

IN THE SUPREME COURT OF SEYCHELLES

Reportable

MA 246/2019
Arising in CA34/2013
[2020] SCSC 211

INTERSHORE BANKING CORPORATION LIMITED
(rep. by Phillip Boulle)

Petitioner

and

CENTRAL BANK OF SEYCHELLES
(rep. by George Thatchett)

Respondent

Neutral Citation: *Intershore Banking Ltd v Central Bank of Seychelles* (MA 246/2019) [2020] SCSC 211 (27 March 2020)

Before: Vidot J

Summary: Judicial Review – Notice of Motion premature - No final decision to judicially review

Heard: 04 February 2020

Delivered: 27 March 2020

ORDER

The application for leave to proceed is refused.

RULING

VIDOT J

[1] This is a Petition praying court to exercise its supervisory jurisdiction granted under the Supreme Court (Supervisory Jurisdiction Over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules, 1995 (The Rules) to judicially review the decision of the

Respondent not to grant the Petitioner a banking licence in pursuance of section 5 of the Financial Institutions Act of 2004 (“the Act”). The Petitioner had filed a Notice of Motion supported with affidavit setting forth the grounds upon which this application is made. The impugned letter from the Central Bank of Seychelles (“the Bank”) is dated 04th July 2019 and signed by the First Deputy Governor.

[2] A brief history of the case is necessary to understand and placed in context the Notice of Motion:

- (a) On the 12th June 2012, the Petitioner applied for a banking licence;
- (b) By letter dated 17th July 2013 the Respondent refused the grant of the licence;
- (c) By letter dated 26th July 2019 the Petitioner appealed against that decision to the Board of the Bank in terms with section 16(1) of the Act
- (d) On 26th October 2013, the Board of the Central Bank dismissed the appeal;
- (e) The petitioner appealed to the Supreme Court against that decision in terms with Section 16(3) of the Act. The Supreme Court ruled in favour of the Bank;
- (f) The matter was appealed against before the Court of Appeal which remitted the matter to the Supreme Court for rehearing;
- (g) On 29th May 2019, the Supreme Court ruled in favour of the Petitioner finding that all grounds for refusal of the licence by the Bank not valid;
- (h) On the 06th June 2019 the Petitioner requested to the Bank that in view of the decision of the Supreme Court which was not appealed against, that the Bank therefore issue them with a licence;
- (i) On the 04th July 2019 the Bank issued the impugned letter which read in part as follows;

“The Central Bank acknowledges the Judgement of the Supreme Court delivered on May 29, 2019. However, it is the interpretation of CBS that whilst the Supreme Court allowed

the appeal, the Court did not direct the CBS to forthwith grant a banking licence to Intershore Banking Corporation Ltd (IBC). In view that decision of the Board was quashed and rejected, CBS must reconsider this application.

In line with the above, and given that it has been a number of years since the application was submitted; CBS require that IBC provides all relevant updated documents/information that relates to the banking licence application”

- [3] In the affidavit the Petitioner submitted that the Supreme Court decision should have been sufficient for the licence to be granted as otherwise the decision of the Bank would make a mockery of the principle of finality of judgments and the rule of law and that the right of the Petitioner is directly affected by the above mentioned letter and that the Petitioner has sufficient interest to seek a remedy in the nature of a writ of mandamus. It is also submitted that the Petition is made in good faith and that in the circumstances it is fair and reasonable that the Respondent be ordered to grant a banking licence.
- [4] The petition is being resisted by the Respondent. The grounds of objection are that the petition is not sustainable in law or facts and that it is not being prosecuted in good faith. The Respondent also argue that the Petitioner failed to produce a certified copy of the order or decision sought to be canvassed and there is no such decision or order. They argue that the application for leave to proceed and indeed the petition is premature. They also submitted that the Petitioner has no locus standi in the matter in that there is no actual / anticipated or likely contravention of the rights of the Petitioner. Therefore, they pray that the Court dismissed the petition.
- [5] The petition for leave to proceed is being prosecuted in terms with Rule 2 of the Rules. It is this application that I address in this Ruling.

Application for Leave

- [6] An application for judicial review undergoes a process comprising of two stages; the leave stage and the merits stage. There are rules governing this procedure and these are found in the Rules. The rules applicable to the Leave stage are Rules 2 to 6. The application is by way of a Petition supported by affidavit and all material documents

being relied upon. An application for leave is made ex-parte to a Judge who may determine whether or not to grant leave. Therefore, it is necessary that the court filters the application to satisfy itself that *prima facie* reasons exist. Normally the Judge should grant it forthwith if it is arguable. If not it is rejected and it falls in between, an inter partes hearing is held. This is exactly what happened in regards to this Notice of Motion. In fact the leave stage is the stage whereby the court weeds out any unarguable case. It makes no allowance for applications from busy bodies. It assesses whether the petitioner is of good faith and has locus standi, i.e sufficient interest in the matter. The concept of arguability also serves as a filter against useless and frivolous applications. Leave will not be granted unless the petitioner demonstrates an arguable point. In **R v Secretary of State for Home Department, ex-parte Cheblak [1991] 1WLR 980** Lord Donaldson MR stated that;

“the requirement that leave is obtained before substantive application can be made for relief by way of judicial review is designed to operate as a filter to exclude cases that are unarguable. Accordingly an application for leave is normally dealt with on the basis of summary submissions. If an arguable point emerges, leave is granted and extended argument ensues upon the hearing of substantive application”

[7] This Notice of Motion was listed ex-parte but the Court deemed it fit and necessary that the Respondent was served with a copy and invited a response to that Notice of Motion. It is settled that though listed as ex-parte, it does not mean that the case has to be decided in the absence of the Respondent (**Duraikannu Karunakaran v CAA SCA 33/2016**).

[8] An application for leave is made pursuant to Rule 2 of the Rules. Rule 2(1) provides that such an application shall be made by petition accompanied by an affidavit and Rule 2(2) states that *“that the Petitioner shall annex to the petition a certified copy of the order or decision sought to be canvassed and originals of documents material to the petition or certified copies thereof in the form of exhibits.”* The Petitioner did not attach certified copies as required by that provision and the Respondent raised strong objections to the same. This is a matter I shall address below.

[9] Leave is not granted merely as a matter of course. In fact Rule 7(1) provides:

“Upon application being registered under Rule 5, the respondent or each of the respondents may take notice of it at any time and object to the grant of leave to proceed, or if leave to proceed had been granted, object to the application at any time before the time fixed by Rule 12 for filing objections and the Supreme Court may make such order on the objections as it may deem fit.”

[10] Rule 6 lays down the requirement of sufficient interest by the Petitioner before the application is allowed. Indeed Rule 6(1) provides that unless the court is satisfied that the Petitioner has sufficient interest in the subject matter and that the petition is instituted in good faith leave will not be granted.

[11] Leave should also not be granted unless the Petitioner demonstrates an arguable case. This is designed as already stated to operate as a filter to exclude cases that are unarguable. If an arguable point surfaces, leave normally would be granted and extended argument ensues upon the hearing of the substantive application. In **R v Inland Revenue Commissioners, Ex-parte National Federation of Self-employed and Small Businesses Ltd [1982] AC 617**, Lord Diplock said:

“If on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting the applicant the relief claimed, it ought to exercise its judicial discretion, to give him leave to apply for that relief.”

Failure to attached certified copy of materials or originals of documents.

[12] I believe that it is necessary that I deal with this objection first. The position of Respondent is that the application is in breach of Rule 2(2). Counsel for the Respondent argued that the Notice of Motion be dismissed because of such shortcoming and deficiency. He pressed that such rule is mandatory and not discretionary; see **Choppy v Choppy [1959] SLR No.24**.

[13] A copy of the impugned letter dated the 04th July 2019 is attached to the Notice of Motion. It is certified by Gerard Maurel, Notary. That I believe is sufficient. It is an

original though the other document being relied upon, the Judgment of the Court dated the 29th May 2019 was a copy and not certified.

[14] I am one who believes that rules of procedure have to be followed. Normally I will advocate that if rules are there to be observed, litigants should be sanctioned for failure to follow them. In the case of **Ex-parte Tornado Trading & Enterprise EST. XP 150 of 2018** (decided on 04th July 2018) this Court applied the rules of procedure strictly. That was on an application for leave to proceed in a case of Judicial Review. I decided to reject leave to proceed inter alia because of procedural irregularity because some of the documents were not originals and not certified. I cited **Viral Dhanjee v James Alix Michel SCSC CP 03/2014** wherein it was held that “*applicants might be hurt when petitions or applications are dismissed due to legal technicality. But in the long run, rule of law will be hurt, if we allow procedural irregularities to be continued.*” I also cited **Ratnam v Kumarasamy [1964] 3 ALL ER 933** where it was held that “*rules of court must prima facie, be obeyed, and in order to justify a court extending the time which some step in procedure require to be taken, there must be some material on which the court can exercise its discretion*”.

[15] On appeal in **Tornado Trading & Enterprise EST v PUC and Procurement Review Panel CA SCA 35/2018** (delivered on 28th November 2018) the Court of Appeal adopted a more relaxed approach to Rule 2(2) and exercised their discretion to admit the impugned decision which had not been certified.

[16] I also find that in this case the Respondent has not been prejudiced. The judgment was within the knowledge of the Respondents as it emanates from the Court and that judgment was read out in court and the Respondent also had access to a copy or otherwise was within the public domain. I believe that the most important document in this case is the impugned letter.

Good faith – Arguable Case

[17] In an application for judicial review upon screening the application, at the leave stage, the Court may allow or reject the application on consideration of 2 matters. The first is locus

standi and once the Petitioner is found to have sufficient interest then the Court considers the second test which is good faith. When addressing good faith, the petitioner must show that the issue(s) it raises in the application is/are arguable. The Petitioner must demonstrate by his Notice of Motion, affidavit and materials he has attached thereto that the case he makes and materials produced is a genuine cause as opposed to frivolous one. In **Omaghomi Belive v Government of Seychelles & Or [2003] SLR 140** good faith was described thus;

“the concept of ‘good faith’ is not to be considered in contra-distinction with the concept of ‘bad faith’. It involves the notion of ‘uberrima fides’ to the extent that the petitioner when filing the petition should have had an ‘arguable case’. That is an objective consideration which has to be assessed by court in deciding whether leave to proceed should be granted or refused.”

See also **Cable and Wireless (Seychelles) Ltd. v Minister of Finance and Communications & Ors CS377 of 1997.**

[18] The Petitioner does not in its affidavit aver per se that the application is being pursued in good faith. However, they aver that they have sufficient interest in the matter. In **Duraikannu Karunakaran v CAA** (supra) *good faith is a statutory criterion and arguability is the judicial test for checking the seriousness or levity of an application for leave. If the issue raised in the application is arguable, it would follow that it has been made in good faith.*” It is for the Petitioner who should by way of material facts presented show the arguability of his case. Basically arguability is a question of fact based on materials. It should not be based on speculation at an inter partes hearing. It is at the time of filing the petition with accompanying documents that the petitioner demonstrates that the issue raised is arguable.

[19] It is the Petitioner’s position that there is an arguable case. They were subject to the refusal of a banking licence. They had gone through long legal process before this Court which allowed the appeal. The Respondent did not appeal against the Judgment of 09th May 2019. The Petitioner avers that by implication that means they are in agreement with that judgment.

[20] However, I find that the Notice of Motion is premature, the impugned letter is not a final decision. Before judicial review can be considered, there needs to have been a final decision. Actually, the letter from the Bank invites the Petitioner to update and produce its documents relating to the banking licence. The Petitioner did not comply with that request not did it respond to that request. If there has been no change or amendments to the particulars already submitted they needed to communicate that to the Petitioner. Therefore, based on that I have to refuse the application for leave to proceed.

[21] Nonetheless, as an advisory to the Respondent, I note that the letter only requested for an update of the documents submitted by the Petitioner and that no new or additional documents are being requested. That being the case unless there is any change in the information already submitted, such as change of directors or shareholders of the legal entities involved, a licence should be granted to the Petitioner. If there is no change in information already provided the Respondent should not engage in a reconsideration stage. A licence should be granted.

Signed, dated and delivered at Ile du Port 27 March 2020

Vidot J