

IN THE SUPREME COURT OF SEYCHELLES

MA 182/2016 arising in Civil Side: CA 19/2015

Civil side CA19/2015 (Consolidated)

[2018] SCSC

ALL VALUE BANK LIMITED

Appellant

versus

CENTRAL BANK OF SEYCHELLES

Respondent

Heard: 5 July 2017, 30 January 2018

Counsel: Mr. Kieran Shah SC for appellant

Mr. George Thatchett for respondent

Delivered: 19 February 2018

RULING

M. TWOMEY, CJ

[1] The Appellant applied for a banking licence from the Respondent pursuant to the provisions of the Financial Institutions Act 2004 (hereinafter the Act) in October 2013. Correspondence between the parties ensued until 23 April 2014 when the

Respondent deemed all requested documents received and evaluation of the application began.

- [2] By letter of 4 July 2014, the Respondent refused the licence based on information disclosed to it by the Financial Intelligence Unit under conditions of confidentiality. The Appellant appealed the decision but by letter of 8 January 2015, the refusal of the licence was confirmed. Subsequently, the Appellant wrote to the Respondent complaining that the information relied on for the refusal of the banking licence was not disclosed and that it did not have a fair chance to answer to the information. It asked for a reconsideration of the decision. The parties met on 14 August 2015 and the Respondent after taking note of the Appellant's concerns maintained its refusal to grant the licence on 1 September 2015.
- [3] On 15 September 2015, the Appellant appealed the decision of the Respondent to the Supreme Court pursuant to section 16(2) of the Act.
- [4] As a result of the appeal, two files of documents were served by the Respondent on the Appellant in order for it to formulate its grounds of appeal. Subsequently, the Appellant filed a motion dated 31 May 2016 requesting (a) the minutes of a meeting held on 14 August 2015 between the parties and (b) the confidential information relied on by the Respondent.
- [5] The Respondent provided the minutes of the meeting but refused to disclose the confidential information sought based on the provisions of section 6 (3) (b) of the Act.
- [6] It objected to the disclosure of the confidential information stating that this was precluded by law. In response, the Appellant has submitted that it is unable to file a memorandum of appeal unless the information is disclosed. It submits further that the proviso relating to the confidential information seeks to only protect the source of the information but not the information itself.

[7] I have decided to consolidate the appeal, which at this stage is not grounded, and the application for the disclosure of the information as Mr. Shah, Learned Counsel for the Appellant, has submitted that a decision on the latter will determine the appeal.

[8] I first turn to a procedural point relating to the appeal being out of time which has been raised by the Respondent. Learned Counsel for the Respondent, Mr. Thatchett, has submitted that the appeal is out of time since the decision of the Respondent was dated 8 January 2015 and the appeal filed on 15 September 2015 more than eight months after the decision and clearly outside the permissible fourteen days under section 16 (3) of the Act as read with Rule 6 (2) of the Appeal Rules (Courts Act). It is also his submission that the letter from the Respondent dated 1 September 2015 was issued in good will and did not convey any statutory decision.

[9] Section 16 of the Act provides in relevant part that:

(1) Where the Central Bank takes a decision —

(a) to refuse to grant a licence under section 6;

...

the aggrieved party may appeal to the Central Bank within 15 days from the date on which the aggrieved party receives notification of the decision of the Central Bank to reconsider its decision. The filing of an appeal does not effect a suspension of any measures imposed by the Central Bank.

(2) The Central Bank shall afford to the aggrieved party an opportunity of submitting a written statement of its case and, at the request of the aggrieved party, provide for a hearing before the Board. The Central Bank shall take a final decision within 90 days after considering the case.

(3) If an aggrieved party is not satisfied with the final decision of the Central Bank under this section, the aggrieved party may appeal to the Supreme Court within the time and in accordance with the procedures applicable to civil appeals to that Court. (Emphasis added).

[10] With regard to appeals to the Supreme Court, rule 6 of the Appeal Rules (Courts Act) provides in relevant part:

6. (1) *Every appeal shall be commenced by a notice of appeal.*

(2) *The notice of appeal shall be delivered to the clerk of the court within fourteen days from the date of the decision appealed against unless some other period is expressly provided by the law which authorises the appeal.*

[11] Insofar as the provisions above are concerned, and given that the decision of the Board on appeal was delivered on 8 January 2015, the notice of appeal dated 15 September 2015 is clearly out of time. However, notwithstanding what appears to be the Respondent's final decision, it entertained further submissions from the Appellant and even met with it on 14 August 2015. It appears that negotiations between the parties were still ongoing despite the decision of 8 January. This therefore renders the Respondent's decision of 8 January 2015 equivocal. In the circumstances, the inference is that it was its decision of 1 September 2015 that was its final decision. The appeal notice dated 15 September 2015 would therefore fall within the statutory period. The submission of Mr. Thatchett, Learned Counsel for the Respondent, on that point is therefore dismissed.

[12] With regard to the Appellant's substantive submission relating to the reliance of the Respondent on the confidential information to refuse the banking licence, Mr. Shah has submitted that such reliance on the provision of the Act is misconceived. He states that "the bar created by the proviso to section 6 (3) (b) of the Act is to the 'reasons' for the decision by the Respondent but not to the information on the basis of which it has acted upon."

[13] He further submitted that if the information was shared, the Appellant would be given an opportunity to rebut the same and/or show that the information was false or 'coloured'. Were the Appellant able to prove that such was the case there would be no necessity for the Court to examine the reasons for the refusal. Any other construction of the proviso would render it otiose. The Appellant submitted further

that the main purpose of the proviso was to non-disclosure of the information, and in the circumstances this was grossly unfair, unjust, unequal and contrary to the rules of natural justice.

[14] Mr. Thatchett has submitted that the law under section 6 (3) (b) (ii) of the Act precludes the disclosure of the information generally, and statutorily the Respondent need not give any reasons for its refusal.

[15] Mr. Thatchett has further submitted that the confidential information was disclosed to the Respondent by the Financial Intelligence Unit, an agency established under the provisions of the Anti-Money Laundering Act 2006 and that the requested documents relate to the character or the identity of the directors and were only divulged to the Respondent in their letters to the Appellant of 4 July 2014 and 8 September 2015 and were therefore not part of the public record of the Bank or its Board with regard to making the decision and therefore do not merit disclosure to the Appellant. He relied on the case of *Intershore Banking Corporation Ltd v The Central Bank of Seychelles* (CA 34/2013 and MA 249/2014) [2016] SCSC 329 (17 May 2016, paragraphs 50-58) for this submission.

[16] The relevant provisions of the Act for a banking licence applicable to the present case are as follows:

“6. (1) In considering an application for a licence received under section 5, the Central Bank shall conduct such investigation as it may deem necessary and shall grant a licence to the applicant on being satisfied as to -

(a) the validity of the documents submitted under section 5(1);

(b) the —

(i) financial status; and

(ii) history of the applicant, where the applicant is an established financial institution;

(c) the character and professional experience of its administrators;

...

(2) Within 30 days after the receipt of an application, the Central Bank shall inform the applicant whether the application is deemed complete or specify the additional information required to make the application complete.

(3) Within 90 days after the receipt of a complete application, the Central Bank shall —

(a) grant a licence; or

(b) inform the applicant that it has refused to grant a licence giving the reasons for the refusal:

Provided that the Central Bank shall be under no duty to give reasons where —

(i) it is precluded by law;

(ii) information has been disclosed to the Central Bank under conditions of confidentiality between the Central Bank and any public sector agency or law enforcement agency; or

(iii) information has been disclosed to the Central Bank under conditions of confidentiality between the Central Bank and any other foreign regulatory agency pursuant to a memorandum of understanding, an agreement or a treaty entered into by the Central Bank or the Republic of Seychelles. [Emphasis added]

[17] Mr. Shah, in interpreting section 6 (3) (b) (ii) of the Act, has stated that it has to be harmoniously constructed with the rest of the provision. In his submission, the thrust of the provision is that the Bank informs the applicant for a licence of the reasons for its refusal to grant the same. The proviso only provides that the Bank has no duty to give reasons where the information is given under conditions of confidentiality. In his submission therefore, the purpose of the proviso is to protect the confidentiality

of the source of the information and not the information itself. I am not persuaded by this submission for the reasons I expone below.

[18] In *Intershore Banking Corporation Ltd* (supra) in considering the disclosure of confidential information when it is statutorily precluded, the Court was tasked with considering the nature of such confidential information. I explained that it was my view that by definition -

“confidential information necessarily relate[d] to a communication in writing, visually, electronically or orally made in confidence between the discloser and the recipient(s)”

[19] I stated that whilst I recognise the need for access to information and the undesirability of blanket bans on public access to information there were limitations to that right.

[20] I also found, in that case, that where the derogation to the right to information exists in law, and a party seeks to have access to the information deemed confidential, the Court cannot interfere with the decision of the Central Bank in its exercise of its discretion whether or not the case comes by way of judicial review or by appeal under the provisions of the Act.

[21] I held that in any case the confidential information did not form part of the record of proceedings pursuant to civil procedure rules in Seychelles, the Courts Act, and those of England and Wales which operate when our provisions are silent.

[22] Let me say at the outset that in terms of disclosure of confidential information generally, rules of both common law and statute exist contemporaneously but exclusively of each other.

[23] This topic is relatively untraversed by the laws of Seychelles. In terms of Article 28 of the Constitution, each person has a constitutional right to access information relating to that person which is held by a public authority. This right may be limited by law to meet the needs of a society. However, there is little jurisprudence

developing this law in practice, and therefore for general principles we look to English law. There is a common law right to access to information when there is a genuine public interest for it to be disclosed. There are certain limitations to that right. Non-disclosure in this regard, is subject to judicial review where the court balances the interest of the parties concerned with that of the public and considers other relevant factors. In *Kennedy v The Charity Commission* [2014] UKSC 20 Lord Toulson opined that:

“It has long been recognised that judicial processes should be open to public scrutiny unless and to the extent that there are valid countervailing reasons. This is the open justice principle. The reasons for it have been stated on many occasions. Letting in the light is the best way of keeping those responsible for exercising the judicial power of the state up to the mark and for maintaining public confidence: Scott v Scott [1913] AC 417; R (Guardian News and Media Ltd) v City of Westminster Magistrates’ Court (Article 19 intervening)[2012] EWCA Civ 420; [2013] QB 618.

... There may be many reasons why public access to certain information about the court proceedings should be denied, limited or postponed. The information may be confidential; it may relate to a person with a particular vulnerability; its disclosure might impede the judicial process; it may concern allegations against other persons which have not been explored and could be potentially damaging to them; it may be of such peripheral, if any, relevance to the judicial process that it would be disproportionate to require its disclosure; and these are only a few examples.” [109- 115]

[24] Lord Toulson went on to state that these underlying considerations apply to any tribunal or body exercising the judicial power of the State.

[25] In *R (Perry) v London Borough of Hackney* [2014] EWHC 3499 (Admin) the Court again had to consider the right to be informed as balanced with claims of confidentiality. Mrs. Justice Paterson stated:

“The scope of the duty of confidentiality may vary from one case to another according to the circumstance in which, and the purpose for which, the material was obtained. But, in the circumstances here, where the information was provided and received on the reasonable basis that it would be treated confidentially and concerned matters of commercial sensitivity I have no doubt that it should be so treated...”

It follows that although there is a common law right to have access to documents it is not without limitation.” [49-59]

- [26] There are numerous other authorities in relation to the confidentiality balance in common law, namely: *R (English) v East Staffordshire Borough Council* [2010] EWHC2744 (Admin); *R v Secretary of State for the Home Department , ex p Kingdom of Belgium* 15 February 2000 unrep; *R (Gunn-Russo) v Nugent Care Society* [2001] EWHC Admin 566; *R v Secretary of State for the Home Department, ex p Gallagher* [1996]1 CMLR557; *R v Secretary of State for the Home Department, ex p Mulkerrins* [1998] COD 235. The common law principles enunciated in those cases is that generally when the public interest in disclosure is greater than the public interest in confidentiality then disclosure must be allowed. The reviewing powers of the court will vary from case to case depending on the specific circumstances.
- [27] These common law principles buttress the right to information and operate even in the absence of Freedom to Information legislation. However, with regard to the preclusion of disclosure of confidential information by statute, the situation is clearly different. It is trite that common law principles cannot overrule statutory provisions. The legislature has specified that there is no requirement to provide reasons where confidential information has been relied on. The presumption to the right of information is therefore qualified. This is clear from the wording in section 6 (3) (b) (ii) of the Act. The Central Bank only has to inform the party that the information is given under conditions of confidentiality to preclude its disclosure and an aggrieved party has no recourse in the light of that provision.

- [28] In considering the appeal of the Central Banks's decision the court has itself no access to the confidential information, although in this situation it was not necessary to have sight of that information. The court cannot carry out a balancing exercise between the public interest in disclosure and the public interest in confidentiality. Even more so when there is a criminal or a quasi-criminal investigation ongoing as in the present case.
- [29] As I stated in *Intershore* (supra), there is certainly an avenue open to the Appellant in terms of challenging the derogation of a charter right by statute as being unconstitutional when such derogation is considered a blanket ban or too large a limitation to the right; but this Court is not presently seized with this issue which in any case was not raised. For these reasons I cannot therefore grant the application for the disclosure of the confidential information.
- [30] Mr. Shah's attempt to distinguish between the information relating to the identity of the directors and the persons or organisation who provided the information is only an exercise in splitting hairs. The information as a whole is confidential. The court cannot distinguish which part of it is more or less confidential than the other.
- [31] However, given the fact that some of the confidential information was disclosed to the Appellant with a view to resolving the issue amicably and the fact that on the heels of that information Mr. Shah has asked for additional information, which request has been refused, I must dispose of the point raised by Mr. Shah in that respect.
- [32] He seeks only the identity of the directors subject to scrutiny and to an investigation relating to anti-money laundering. He seeks their identity to be in a position to rebut the information held by the Respondent. The Respondent invariably seeks to not disclose the information as it may, presumably, hinder an ongoing financial investigation.
- [33] I notice that the investigation referred to by the Respondent started in 2015 or before. It is not in the interests of justice that investigations carry on unimpeded with

no closure and suspects kept in limbo. The Respondent should consider whether the confidential information is still relevant and/or to disclose the same to the Appellant. However, ultimately the Respondent retains the right to maintain its decision. It is hereby given two months to comply with the Court's direction and to convey its decision to the parties and the Court.

[34] Ultimately, the Appellant's application is dismissed but it has the liberty to proceed with filing its grounds of appeal notwithstanding the non-disclosure of confidential information.

[35] This matter will be mentioned for ascertaining the decision of the Appellant regarding the appeal on the 7 March 2018.

Signed, dated and delivered at Ile du Port on 9 February.

M. TWOMEY
Chief Justice