [2015 SCJ 414]**. She concluded that, in law, this motion of the applicant may not be appropriate in applications for judicial review given that interrogatories are governed by the Supreme Court Rules 2000 and the Code de Procedure Civile.

She stressed that there is an overlap between the prayer sought at A(b) in the motion paper and the motion for disclosure inasmuch as prayer A(b) in the motion paper seeks *inter alia* the bringing up of records.

Learned State Counsel submitted that from a strict legal perspective, a respondent in a court case is not required to give all details. In considering the duty of candour, it must be borne in mind that an application for judicial review is meant to look at the decision-making process as opposed to the decision itself.

Learned State Counsel further submitted that an application for judicial review is clearly and squarely constrained by the leave granted, the motion paper and the statement of case. She submitted that it is apparent from English cases that the grant of the disclosure order is akin to a prerogative order and would therefore depend on the discretion of this court. It is, therefore, for the court to assess whether to grant such an order, taking into consideration the stage reached, the nature of the application, the affidavits placed on record, the prayers sought in the motion paper and, more importantly, whether the applicant is not on a 'fishing expedition'.

Finally, she referred to the case of **R (on the application of Citizens UK) v Secretary of State for the Home Department [2018] EWCA Civ 1812**, dealing with the issue of disclosure in an application for judicial review. She appreciated that the context is wholly different from the present one but the case lays down out the principles set out for disclosure in judicial review proceedings.

As far as the issue of disclosure is concerned, we find it important to recall the applicant's prayers in his motion paper. The applicant is seeking an Order of Certiorari to bring before this court all the records and files relating to the decisions of the respondent No. 1's to proceed with further investigations purportedly under Section 46(3) of the POCA, to convene the applicant to the Independent Commission Against Corruption's Headquarters and to require him

to make a statement under warning in order to have the said decisions quashed, reversed and or set aside on the grounds that the said decisions are unlawful, *ultra vires*, unfair, irrational, unreasonable, procedurally improper and made for improper motives.

A perusal of the English authorities cited by Counsel only strengthens the view that disclosure of documents in judicial review proceedings is not automatic and is granted only when such order is deemed really necessary to resolve the matter fairly and justly. As the court held in **R (on the application of Citizens UK) (supra)**, there exists a "self-policing" duty of candour and co-operation which would "*assist the court with full and accurate explanations of all the facts relevant to the issues which the court must* decide" and which is a "*duty to disclose all material facts known to a party in judicial review proceedings*".

The applicant has failed to show that there is any necessity of the disclosure order being sought in the present matter to resolve it fairly and justly.

In any event, granting such motion would serve no purpose inasmuch as a perusal of the respondents' affidavits shows that they have disclosed all the relevant facts and materials that would assist the court in making a determination of the matter at hand. Further, the granting of the disclosure orders would not help the court, in any manner whatsoever, to reach a decision in respect of the prayers of the applicant.

For all the reasons set out above, we refuse to grant the prayers sought under paragraphs A and C of the motion of the applicant. We accordingly fix the case to the 15th February 2023 at 13.00 hrs before the present bench for the matter to be put in shape for hearing on the merits.

S.B.A. Hamuth-Laulloo
Judge

K. Gunesh-Balaghee
Judge

06 February 2023

Judgment delivered by Hon. S.B.A. Hamuth-Laulloo, Judge

For Applicant:	**Mr V.R. Dwarka, SA** **Mr S. Bhuckory, SC together with Mr H. Duval, SC,** **Mr V. Reddi and Ms D. Harnaran of Counsel**
For Respondent No. 1:	**Ms B.M. Chatoo, Attorney at Law** **Mr M. Roopchand, of Counsel together with** **Ms P. Bissoonauthsing and Mr L. Nulliah, of Counsel**
For Respondent No. 2 and 3:	**Mrs A. Ragavoodoo, Attorney at Law** **Mr R. Chetty, SC together with Ms U. Bhurtun,** **of Counsel**
For Co-respondent:	**Ms V. Nursimooloo, Chief State Attorney** **Ms O. Ombrasine, Ag. Assistant Parliamentary** **Counsel**