MR. JOSEPH RENE HERBERT MAINGARD COUACAUD & ANOR

v GLADIUS LIMITÉE & ORS

2023 SCJ 313

Record No. SC/COM/WRT/00466/2017

THE SUPREME COURT OF MAURITIUS
(Commercial Division)

In Chambers

In the matter of:

1. **Mr. Joseph Rene Herbert Maingard Couacaud**
2. **Mr. Julien Arthur Roland Doger De Speville**

Applicants

v

1. **Gladius Limitée**
2. **Pelagic Process Ltd**
3. **FWM Secretarial Services Limited**
4. **Island Management Ltd**
5. **Island Catch Ltd (formerly known as Baltahzar Investments Ltd)**
6. **Mr. Michel Guy Rivalland**

Respondents

In the presence of:

Mr. Arnaud Leclezio

Co-Respondent

RULING

In the present matter, an interim order in the nature of an injunction has been issued-

(i) restraining and prohibiting respondent No. 1 from holding the Extraordinary General Meeting that was to be held at AXYS Group, 6th Floor, Dias Pier

Building, Le Caudan Waterfront, Caudan, Port Louis on Friday the 28th of April 2017 and putting to vote the five resolutions as mentioned in applicants' affidavit and also the Notice of Extraordinary General Meeting of the Company dated 13th April 2017;

(ii) restraining and prohibiting respondent No. 1 from holding any General Meeting in the future in order to vote the five resolutions as mentioned at paragraph (1) or any resolution in the same purport and effect thereof;

(iii) preventing respondent No. 1 from disposing of any of its shares in Pelagic Process Ltd or any asset of Pelagic Process Ltd pending the determination of the main case;

(iv) preventing respondent No. 2 from disposing of its assets pending the determination of the main case;

(v) preventing respondent No. 6 from signing any share purchase agreement and/or any ancillary agreement and/or any resolutions relating to Gladius Ltée and/or Pelagic Process Ltd to dispose of Gladius Ltée and/or Pelagic Process Ltd and/or its assets;

(vi) preventing respondent No. 1 from issuing any shares or altering its stated capital pending the determination of the main case; and

(vii) preventing respondents Nos. 4 and 5 from injecting any further capital or shareholders' loan in respondent No. 1 pending the determination of the main case.

Respondent No. 3 and the co-respondent have left default. The applicants have moved to amend the proecipe dated 24 April 2017 in terms of a proposed amended proecipe dated 24 December 2022. Respondents Nos. 1, 2, 4, 5 and 6 (hereinafter referred to as the "respondents") have raised seven grounds of objection to the said proposed amended proecipe which are reproduced hereunder–

"*1. The proposed amendments seek to introduce new parties who are not parties to the main case H. Couacaud & Anor v Island Management Ltd & Ors. IPO Gladius Ltee bearing cause No. CO 58/12;*

2. *The proposed amendments seek to introduce new issues and prayers;*

3. *The proposed amendments seek to introduce a new case that is different to the present chambers case and has been made after a considerable delay and is as such abusive;*

4. *The proposed amendments amount to an abuse of process of the Court inasmuch as–*

   4.1 The Application for an interim injunction has been lodged 24.04.2017 and obtained on 27.04.2017;

   4.2 Since 27.04.2017, the Respondent No. 1 has been prevented from holding an Extraordinary General Meeting and put to vote the five resolutions as mentioned in paragraph 19 of the Applicants' First Affidavit dated 24.04.2017;

   4.3 The Respondent No. 1 has been prevented from disposing of any of its shares in Pelagic Process Ltd or any assets of Pelagic Process Ltd pending the determination of the main case;

   4.4 The Respondent No. 2 has been prevented from disposing of its assets pending the determination of the main case;

   4.5 The Respondent No. 6 has been prevented from signing any share purchase agreement and/or any ancillary agreement and/or any resolutions relating to the Gladius Ltée and/or Pelagic Process Ltd to dispose of Gladius Process Ltd and/or Pelagic Process Ltd and or its assets;

   4.6 The Respondent No. 1 has been prevented from issuing any shares or altering its stated capital pending the determination of the main case;

   4.7 The Respondents Nos. 4 and 5 have been prevented from injecting any further capital shareholder's loan in the Respondent No. 1 pending the determination of the main case.

5. *Since 24.04.2017, the case is not yet in shape with the result that the hearing has not yet taken place.*

6. *The purport of the amendments is to delay further the hearing of the case and would subsequently cause prejudice to the Respondents Nos. 1, 2, 4, 5 and 6 respectively.*

7. *The proposed amendments have been wrongly made, are misconceived and wrong in law.*"

Ground 1

The proposed amendments seek to introduce new parties who are not parties to the main case, that is, H. Couacaud & Anor v Island Management Ltd & Ors IPO Gladius Ltée bearing Cause No. CO 58/12

It has been submitted on behalf of learned Senior Counsel for the respondents that the applicants are seeking to join three separate legal entities to the present matter, namely, St. Felix Brands Ltd, Maxima5 Seafoods Ltd and Dale Capital Group Limited who are not parties to the main case and neither have they been parties to the present matter when the application was lodged in April 2017 so that it cannot be the case that they have suddenly become interested parties. It has been argued that the applicants are entitled *de facto* to summon any relevant witnesses that they require to prove their case. Learned Senior Counsel for the respondents has argued that the intervention of the proposed new parties to the present matter runs contrary to the cardinal principle that only interested parties ought to be joined as parties to a case as laid down in the case of **Cellplus Mobile Communications Ltd v Gellé [2001 MR 193]**. The case of **Saint Felix Worldwide Resort Ltd v The Ministry of Housing and Lands & Anor [2013 SCJ 208]** has equally been relied upon whereby the Court, citing the case of **Gopal v Beejadhur [1985 MR 112]**, held that a party can only be made to intervene if he has an *intérêt.*

It has been further submitted that, at any rate, the proposed prayers directed towards the new parties have no *raison-d'être* inasmuch as an interim order in the nature of an injunction has already been obtained as far back as 27 April 2017 in order to prevent respondents Nos. 1 and 2 from disposing of its shares and/or assets pending the determination of the main case.

On the other hand, learned Senior Counsel for the applicants has argued that the amendments are being sought following the filing of the third affidavit on behalf of the applicants and in furtherance of matters set out therein, namely that the respondents, in connivance, with certain third parties, that is, the proposed new parties, have knowingly taken a series of measures to deliberately circumvent and flout the interim order by indirectly disposing of the assets of respondents Nos. 1 and 2 inasmuch as Dale Capital Group Limited, by itself and through its subsidiaries, St. Felix Brands Ltd and Maxima5 Seafoods Ltd, despite being aware of the interim order issued, provided loans to respondent No. 2, entered into a suspensive share purchase agreement with Gladius Limitée (hereinafter referred to as Gladius Ltée) where it agreed to purchase 100% of the entire paid up and subscribed share capital of respondent No. 2 including 3 vessels. It is believed that this purchase agreement is likely to have been backdated to 31 March 2017 with the purpose of defeating the interim injunction. In or about December 2017, Dale Capital Group Limited by itself and through its subsidiaries, St. Félix Brands Ltd and Maxima5 Sea Foods Ltd entered into a 9-year operating lease of the activities and boats of Pelagic Process Ltd as well as a long-term lease agreement with retrospective effect from 01 April 2017, of the factory and assets of the latter. They also entered into time charter agreements with Gladius Ltée to utilise 3 vessels named Ouvea Vimaya and Etretat, which are dated 07 December 2017 and 11 December 2017 for the charter of the 3 vessels for a 5-year period ending 07 December 2022 and renewable for a further 4 years by Dale Capital Limited. They had a management agreement purportedly dated 04 April 2017 and an Addendum to the Management Agreement dated 28 July 2017 to manage the business of Pelagic Process Ltd with effect from 01 April 2017. This agreement was transferred to Maxima5 Seafoods Ltd on 01 September 2018. All revenues and expenses of Pelagic Process Ltd have been accounted for in the books of St. Felix Brands Ltd and Maxima5 Seafoods Ltd. They have refurbished and repaired the factory and the 3 shipping vessels and equipment since 2017 and to date, capex and vessel repairs and operational expenses amount to USD 1,250,000/-.

It has also been submitted that it appears that there was a share purchase agreement dated 01 September 2018 through which St. Felix Brands Ltd disposed of its interest in the acquired right in Pelagic Process Ltd to its subsidiary St. Felix Seafoods Ltd, resulting in a profit on disposal of interest of MUR 36,000,000/-.

Thus, it is clear that St. Felix Brands Ltd, Maxima5 Seafoods Ltd and Dale Capital Group Limited are interested parties to the present application. It has also been submitted on behalf of the applicants that their presence is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter,

since those three entities have, despite the Interim Order issued, now been put in control of and are managing the assets of respondents Nos. 1 and 2.

Ground 2: The proposed amendments seek to introduce new issues and prayers.
Ground 3: The proposed amendments seek to introduce a new case that is different to the present chambers case and has been made after a considerable delay and is as such abusive.

It is the contention of the respondents that the averments against the proposed new parties, introduce new issues and new prayers such that they are to be construed in law as amounting to a new application altogether. It is the case of the respondents that the nature and character of the proposed amendments are completely foreign to the initial cause of action against the respondents as they refer to purported transactions and agreements entered by the proposed parties that were not the subject matter of the initial application on 24 April 2017. The case of **Harel and anor v Société Jean Claude Harel and Cie and ors and Société du Patrimoine** [1993 SCJ 464] has been relied upon in furtherance of the point that the Court would be stricter in granting applications for amendment at the trial than before the trial. In the latter case, the Court had also held that an amendment which is substantial and raises new issues which are inconsistent with those found in a statement of claim will not be granted so that the same principle would apply to the present matter.

It has also been argued on behalf of the respondents that the new issues raised go to the fairness of the proceedings; the respondents need to know the case they have to meet, *vide* the case of **Huet J.P.B. & Anor v System Building Contracting Ltd** [2020 SCJ 250].

Learned Senior Counsel for the respondents has equally argued that the proposed amendments come late in the day, more than six years after the application was lodged and this at a juncture when the case is in shape to be heard. I have been referred to the case of **Harel and anor v Société Jean Claude Harel and Cie and ors and Société du Patrimoine (supra)** where the Court, whilst referring to the case of **Ketteman v Hansel Properties Ltd [1987] AC 189**, held that it will not allow an amendment which will prejudice the rights of the opposite party as existing at the time of the amendment since the other party will suffer injustice or injury which cannot be compensated for by costs or otherwise.

It has been submitted that the respondents will be severely prejudiced due to protracted proceedings which would be beyond the bounds of compensatory remedy if the proposed amendments were to be allowed.

On the other hand, learned Senior Counsel for the applicants has submitted that there are no new issues or prayers that are being introduced by the proposed amendments but are to the effect of only simply adding three entities and adding a prayer in respect of the latter, namely preventing them from using, utilising, disposing, transferring or leasing the assets of respondents Nos. 1 and 2 pending the determination of the main case. It has been further argued that it does not avail the respondents, after having schemed with these entities, to circumvent the interim order issued, to now complain about these said entities to be joined as parties and for prayers to be sought against them. It has equally been submitted that if separate injunctive proceedings were to be sought against the said entities, all the existing parties would also have to be joined and all the averments will have to be repeated again and thus, in order to avoid *contrariété de jugements*, it would be more appropriate for all issues to be adjudicated upon in one single case.

In addition, it is the contention of the applicants that the addition of new parties to the present matter will not have as result the introduction of new issues which are different or inconsistent with the issues in the proecipe and affidavits that are on record. It has been argued that evidence in relation to these entities have been adduced in the course of the third affidavit put in on behalf of the applicants without any objection from the respondents so that if these new parties are added, this would bring the pleadings in line with the evidence that is already on record. These entities are interested parties and their presence is necessary to enable the Judge in Chambers to adjudicate fully on issues raised in the third affidavit of the applicants. It is the case of the applicants that no prejudice will issue to the respondents as the latter will have the opportunity to file an affidavit in reply to applicants' third affidavit or any affidavit that the new parties will put in.

As regards the question of delay to bring in the proposed amendments, it has been submitted that although the proposed amendments come at a very late stage, this in itself should not be a reason for the proposed amendments to be refused, *vide* the case of **Patel Sakoor Dawood and Anor v Benessreesingh Anandsing & Ors [2008 SCJ 106].**

Ground 4: The proposed amendments amount to an abuse of process of the Court
Ground 5: Since 24 April 2017, the case is not yet in shape with the result that the hearing has not yet taken place.
Ground 6: The purport of the amendments is to delay further the hearing of the case and would subsequently cause prejudice to the respondents.

The respondents have referred me to the history of the present matter, namely-

(1) the application for an interim injunction has been lodged on 24 April 2017 and obtained on 27 April 2017;

(2) since 27 April 2017, respondent No. 1 has been prevented from holding an Extraordinary General Meeting and putting to vote the five resolutions;

(3) respondent No. 1 has also been prevented from disposing of any of its shares in Pelagic Process Ltd or any assets of Pelagic Process Ltd pending the determination of the main case;

(4) respondent No. 2 has been prevented from disposing of its assets pending the determination of the main case;

(5) respondent No. 6 has been prevented from signing any share purchase agreement and/or any ancillary agreement and/or any resolutions relating to Gladius Ltée and/or Pelagic Process Ltd to dispose of Gladius Process Ltd and/or Pelagic Process Ltd and/or its assets;

(6) respondent No. 1 has been prevented from issuing any shares or altering its stated capital pending the determination of the main case; and

(7) respondents Nos. 4 and 5 have been prevented from injecting any further capital shareholder's loan in respondent No. 1 pending the determination of the main case.

It has been argued that since 24 April 2017, the case is not yet in shape with result that the hearing has not yet taken place. The purport of the amendments is to delay further the hearing of the case and such a state of affairs would subsequently cause prejudice to the respondents.

It is the contention of the respondents that the interim order issued remains in force for all intents and purposes and that further protracted proceedings will have the effect of jeopardizing the very existence of respondents Nos. 1 and 2 which may go into liquidation with consequential loss of jobs for all employees.

It has also been submitted on behalf of the respondents that pleadings are designed to identify the issues to be resolved by the Court and they should not be treated as a tactical game as held in the case of **Marie Jean Nelson Mirbel and Others v The State of Mauritius and Others** [2009 PRV 46].

On the other hand, it is the contention of the applicants that the delay rests on the respondents themselves due to the fact that they applied to the Supreme Court for a discharge of the interim order in 2017 and the present matter was stayed pending the application of the respondents and that they cannot now complain of purported hardship due to delay.

Ground 7: The proposed amendments have been wrongly made, are misconceived and wrong in law.

It has been submitted on behalf of the respondents that the most compelling reason for rejecting the proposed amendments is that they are misconceived and wrong in law in the light of the principle of retroactivity of amendments. I have been referred to the case of **ABC Motors Co Ltd & Ors v Ngan Hoy Khen Ngan Chee Wang & Ors** [2010 SCJ 163] where the Court held that "*…it is trite law that an amendment allowed by the Court dates back in general to the time of the original pleading and the action continues as though the amendment has been ab initio*".

It has been submitted that the procedure of putting into cause new parties to an application for converting an interim injunction to an interlocutory injunction, made by way of proposed amendments to the heading and prayers of the applicants' proecipe so as to cause the proposed parties to be bound by the initial order of interim injunction, is a blatant abuse of the process of the Court, which cannot be condoned. It is submitted that the applicants ought to have had recourse to separate proceedings against the proposed parties to vindicate their rights and ought to have followed the due process of the law.

On the other hand, it has been argued by the applicants that they are at a loss to understand what point the respondents are trying to make under what has been termed as a "vague ground".

Findings

I have given due consideration to both the oral and written submissions of Counsel.

I will first deal with the ground that the proposed amendments come at a very late stage, that is, when the case is almost into shape and invariably delay is being caused. True it is that the proposed amendments come late in the day, that is, nearly six years after the lodging of the present application. However, such a state of affairs could not have been otherwise if we look at the chronology of events since the application was lodged. The present matter was stayed pending the determination of the respondents' application. On 24 May 2022, there was no objection to a motion for postponement on behalf of the applicants. On 30 June 2022, there was a joint motion for a postponement and for the case to be called for physical appearance in order to see where matters stand since the motion case was coming on 20 July 2022 and the main case on 07 November 2022. Upon being informed that the main case had been postponed to 25-28 July 2023 and that the present matter was not yet in shape, I ordered the matter be sent back to the E-filing system for the case to be in shape and needful to be done. The applicants then signified their intention to file a third affidavit and moved for leave to do so. The respondents raised no objection but reserved their right to reply to the third affidavit. In the light of such chronology, it would not be fair to state that the delay emanates only from the doings of the applicants so that on this score, the objection as regards delay does not hold water and is thus not upheld by me.

Now this brings me to consider whether at all the proposed amendments should be allowed. It is the case of the respondents that the applicants are seeking to join three new entities and to add new prayers in relation to them. According to Rule 19(2)(b) of the Supreme Court Rules 2000, the Court is empowered to add or substitute a new party whose presence may be necessary to adjudicate upon or settle all questions involved in the case. However, as rightly pointed out by learned Senior Counsel for the respondents, the proposed new parties are not parties to the main case (Cause No. CO 58/12) so that it is not very clear how they have attained the status of interested parties in virtue of only averments laid down in the third affidavit of the applicants especially given the fact that an interim order has since long been issued in the present application. A close reading of the interim order granted would show that the prayers that have been acceded to by the Judge in Chambers are wide enough to allay the fears that the applicants may have in relation to the proposed new entities in so far as the assets of respondents Nos. 1 and 2 are concerned.

Whilst the Court has wide powers of amendment, yet such power must be used in a judicious manner so that the Court itself is not taxed for making an abuse of its own process. I, therefore, rule that it would not be in the interests of justice that the present matter be protracted any further than it has unfortunately already been. If the proposed amendments are acceded to, this would also cause a situation where the interim order already issued would

have to be varied in order to accommodate the new prayers or alternatively for a second additional interim order to be issued whereby the new entities would have to be allowed to give their stand with the consequence of pleadings having to be exchanged anew with the result of a number of additional affidavits being exchanged with the leave of the Judge in Chambers having to be sought time and again by already existing parties who would have already uploaded the maximum number of affidavits allowed to be put in, in a chambers case as per the Supreme Court (Judge in Chambers) Rules 2002.

In the light of the foregoing, the motion made on behalf of the applicants to join in the new entities and to add new prayers in relation to them is not acceded to. The matter is made returnable on the E-filing system for the case to be in shape and needful to be done at latest by 17 August 2023.

P. D. R. Goordyal-Chittoo
Judge

03 August 2023

For Applicant	**:**	**Mr. T. Koenig, Senior Attorney**
	:	**Mr. D. Basset, Senior Counsel together with Mr. M. Sauzier, Senior Counsel and Mr. J. G. Basset and Mr. H. Dhanjee, both of Counsel**
For Respondent	**:**	**Mr. J. J. Robert, Attorney-at-Law**
	:	**Mr. R. Chetty, Senior Counsel together with Mrs. A. Desvaux de Marigny and Ms. U. Bhurtun, both of Counsel**