

SUPREME COURT OF SEYCHELLES

Reportable
[2019] SCSC 1136
MA 118/2019
(Arising in 36/2019)

In the ex parte matter of:

Ex Parte: BERTINE AH-KONG TRADING AS VILLA AUTHENTIQUE
(rep. by Alexandra Madeleine)

Neutral Citation: *Exparte: Bertine Ah-Kong Trading as Villa Authentique* (MA 118/2019 arising in CS 36/2019) [2019] SCSC 1136 (17th December 2019)
Before: Pillay J
Summary: Revocation of injunction
Heard: By way of submissions
Delivered: 17th December 2019

ORDER

- (1) *In the circumstances the application to dismiss, vacate and remove the injunction is refused.*
 - (2) *The injunction is maintained until the final disposal of the case.*
-

RULING

PILLAY J

- [1] The Plaintiff in the main case, Applicant in the present motion, sought and was granted an interim interlocutory injunction against the fourth Defendant in the main case on 2nd April 2019.
- [2] The fourth Defendant on being served with the Plaint and the injunction filed its Defence and an affidavit in reply on 3rd July 2019 objecting to the granting of the said injunction in part on the basis that “there will be a greater degree of hardship, financial prejudice

and suffering to the PUC if the injunction granted ex-parte is allowed to be continued while the arrears of SR.... a huge sum remains unpaid.”

- [3] The parties were given time to file submissions on the issue, which Mr. Rajasundaram did on behalf of the fourth Defendant and Miss Madeleine on behalf of the Plaintiff/Applicant.
- [4] Mr. Rajasundaram’s submissions are that the fourth Defendant is an unnecessary party to the litigation between the Plaintiff and the first, second and third Defendants. He submits that the matter is a trade dispute between and amongst them and the fourth Defendant is not privy to any transactions that stemmed out of a business contract between them.
- [5] It was his submission that the addition of the fourth Defendant to the proceedings when the fourth Defendant is not a party to the contract is a clear abuse of the Court’s process.
- [6] Counsel further submitted that the fourth Defendant is not a party to the injunction application and that the Plaintiff has wrongly obtained the injunction against his client when his client was not a party to the Notice of Motion.
- [7] It was further counsel’s submissions that if the Court encourages the non-payment through an injunction order the public finance would be seriously jeopardized. It was his submission that the injunction leads to serious financial loss thus causing serious prejudice to the running of the fourth Defendant.
- [8] Counsel submitted that the fourth Defendant has strong reasons to believe that the parties are “collusive amongst themselves in order not to pay the legal charges due and payable to this defendant that remains long outstanding.”
- [9] For her part Miss Madeleine submitted that the application for the order of injunction as granted by the Supreme Court on 2nd April 2019 satisfies all the requirements of the **American Cyanamid** Case and should be maintained until the judgment in the main case.
- [10] It is her submission that there is a serious question of fact to be tried in the main case being liability for the outstanding water and electricity bills. She submitted that the fourth

Defendant is a third party to the commercial lease agreement between the Plaintiff and the first, second and third Defendants and is a necessary party to the Plaintiff in that it supplies water and electricity to the small hotel “Villa Authentique”. She further submitted that the seriousness of this question is impacted by the fourth Defendant’s own insistence that its only customer has been the “Villa Authentique”.

- [11] She further submitted that damages will not adequately compensate Plaintiff for loss to be sustained if the 4th Defendant disconnects the supply of water and electricity to the small hotel “Villa Authentique”. She further submitted that the Plaintiff trading under the name of “Villa Authentique” will suffer irreparable hardship if the supply of electricity and water is disconnected until this Court determines liability for the outstanding bills since the hotel will have to cease operation until the issue is determined by the Court and incur liabilities from clients who would have reserved and paid for bookings in the hotel.
- [12] It was her submission that the balance of convenience, being the balance of risk of doing an injustice lies in favour of the Plaintiff in maintaining the order of injunction until the determination of the main case.
- [13] Counsel submitted that the Court was justified in granting the order ex-parte on the ground of extreme urgency and that now the fourth Defendant has had the opportunity to challenge that order in inter-partes hearing.
- [14] She further submitted that the fourth Defendant is not a third party to the application and order of injunction granted on the same date in that leave was obtained from the Court on 2nd April 2019 to add the fourth Defendant as a party to the plaintiff in the main case.
- [15] Counsel for the Plaintiff/Applicant relied on the case of **American Cyanamid Co v Ethicon Ltd [1975] A.C. 396 (05 February 1975)** as well as Chapter 3, pages 20-30 of David Bean’s book ‘Injunctions’ in support of her position.
- [16] Indeed the case of **American Cyanamid Co** is the guiding light for Courts in considering applications for injunctions. As rightly stated by counsel for the Plaintiff/Applicant the consideration is whether there is a serious question to be tried.

[17] This principle was followed in the case of **Pest Control v Gill (1992) SLR 177** wherein the Court found that “in order for a Court to exercise its discretionary powers under section 5 of the Courts Act, the Applicant must show that there is a serious question to be tried and that damages are not an adequate remedy.”

[18] In the case of **Techno International v George SSC 147/2002, 31 July 2002**, the Court went further and decided that in addition to the two above considerations it also had to consider the “balance the convenience” which in **Dhanjee v Electoral Commissioner SCA 20/2011, 27 May 2011** was explained as follows:

- (i) whether more harm will be done by granting or refusing the injunction;
- (ii) whether the risk of injustice is greater if the injunction is granted than the risk of injustice if it is refused; and
- (iii) whether the breach of the appellant’s rights would outweigh the rights of other in society.

[19] Indeed as stated by counsel for the fourth Defendant, the PUC Act may allow for disconnection, however the Court retains jurisdiction in any dispute with regards to unpaid charges and it has authority to make any order pending a final determination in such a matter.

[20] In the matter at hand the fourth Defendant is a public corporation, this Court takes judicial notice that the fourth Defendant is the sole supplier of electricity and water in the Republic. Should the injunction be maintained this Court is of the view that the fourth Defendant does not stand to lose anything materially other than a delay in recouping the sums owed as opposed to the Plaintiff/Applicant who stands to lose untold business opportunities and monies. The fourth Defendant at the end of the case stands to recoup all the monies owed to it from either the Plaintiff/Applicant or first, second and third Defendant in addition to interest.

[21] This Court fails to see how a debt in the region of SCR 197, 749.29 will affect the fourth Defendant in its daily functions.

[22] The arguments of the Plaintiff/Applicant's counsel that irreparable hardship will be caused to her client if the injunction is revoked are accepted. On a balance the Plaintiff/Applicant will suffer greater injustice if the injunction is revoked.

[23] As regards the issue that the fourth Defendant is not a party to the injunction application, indeed as stated by the Plaintiff/Applicant's counsel a motion to add the fourth Defendant to the Plaint was made and granted by the Court before the motion for an interim injunction was made. However as counsel for the fourth Defendant stated the fourth Defendant is not reflected in the heading of the motion for injunction. However it is noted that the motion was filed ex-parte and the affidavit in support refers to the fourth Defendant. Clearly the notice of motion for the injunction was filed prior to the amended Plaint being filed and was not amended subsequently. With that said this Court finds that this oversight is not fatal to the matter. It was clear on the motion that an injunction was sought against the fourth Defendant on the grounds stated in the affidavit in support.

[24] As regards Mr. Rajasundaram's argument that the fourth Defendant is an unnecessary party in the main case, this is best left to be decided when we get to the plea in limine which he has raised as part of his Defence.

[25] In the circumstances the application to dismiss, vacate and remove the injunction is refused.

[26] The injunction is maintained until the final disposal of the case.

Signed, dated and delivered at Ile du Port on 17th December 2019

Pillay J