

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: MA 257/2017

(arising in CS85/2017)

[2017] SCSC 1146

NATESHKUMAR BALASUBRAMANIAN

First Petitioner

CHANDRAN SEKARAN PADMANABAN

Second Petitioner

versus

SEYCHELLES HINDU KOVIL SANGAM

Respondent

Heard:

Counsel: Mr. S. Rouillon for petitioner

Mr. S. Rajasundaram for respondent

Delivered: 24 November 2017

ORDER ON MOTION

Vidot J

- [1] On 01st September 2017, the Petitioners filed a Notice of Motion supported by affidavits seeking an interim injunction to prevent the Respondent from holding an Annual General meeting which was scheduled for 10th September 2017. The Notice of Motion was filed

pursuant to Section 304 of the Seychelles Code of Civil Procedure (SCCP). On 06th September 2017, the Court made an order granting the injunction. The application had been heard ex-parte.

- [2] It was held in **D’Offay v The Attorney General [1975] SLR 118** that although matters of injunction are made pursuant to Section 304 of the SCCP, the court should be guided by precedents of the courts of England. In **Pickwick International Inc. (G.B) Ltd v Multiple Sound Distributors [1972] 1WLR 1213**, it was held that there was no requirement that the application be served on the Defendant prior to the hearing. The same approach was adopted in **France Bonte v Innovative Publication [1993] SLR 138**. I hold the opinion that the ex-parte procedure should be adopted if 2 conditions are satisfied; (i) there is urgency and the relief is required immediately and (ii) secrecy is essential. Since I was then satisfied that these conditions existed, the Motion was heard ex-parte.
- [3] Thereafter, the Court allowed the Respondent the possibility of filing an objection in response to the Application if it so desired. The Respondent in fact filed its Answer to the Application praying that the interim injunction be vacated. This was supported by an Affidavit sworn by Mr. J Somas Kandan Pillay the secretary of the SHKS. In his Affidavit he disagreed with averments made by the Petitioners in their affidavits. In particular he avers that the holding of the proposed AGM was in conformity of the Rules of the SHKS.
- [4] The Respondent in its Reply objected to the application for injunction challenged the representative capacity of the Petitioners. Learned Counsel for the Respondent submitted that the Petitioners (Plaintiffs in the main case) only aver that they are interested parties to the matter of the SHKS and refer to interested parties that could be affected by the holding of the AGM at the time that it had decided to do so and stated as one of the reasons was that these so called “interested parties” would be absent at that time. It is Mr. S. Rajasundaram’s contention that such a mere averment cannot provide the Petitioners the right to act in a representative capacity of such other “interested parties”. He argues that there should at least have been affidavits from such parties electing the Petitioners to act on their behalves. He submitted that such a defect cannot be cured at this stage.

- [5] Mr. Rouillon, Counsel for the Petitioner resisted such objection from the Respondent. He referred to **Mulholland & Or v St. Peter Roydon Parochial Church Council & Or** [1969] W.L.R 1842. In that case 2 parishioners sought an Order against the Church Council from acting on behalf of the church. In that case the Court accepted that 2 parishioners could institute the case for their common grievance, even if there were many others. Mr. Rouillon further referred to **John v Rees** [1970] 1 Ch. 346, where the Court considered the validity of a case brought by one Plaintiff as a representative action where there were discrepancies as to who was being represented in fact. The Court held that the rule concerning representative actions was not a rigid one but a rule of convenience. In that case Megarry J commented as follows;

“actions are decided by reference to justice and according to law and not by counting heads”

- [6] This Court is of the view that the ideal situation would be for a petitioner who claims to initiate action before Court in a representative capacity obtains affidavits from such persons he claims to represent. However, in the present case the Petitioners claim that they are members of the SHKS and as such they may bring an action in a personal capacity. It would have been fatal to have allowed the Application had they not been such members. In the present case, I hold that the Petitioners themselves have an interest in the matter. In **M. Nutchetrum & Ors. v Poudre D’Or Village Tamil Circle & Ors** [2006] SCJ 104, some Association members were successful in obtaining an injunction to prevent the Association from holding an AGM.

- [7] In **Subramanian Pillay & Ors. v Shamugan Pillay & Ors** C.S 153 of 2010, in dealing with the issue of representation reference was made to Section 112 of the SCCP which states that *“no cause of action shall be defeated by a misjoinder or non-joinder of parties and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it”*. This is exactly the approach that I wish to adopt in this case.

[8] An interim injunction is granted at the discretion of the Court. In the case of **American Cyanamid Company v Ethicon Ltd. [1975] AC 396**, it was held that in dealing with interlocutory injunctions, the court shall be guided by 3 considerations;

- (a) whether there is a serious question to be tried;
- (b) Inadequacy of damages to either side; and
- (c) that on the balance of convenience an interim injunction should be granted

These are the same considerations considered in *Techno International v George SSC* 147/2002, (31st July 2002), **Laporte & Anor v Lablache [1956-1962] SLR No. 41 and France Bontev Innovative Publication**

[9] In its consideration of the Application the Court's approach is based on the presumption that there will be trial on merits at a later stage. The court shall be satisfied that prima facie there is a serious question to be tried. It has to consider the actions and conduct of both parties before exercising its discretion. The Court shall also evaluate if the parties can be adequately compensated for any damages suffered should the application be denied. The court shall ensure that any further loss or damage, especially if such will be irreparable, is contained. The test to be used in addressing itself to and evaluating the balance of convenience the court shall consider;

- (a) whether more harm will be done by granting or refusing the injunction,
- (b) whether the risk of injustice is greater if the injunction is granted than the risk of injustice if it is refused and
- (c) whether the breach of the Applicant's rights would outweigh the rights of others.

[10] The Petition for interim injunction sought an order from the Court to prevent the holding of the SHKS's AGM that was scheduled for the 10th September 2017. The Order of 06th September 2017 has effectively dealt with that. The AGM did not take place. The Court needs to consider whether there is legitimacy in maintaining that Order until final

determination of the Plaint. Though not necessarily making any decision on the Plaint, it shall be necessary to consider aspects of the Plaint and the Defence.

- [11] According to Rule 5.2 of the SHKS Rules, (“the Rules”) *“the Annual General Meeting shall be held within three months of the closing of the accounts in December”*

Therefore, the AGM should have been held by the latest end of March. In this case, the AGM had only been scheduled to be held on 10th September 2017, more than 5 months from its due date. There must have been a reason why the dates for convening the AGM within such specific period has been incorporated in the Rules. One of the reasons would surely have been to allow those who are interested in the affairs of the Association to make necessary plans should they wish to attend. Furthermore, there is the issue of mandate of the existing Governing Council as their tenure had already lapsed by the end March within which period the AGM should have been called. This definitely suggests that there are serious issues to be tried.

- [12] Rule 5.3 of the Rules provides for matters to be addressed at the AGM. They are;
- (a) adopt the annual programme of work plan and budget;
 - (b) review and approval of audited accounts of the preceding year;
 - (c) consider any proposed amendments of the Rules; any approval requires of two thirds ($\frac{2}{3}$) of the members present at the AGM;
 - (d) election of Committee members. An officer shall not hold the same position for a continuous period of more than 3 consecutive terms; and
 - (e) resolve any matters relevant to the objectives of the Association.

The most pertinent concern of the Applicants pertains to “approval of SHKS development plan” as per classified notice for AGM published in the Seychelles Nation newspaper of 11th August 2017. The original plan for the building had already been approved at a SGM of the Association. They allege that the new substituted plan which would have been presented for approval was not made known to many members of the Association. They

aver that the new plan makes a shift in the concept in that it abandons the combined commercial and general humanitarian public benefit and retains the former only

[13] In fact the minutes of a meeting of the Governing Council dated 23rd June 2017 reveals that indeed there was talk of a shift from the original concept and function of the proposed building to change it to a commercial enterprise only. The issue of change of the plan is by the affidavit of Mr. Somas Kandan Pillay and the advertisement not just a mere “belief” by the Petitioners, but an actual fact. That suggests that as members of the SHKS the Petitioners could be affected by the decision to change the original purpose of the building as it possibly will not conform to the objectives of the SHKS.

[14] In considering this Application, particularly the activities of the Association, the Court has to ensure that it continues to function and discharge and uphold the objectives set out in the Rules. The Rules have to be observed. Section 11 of the Registration of Association Act provides;

“the rules for the time being of any registered association shall bind the association and every member thereof and any person claiming through such member to the same extent as if such member or person has subscribed his name thereto:

Provided that no person shall be made liable for debts contracted after he has ceased to be a member of that association”.

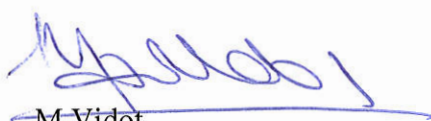
[15] Therefore, I find and agree with Mr. Rajasundaram that the Court cannot allow the Association to continue to exist and not hold an AGM as required under the Rules. Therefore, in the interest of the Association the balance of convenience tips in favour of the Respondents which requires that the injunction be vacated. Furthermore, the building which plan was approved at the above mentioned SGM has a commercial component to it and therefore any delay in the start of construction will cause damage to the Association.

[16] However, the current office bearers of the Governing Council have lapsed and they have remained complacent and not held the AGM as per the Rules. In fact Section 23 of the Registration of Business makes them guilty of an offence for failure to observe the Rules of the Association. They continue to assume their offices within the Governing Council

with no legitimacy. If there was need to extend their mandate they needed to go back to the “General Body” to obtain that extended mandate.

- [17] However, as above stated the balance of convenience favours allowing the SHKS to continue to discharge its obligations under the Rules. Therefore, since as per Rule 5.2, the audited account for this year should be completed and available by the end of December, I cancel and vacate the injunction which was imposed by the Order of 06th September 2017, on strict condition that an AGM shall be convened anytime between January 2018 and March 2018 whereby as required per the Rules there shall be election of new office bearers of the Governing Council. The existing Secretary of the SHKS shall ensure that all formalities are followed to facilitate the holding of that AGM.
- [18] As a further note, I remind the SHKS Governing Council that any matters relating to a change of a revised plan for the building development on V423, which plan had already been approved, can only be addressed at an SGM. The Rules are clear as to matters that should appear on the agenda for an AGM. Revision and approval of a building plan is definitely not one of them.

Signed, dated and delivered at Ile du Port on 24 November 2017



M Vidot
Judge of the Supreme Court