_Header: G & L MERVEN CONSULTANTS LTD v CONNOLLY & TURNER BLOODSTOCK FORWARDING (PTY) LTD & ANOR
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G & L MERVEN CONSULTANTS LTD v CONNOLLY & TURNER BLOODSTOCK FORWARDING (PTY) LTD & ANOR
2023 SCJ 288
SC/COM//WRT/000885/2021
IN THE SUPREME COURT OF MAURITIUS
(BEFORE THE JUDGE IN CHAMBERS)
(COMMERCIAL DIVISION)
In the matter of:-
G & L Merven Consultants Ltd
APPLICANT
v
1. Connolly & Turner Bloodstock Forwarding (PTY) Ltd
2. Selvaraajen Soundron MURDAY
RESPONDENTS
JUDGMENT
The applicant obtained an interim order on 20 December 2021 against the respondent no.1 following an ex parte application made to the Judge in Chambers as regards “restraining and prohibiting the first respondent, whether directly or indirectly by himself or his attorney or agent, préposé or otherwise from entering the applicant’s premises situate at Trou aux Biches and Chamarel and operating as quarantine stations for the purpose of dismantling or removing and/or disposing of the materials, tools and equipment on the applicant’s premises namely at its Trou aux Biches and Chamarel quarantine stations”. The issue is now to decide whether the said interim order should be discharged or, instead, be converted into an interlocutory order pending the decision of the Court in the main case.
It is understood that a main case for a perpetual injunction had been lodged by the applicant against the respondent no.1 by way of a plaint with summons before the Commercial Division of the Supreme Court.2
Each party filed two affidavits with annexes for the present application. At the outset, before dwelling into the merits of the application, a preliminary objection was raised by counsel for the respondents that Mr Georges Gilbert Merven had not been duly and properly mandated to enter the present application and swear the affidavits in support. According to counsel for the respondents, the board resolution of the applicant company dated 17 January 2018, does not meet the requirements as set out at pages 21 and 22 of ENL Limited & Anor v Independent Commission Against Corruption [2023 SCJ 190] namely –
“(1) subject to any restriction in the constitution of a company, the Board of a company may lawfully delegate and authorise any person to represent the company and to give evidence on behalf of the company in the course of any civil proceedings;
(2) such authorisation must normally emanate from the Board in conformity with its constitution and the relevant legislation;
(3)
the lack of a formal resolution does not render the proceedings void as it is open to a properly constituted Board of directors to ratify subsequently authority to represent the company and to give evidence on behalf of the company;.....”

Counsel for the respondents referred to several authorities which held that a board resolution is required from a company and in the event that there is no board resolution, then there can be a ratification by the company of its awareness that a case had been entered and that the relevant person had been duly mandated to represent the company. None exists in the present case, be it, a board resolution or a ratification. He also added that it is not a mere technical issue which he is raising as preliminary objection. He referred to the following cases, namely, Jyoti's Clinic Ltd v Sika (MAURITIUS) Ltd [2022 SCJ 338], Laser Informatics Ltd v RBRB Construction Ltd [2021 SCJ 407], CEB Facilities Co Ltd v Redundancy Board [2022 SCJ 378] and Flexi Investment Ltd v Devdassingh Ramdenee & Ors [2023 SCJ 19]. Counsel also added that the wordings of the board resolution of 17 January 2018 are too vague and could not have foreseen and catered to give mandate to Mr Georges Gilbert Merven for the present application. According to him, this cannot amount to a board resolution and in the absence of same, the application should be set aside.

Senior learned Counsel for the applicant submitted that the applicant company has only a sole shareholder and director in the person of Mr Georges Gilbert Merven. By virtue of section 128(7)(b) of the Companies Act, the company having a sole director, the board is duly constituted by the director.

Besides, the written resolution of 17 January 2018 gives the3 required mandate to Mr Georges Gilbert Merven to represent and institute proceedings on behalf of the company.

I have considered the submissions of both learned Counsel. The facts of the present case need to be distinguished to ENL Limited [supra]. We are here dealing with a one person company.

However, the requirement is the same for a one sole director company or a company consisting of a number of directors, that is, there must be a board resolution for a specific person to be delegated to represent the company and do whatever is necessary for court proceedings. What is therefore required of Mr Georges Gilbert Merven to enter the present application and swear the affidavits by means of a board resolution to do so. I am satisfied that from a reading of the board resolution of 17 January 2018 of the applicant, there had been a written resolution that "Mr Georges Gilbert Merven, be and is hereby authorised to sign any legal documents and represent the company." I find that the wordings of the board resolution are adequate and sufficient for the said Mr Georges Gilbert Merven to have been duly mandated to represent the applicant company for the present application and to swear the affidavits. I disagree with counsel for the respondents that it must clearly spell out the nature of the application which is being lodged in Court and specific reference to the swearing of affidavits. I, therefore, overrule the preliminary objection raised by counsel for the respondents.

As regards the merits of the application, since it is an interlocutory order for an injunction which is being sought, there are three main considerations as laid down in American Cyanamid Co v Ethicon [1975 AC 396] which the applicant needs to satisfy to be granted such an order, namely –

(i) there must be a serious question to be tried;

(ii) money cannot adequately compensate the damage and prejudice that the applicant is likely to suffer should the interlocutory order be declined; and

(iii) the balance of convenience tilts in favour of the applicant to be granted with an interlocutory order.

The applicant is the lessee of two portions of land found in Trou aux Biches and Chamarel which have been used as quarantine stations for horses which are imported into and in transit in Mauritius before the said horses are conveyed to their final destination. The applicant and the respondent no.1 have been in a business relationship over the years whereby the respondent no.1 would make use of the facilities for horses at the said quarantine stations. It is not disputed that problems arose between the parties when the respondent no.14

refused to pay for the horse quarantine services provided at Trou aux Biches and Chamarel following which the applicant resorted to a saisie conservatoire commerciale to safeguard its rights and to secure payment. Upon payment of the dues, the said horses had been released for onward destination. This led to the present dispute for which the applicant applied and obtained an interim order as referred to above. As for the respondent no.2, he is the attorney of the respondent no.1, who caused a notice to be served on the applicant on 28 December 2021 that an usher would call at Chamarel to take possession of the materials, equipment and tools found therein and then to proceed to Trou aux Biches to conduct a similar exercise.
The respondent no.1 claimed to have met with all the expenses for the setting up of the horse quarantine stations whereas the applicant's case is that it had instead done so for such facilities. There are various annexes in support of each respective party regarding their claims for the setting up of such facilities. A constat had been made by the respondent via the services of an usher, the legality of which is contested by the applicant as the latter had never consented to a constat being made at the said premises.
However, it is a fact that the constat and photos of the facilities existing at the two horse quarantine stations are such that they can be considered to be "immeubles par destination". For that matter I agree with senior learned counsel for the applicant and by referring to articles 524 and 525 of the Code Civil and Joomun v The Queen [1973 MR 238] where reference was made to a learned note of Mr Valéry annexed to a decision of the Cour d'Appel de Lyon –
".....Que les objets destinés à demeurer
constamment dans
l'établissement soient considérés comme en étant des parties
intégrantes, rien de plus naturel: aux yeux du public, ils le complètent et
s'y rattachent par des liens visibles. Mais il en est tout autrement pour
les choses, qui bien que nécessaires peut-être à l'exploitation du fonds
en sortent à tout moment. Non seulement les liens qui les unissent à
l'établissement sont tres laches, mais encore, si on voulait à tout prix
leur attribuer le caractère immobilier, il serait impossible dans une foule
de cas de le leur maintenir.
The facilities found at both premises are described, inter alia, as barns for horses, horse stables, horse walker with control panel, fixed rails, paddock and training track rails, water pump and tanks. I am satisfied that these have been affixed onto the land leased by the5 applicant for the running of its horse quarantine business. Since there is a serious dispute between the parties as to the ownership of the fixtures and fittings put up in the horse quarantine stations run by the applicant, it will be for the competent Court to decide on those issues of ownership. As such there is a serious issue to be tried.
Considering that there is even an affidavit put up by an expert that those items referred to in the constat cannot be considered to be "immeubles par destination" clearly reveals that both parties are in dispute about who owns those items and whether they can be removed or not is also relevant. I find it relevant to refer to Jhuboo S.P.V. v Anauth R. & Anor [2019 SCJ 275] where the Court of Civil Appeal held –
"Indeed, it is well established that it is not the duty of the learned
Judge
in chambers to "resolve conflicts of evidence on the written
evidence as to facts to which the claims of either party may ultimately
depend nor to decide difficult questions of law which call for detailed
argument and mature considerations" as these are matters to be dealt
with at the trial before the competent court. (American Cyanamid Co v
Ethicon [1975] AC 396 per Lord Diplock)"
I find that no amount of damages will be adequate to compensate the applicant if there is the removal and uplifting of the facilities found at the two horse quarantine stations as such removal will in effect prevent the applicant from running the business as it is presently.

Insofar that ex facie the affidavits and the constat made, the existing facilities at the horse quarantine stations are “immeubles par destination”, the balance of convenience tilts in favour of the applicant for the conversion of an interim order into an interlocutory order until the dispute regarding the ownership of the existing facilities are thrashed out and determined by the competent Court.

For the reasons mentioned above, I therefore convert the interim order into an interlocutory order so that the respondent no.1 is restrained and prohibited whether directly or indirectly by himself or his attorney or agent, préposé or otherwise from entering the applicant’s premises situate at Trou aux Biches and Chamarel and operating as quarantine stations for the purpose of dismantling or removing and/or disposing of the materials, tools and equipment on6 the applicant’s premises namely at its Trou aux Biches and Chamarel quarantine stations, pending the determination of the main case.

With costs and I certify as to Counsel.

M J Lau Yuk Poon
Judge
19 July 2023

FOR APPLICANT : Mr M. Rama, Attorney-at-Law
FOR RESPONDENTS : Mr A. Domingue, Senior Counsel
: Mr S.S. Murday, Attorney-at-Law
: Mr N. Hussenee, of Counsel