IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2020] SCSC 460
MC19/2019

ISLAND DEVELOPMENT COMPANY LIMITED **Petitioner**
(rep. by Basil Hoareau)

and

MARINE ACCIDENT INVESTIGATION BOARD **Respondent**
(rep. by George Thatchett)

Neutral Citation:	*Island Development Company v Marine Accident Investigation Board* (MC 19/2019) [2020] SCSC 460. (16 July 2020).
Before:	Vidot J
Summary:	Judicial Review. Powers of the Marine Accident Investigation Board, whether investigation carried out under sections 170 or 227 of the Merchant Shipping Act. Breach of Rules of Natural Justice and Procedural impropriety. Form of affidavit Order 41 of the White Book
Heard:	10 March 2020
Delivered:	20 July 2020

ORDER

Petition succeeds and parties to bear their own cost

RULING

VIDOT J

Background

[1] The Petitioner filed a petition for judicial review of a finding and decision made by the Respondent, dated 25th August 2018, praying that this Court exercises its supervisory jurisdiction conferred upon it pursuant to the Supreme Court (Supervisory Jurisdiction over

Subordinate Court, Tribunals and Adjudicating Authorities) Rules to review that finding and decision.

[2] The Respondent is a statutory body established under the Merchant Shipping Act ("the Act") and mandated under section 170 of the Act to hold an inquiry into the circumstances surrounding the death or serious injury where –

(a) a person dies or suffers serious injury in a ship; or

(b) a seaman belonging to a ship dies or suffers a serious injury away from the ship;

at the next port in Seychelles at which the ship calls.

The Marine Accident Investigation Board ("MAIB") may also pursuant to section 227(1A) of the Act investigate all types of marine casualties, accidents , incidents on board a Seychelles flag ship worldwide and any other matters provided in the Act as the Minister may order in writing.

[3] The MAIB conducted an investigation into incident where a landing vessel known as the Sea Horse (hereafter "the vessel"), being operated and managed by the Petitioner caught fire and subsequently sank off the shores of Coetivy Island. That incident happened on 24th August 2018. The Petitioner further avers that the vessel failed to beach on the island that night due to low tide. It is further averred that the vessel was at the material time managed, operated and under the control of the Petitioner and had been hired by the Prison Authorities to bring supplies to Coetivy.

[4] During the early hours of the 26th August 2018, the vessel caught fire. Thereafter, the vessel sank and was a complete lost and unsalvageable. As a result thereof, the Petitioner avers that subject to the powers under section 170 of the Act an inquiry into the incident was held by the MAIB. Following the holding of that inquiry the 12th December 2018, the MAIB sent via email a copy of their report containing their findings to the Petitioner.

[5] The Respondents on its part, submits that pursuant to section 227 (1A) of the Act, under which MAIB acted, in fact gives the MAIB powers to investigates all types of marine casualties. In the Objections to the petition, Counsel avers that though the Respondent is

mandated under section 170 of the Act to conduct the inquiry, the Respondent in fact conducted the inquiry as mandated under section 227(1A), to determine the sequence of events that led to the accident and to make recommendations to the relevant authorities to prevent such future accidents and that the investigation report was used also for the purpose of section 170 of the Act.

[6] The Petitioner alleges that in its report the Respondent makes the following findings which they claim are erroneous;

i. That the Petitioner was responsible for the management of Coetivy;

ii. That the Petitioner unilaterally took charge of the search and rescue operation after the incident;

iii. That the relevant authorities were reliant on the Petitioner for resources for the search and rescue;

iv. That the proper loading practices with regard to the petroleum products were not followed by the Petitioner;

v. That the surface search operation carried out was being managed by the Petitioner;

vi. That the vessel was fitted inadequate chain; and

vii. That there was no port clearance issued to the vessel for the voyage to Coetivy.

The Respondent admitted that the above were the findings of the Petitioner save for the first one which they argue was not one of such findings. The Petitioner attached a copy of the Report to the petition and upon a reading of the findings, I can confirm that there was not any findings that the Petitioner is responsible for the management of Coetivy Island.

[7] The Petition seeks the review of that report and more particularly the findings found therein on the grounds of (a) illegality / ultra vires, (b) of Rule of Natural Justice / procedural

impropriety and (c) irrationality and unreasonableness. The Respondent disputes all averments made on such grounds. In their objections, they submit that the findings were arrived at after full consideration of all information that was gathered at the investigation some of which emanated from the Petitioner. Wherefore, the Petitioner prays to Court for the following;

i. A declaration that the Respondent had no authority to hold an inquiry into the incident under section 170 of the Act;

ii. Issue a writ of certiorari quashing the findings and decision of the Respondent; and / or

iii. Issue a writ of certiorari quashing the findings and decisions of the decisions of the Respondent set out in paragraph 11 of the Petition and

iv. Order the Respondent to pay cost to the Petitioner.

[8] On their part the Respondent prays the Court to dismiss the Petition arguing that the Respondent did not breach any rules of natural justice nor acted with procedural impropriety as averred by the Petitioner. They argue that the Respondent was not conducting an inquiry to determine the rights the Petitioner or others involved in the accident. They averred that the investigation was carried out in a fair manner and that the findings and recommendations are rational and reasonable, arrived at after considering all information gathered during the investigation.

Illegality / Ultra Vires

[9] The point of contention as presented by the Petitioner is that the Respondent acted outside the ambit of its jurisdiction in carrying out the investigation. The Respondent is a statutory body and exercises powers bestowed upon it by statutes, particularly the Act. If that body acts outside the ambit of the law then such act will be considered ultra vires or illegal.

[10] The MAIB maintains that in conducting the inquiry, they acted in conformity with section 227 (1A) of the Act (amended by Act 13 of 2014). It is the Petitioner's submission that in fact the MAIB acted in pursuance of sections 170 and 171 of the Act. That, according to

the Petitioner, that as per the report the Respondent stated that they conducted an inquiry in accordance with section 170. In fact section 170(2) mandates that the MAIB holds an inquiry at the next port in Seychelles at which the ship calls as a result of conducting an inquiry pursuant to section 170(2). In the present case after the vessel caught fire with 5 crew on board, one of whom managed to swim to shore and the other 4 were declared missing, did not call at any port including Port Victoria. Section 170(2) provides as follows;

"(2) subject to section 171(2)

(a) A person dies or suffer serious injury in a ship; or

(b) A seaman belonging to the ship dies or suffers a serious injury shall, unless the minister otherwise directs, to be heard by the Marine Board or a person or authorised by the Marine Board at the next port in Seychelles at which the ship calls.

The vessel unfortunately sank and therefore, subsequent to that did not call at any port in Seychelles.

[11] The Respondent argued that they acted in pursuance with section 227 of the Act. Section 227 merely provides for the establishment of the MAIB. The appointment of members are made by the minister. The section talks about the appointment of the chairperson and how tenure of members may be terminated. On the other hand section 227(1A) which section the Respondent refers to in the affidavit of its chairperson attached to their Objections, provides as follows;

"The Marine Accident Investigation Board, in pursuance of the provisions contained in Part XIV of this Act shall –

(a) Examine and investigate all types of marine casualties, accidents, incidents on board a Seychelles flag ship worldwide;

(b) ……

(c) Any other matters provided in the Act as the minister may order in writing.

[12] At page 2 of the Report, the MAIB referred to section 170 and seems to suggest that they were granted power under that section to conduct the enquiry. It states what its mandate was and what their functions were under the Act. They state that they are mandated to summon and direct any person to appear before them. That power is found under section 171 of the Act. This suggests that they acted under that provision of the law. The MAIB further addressed a letter dated 16th February 2018 to Mr. Glenny Savy, CEO of the Petitioner that *"the MAIB is permitted under the laws of Seychelles, specifically under section 171 of the Merchant Shipping Act, to require the production of any document which in the opinion of the Board, is relevant to the inquiry."* This is further indication that the MAIB was acting pursuant of section 171.

[13] Counsel for the Respondent contends that in conducting the inquiry that the MAIB was labouring under section 171 and section 227(1A). Counsel for the Petitioner called this a hybrid enquiry. He maintained that it is not possible to conduct such an inquiry by relying on both sections. Counsel for the Respondent submitted that there is a difference in the wordings of sections 170 and 227(1A). He added that section 170(2) provides for an inquiry is held into events surrounding the death or injury suffered by a person whilst on board a ship whilst section 227 (1A) provides for an investigation of all types of marine casualties, accident, or incidents. So, he submits that the first sections refers to an inquiry and the second to an investigation.

[14] I have accorded full consideration of the Respondent's position, they acted under both sections 170 and 227(1A) of the Act. This is in fact suggests that they conducted a sort of hybrid enquiry. I hold the view that though MAIB may under either sections have come to the same findings. However, the sections deal with different situations and where different courses of action have to be adopted. In fact, this Court is of the view that is reason why the Act was amended by Act 3 of 2014, to insert section 227 (1A) in the Act. The MAIB seemed confused themselves as to which provisions of the law they were acting under and only after the Petition was filed did they realise that they could not have acted under section 170. I think that it was at that time that section 227(1A) was considered and they averred that they had acted not under section 170 but rather under section 227(1A) (paragraph 3 of the Objections). However, reading from exhibit GS3, which is the letter addressed to Mr.

Savy by the MAIB, it clearly states that they was carrying out an inquiry pursuant to section 170. However, they then realised that the incident could not be subject to an inquiry under that section as that requires that an inquiry be held at the next port in Seychelles the ship calls. The vessel could not have called at any port in Seychelles as it sank. Therefore for the purposes of section 170 no inquiry could have been held.

[15] Even if on the other hand as was to claimed by the Respondent, they were acting pursuant to section 227(1A) of the Act, they would still be placed in a tight spot. This is because as per section 228, Regulations needed to be made with provisions as to (a) the manner in which the MAIB exercise or perform its functions under the Act; and (b) the manner in which the business or meetings of the Board shall be conducted. Such Regulations have not been made. That means that the MAIB was handicapped in undertaking the investigation. They could not act as long as Regulations were not made. In that sense I find that the MAIB acted ultra vires and illegally.

Breach of Rules of Natural Justice

[16] Counsel for the Petition submitted that the Respondent breached the Rule of Natural Justice due to procedural impropriety. He states that Mr. Glenny Savy, CEO of the Respondent was not questioned in regards to particulars pleaded in paragraph 11 of the Petition (paragraph 6 above). These deal with some findings which the Petitioner holds are totally wrong. It is also averred that MAIB did not question Mr. Savy in respect of their findings and therefore the Respondent was not accorded the opportunity to respond to, comment on, counter or refute the said findings. This, he argues is because the Respondent had a legal duty to invite the Petition's comments before the Respondent made its findings public. As a result, the Petitioner considers some findings found in the report to be erroneous, misinformed and misguided.

[17] The Petitioner admits that Mr. Savy was called and interviewed by the MAIB and that he gave his opinion or evidence as to what happened in regards to that voyage and unfortunate tragedy of the vessel. In the affidavit attached to the Petition, Mr. Savy avers that he was not questioned about certain findings made by the Respondent, yet he was the last person to be called by the Respondent. Therefore, the MAIB could have used that opportunity to

put certain matters to him and invite for his response or comment and clarify certain averments made by some other witnesses. One such fact is that the MAIB concluded that Coetivy Island is under the management of IDC, which is not the case. Other complaints include reference to loading which according to the Petitioner was the control of the Darren Morel, the master of the vessel and not IDC. So it was up to him to ensure proper loading practices were respected. The report also cites as factual that the vessel was not equipped with chains. The Petitioner produced a Local Safety Certificate from the Seychelles Marine Safety Administration which shows that the vessel was seaworthy and adequately equipped. Such findings are prejudicial to the Petitioner. They suggest that the latter did not observe proper and safe practices in loading and putting adequate safety facilites on the vessel.

[18] Counsel for the Respondent whilst not denying that Mr. Savy was not interviewed about certain aspects of the investigation on which MAIB made findings, argued that the MAIB was not determining rights of any person, they were merely investigating into an accident. They were not conducting an inquiry into the cause of death of the men on-board the vessel. So, there was no minimum required standard of rules of Natural Justice to be accorded to the Petitioner. Counsel stated that there was an investigation not merely to make findings but to make recommendations as well. They interviewed Mr. Savy and heard him and the recommendations are not directed at the Petitioner.

[19] Counsel for the Petitioner relied on Dugar Das Basu, Administrative Law, 6th Edition to prove his point; that is that Mr. Savy should have been granted the opportunity to contradict or correct any relevant statement which prejudicial to the Petitioner. The following is quoted from p269 of that edition;

"where a statute conferring a quasi-judicial power is silent as to the procedure to be followed by the authority or leave it to his discretion, the court would be satisfied if the minimum of natural justice is observed, namely,-

(a) That the person to be affected by the order is given –

"an opportunity to correct or contradict any relevant statement to his prejudice or a real and effective opportunity of meeting any allegations made against him"

Hence, in such cases, the authority may obtain information at the back of the aggrieved party or examine witnesses without allowing him an opportunity of cross examining such witnesses provided he is informed of the case he had to meet and had the opportunity of making the case against him.

At the minimum level, thus natural justice does not postulate either a right to be heard orally or to adduce evidence or to confront or cross examine witnesses, but simply to make representation against the action proposed."

[20] The argument of the Respondent was that the MAIB was not deciding the right of a person which would have rendered the minimum requirement here above mentioned necessary. With respect to Learned Counsel for the Respondent, I disagree and opine that reference to *"person"* should be accorded a larger meaning. It should not only mean a physical person but should include a legal person which would include a body corporate. Mr. Savy was accorded an audience with the MAIB. In fact it was alleged that he was the last person to be interviewed. He was representing the Petitioner. He was not there in a personal capacity because it evident that the Petitioner being a company had to be represented by someone and that was the CEO of the Petitioner. To state that the MAIB was not investigating a person and therefore not concerned about a personal right that should be granted to a person is my view erroneous. However, I do find that the MAIB was not deciding personal rights per se. Under section 170(2) the MAIB in conducting its enquiry merely makes a finding of matters surrounding the event that gave cause for the enquiry. Under section 227(1A) the MAIB is entrusted with power to investigate. At the end of the investigation the MAIB will make findings and recommendations. That, I feel translates into the fact that there is no punishment or anything adverse that will necessitate taking any action against the body against whom the inquiry or investigation is carried out. I presume that this is what Counsel for the Respondent was arguing when he submitted that no personal rights are being affected. In fact the inquiry was merely an exercise into findings of fact as to what

happened to the vessel and crew on that unfortunate day. Nonetheless, such findings could tarnish the image of the Petitioner

[21] Unfortunately, the Court did not benefit from the privilege of being served copies of proceedings in this matter by MAIB. That would have enabled Court to satisfy itself as to whether or not Mr. Savy was asked questions about matters that would end up in the report's findings. At the end of the day, MAIB may still have arrived at the same conclusions in their findings but at least the Respondent would have had the opportunity before the findings were made public to have corrected or contradicted any of the findings. Thereafter, if still unsatisfied with these findings the Petitioner could have through some legal mechanism challenged these findings.

[22] There are no universal rule as to the kind of hearing that is required to satisfy natural justice. Normally there is a minimum that should be enforced where statute is silent provided the function is held by a quasi-judicial body. In that case the Act is silent but provides that the MAIB shall regulate its own proceedings. However, in regulating its own proceedings, it is paramount that proper application of the rules of natural justice are observed. There is no need in such circumstances to adopt any judicial procedure but sufficient that the matter is heard in a judicial spirit and in accordance with the spirit of substantial justice.

[23] However, as stated, the Petitioner, through Mr. Savy was granted a right to be heard. A request for a written report would have been sufficient. Nonetheless, I hold the view that a minimum of natural justice was required. Since Mr. Savy was the last person to be interviewed, it was necessary that clarifications on certain matters which is now being contested should have been placed before him so that he could have corrected or contradicted the same. It is unknown as to whether that was done. That would have made the report more complete with no misstatements or erroneous findings being made. This would have required the rules of natural justice to have been put in application. In that matter that was not fully applied. Some of the findings which are contested are indeed very prejudicial against the Petitioner. I find that some rules of natural justice were actually put in practice. Nonetheless, as far as the Petitioner is concerned, that minimum standard was

not followed. Therefore, I find that there was a breach of the rules of natural justice resulting in some procedural impropriety.

Irrationality and unreasonableness

[24] The third bone of contention as to the manner the inquiry was conducted is that it was devoid of rationality and reason that no reasonable tribunal or authority would have come to such findings. The Petitioner submits that there was no evidence laid down before the MAIB which would have convinced them to come to all or any of the findings in the Petition. Furthermore, the Petitioner avers that the Respondent took irrelevant matters into consideration and failed in arriving at their findings. However, in his submission Counsel for the Petitioner did not elaborate further on these averments. I note nonetheless that there have been some reference to these matters in arguments advanced on the objection in regards to rules of natural justice and irregularity. Therefore, I shall not address these any further.

[25] The Petitioner further complained that the affidavit of Emily Gonthier, Chairperson of MAIB, attached to the Defendant's Objections is defective. The contention goes as to form of the affidavit. Section 170 of the Civil Procedure Code describes what should be contained in an affidavit. These are such facts that a witness is able through his own knowledge to prove, except on interlocutory application on which statements as to belief may be admitted. However, since the domestic law does not fully provide a format for affidavits, one has to turn to Order.41 of the White Book of England. It has been pronounced by courts in this jurisdiction that Order 41 has applicability in Seychelles; see section 12 of the Evidence Act.

[26] Order 41 provides as follows;

"(1) subject to paragraphs (2) and (3), every affidavit sworn in a cause or matter must be entitled in that cause or matter.

(2) .....

(3).....

(4) Every affidavit must be expressed in the first person and must state the place of residence of the deponent and his occupation or, if he has none, his description and if he is, or is employed by, a party to the cause or matter in which the affidavit is sworn the affidavit must state that fact

(5) .....

(6) .....

(7) .....

(8) Every affidavit must be signed by the deponent and the jurat must be completed and signed by the person before whom it is sworn."

[27] The Petitioner also complained that the affidavit is lacking in that some of the averments are based on information and belief and the sources of such information and grounds of such beliefs are not disclosed. Counsel for the Petition further contends that the averments in the affidavit should distinguish which part is based on knowledge and which part is based on information and belief. This is a requirement of any affidavit; see **Union Estate Management (Propriety) Limited v Herbert Mittermayer [1979] SLR 140.** I have had a careful look at the affidavit and I do not agree that it is in any way lacking in that department. Ms. Emily Gonthier who is a lawyer by profession, avers that most of the averments are based on personal knowledge and the affidavit was in response of Mr. Savy's affidavit and where informed of any matters stated the source of that information.

[28] As far as the jurat is concerned, this Court is satisfied that it was in order. The affidavit had the parties to the action sufficiently titled in its caption with the cause or matter. Therefore, accordingly there was no breach of Order 41 (8) and (1). It was held in **Lablache de Charmoy v Lablache de Charmoy SCA 08/2019** and **El Masry & Anor v Margaret Hua Sun MA 195/2010 (arising in CC13/2014 [2019] SCSC 962** that where an Affidavit fails to comply with Order 41, particularly where the jurat is concerned, that affidavit is invalid due to such impropriety. The only probable argument was a breach of Order 41(4) in that she did not mentioned or provide her place of residence. In the **El Masry** case the Honourable Twomey CJ remarked that Order 41 is couched in mandatory terms as to the

form that an affidavit should take. I find that despite not mentioning her residence Ms. Gonthier gave the address of the Respondent and sufficiently described her positing within the MAIB. It can be safely deduced from particulars provided that she was acting as a member of the Respondent and she in fact claimed to be acting for them in the capacity of Chairperson. Justice should not be compromised just because a particular wording is not used and there does not seem to be any prescribed wording to be adopted to satisfy Order 41. As long as the wordings satisfy the requirements of that provision that will suffice. Therefore, I declare the affidavit to be good in law.

Conclusion

[29] I therefore make the following declaration and Order

i. The Respondent had no authority to hold an inquiry into the incident under section 170 of the Merchant Shipping Act;

ii. A writ of certiorari is therefore issued quashing the findings and decisions of the Respondent

iii. Each party shall bear its own cost

Signed, dated and delivered at Ile du Port on 20 June 2020

Vidot J