PIZ PROPERTY LTD & ORS v MOABI LTD & ORS

2023 SCJ 434

Record No. SC/COM/JICA/000440/2021

THE SUPREME COURT OF MAURITIUS
(Commercial Division)

In Chambers

In the matter of:

1. **PIZ Property Ltd**
2. **Nicolas Robert Fabrice Pizano**
3. **Claire Alice Caroline Blanchard**

Applicants

v

1. **Moabi Ltd**
2. **Marc Jean Serge Louis Dailland**
3. **Corinne Blanche Jacquelin also known as Corinne Blanche Edith Jacquelin**

Respondents

In the presence of:

Ayesha Rabeah Jaddoo, Notary Public

Third Party

JUDGMENT

This is an application made under Article 2173-1 of the *Code Civil Mauricien* praying the Judge in Chambers to issue an order authorising the applicants to cause an *hypothèque judiciaire conservatoire* to be inscribed on *lot No. 2 étant un lot commercial situé au rez de chaussée du Bloc A à droite du lot No. 1 et à gauche du lot No. 3 en regardant le dit bloc de la route Côtière, d'une superficie de Quarante Deux Decimal Vingt Cinq Mètres Carrés (42.25m^2)* registered and transcribed in TV 3522/20 belonging to respondent No. 1. The

application is resisted by the respondents who have raised preliminary objections in their first affidavit dated 08 December 2021 and which are reproduced as follows-

> *"3. We stand advised that an application for the inscription of an "hypothèque judiciaire" is not for the mere asking. Applicants must satisfy the stringent conditions contemplated by Article 2173-1 of the Civil Code. They have lamentably failed to establish -*
>
> *i. the existence of a créance;*
>
> *ii. a "nécessité de garantir la créance"; and*
>
> *iii. that the recovery of the créance looks to be compromised on account of -*
>
> *(a) the comportement of the debtor;*
>
> *(b) the situation of the debtor.*
>
> *We are advised that the order sought, as a matter of law, cannot be granted. We, therefore, pray that the application be set aside with costs.*
>
> *4. We further aver that Respondents Nos. 2 and 3 have wrongly been joined in the present proceedings inasmuch as they were not personally involved in the contract for the importation of the goods referred to; the goods were imported in the name of Respondent No. 1 for reasons set out below. The property transcribed in TV 3522/20 is owned by them but by Respondent No. 1. They pray that they be put out of cause."*

Brief facts of the case

1. In virtue of a deed under private signatures dated 26 August 2020, respondents Nos. 2 and 3 who are the sole shareholders and directors of respondent No. 1, granted an option to applicant No. 1 to acquire the totality of their shareholding in respondent No. 1 for and in consideration of a sum of Rs 25,000,000/- in furtherance of which, applicants Nos. 2 and 3 deposited a sum of Rs 2,500,000/- with the third party, a Notary Public.
2. The option was concluded for a period of three months subject to renewal for a further period of three months by mutual consent. This option was subject to several *conditions suspensives* amongst which the abovenamed shareholders of respondent No. 1 were required to submit various documents in respect of the latter so as to enable

applicants Nos. 2 and 3 as its shareholders and directors to decide as to whether the option should be exercised or not.

3. In the meantime, respondent No. 1 acting through respondents Nos. 2 and 3 requested applicant No. 2 to pay for a consignment of goods that respondent No. 1 had ordered from Indonesia. A copy of all invoices was sent by respondent No. 1 to applicant No. 2, who acting on behalf of applicant No. 1, paid for the said consignment by way of a bank transfer in the sum of Euros 13,214,44/-. When the consignment reached Mauritius, respondent No. 1 requested applicant No. 1 to pay VAT in the sum of Rs 129,114/-, which payment was carried out by way of bank transfer to Somatrans SDV Ltd on 04 December 2020.
4. After the expiry of the three months, applicants Nos. 2 and 3 did not exercise the option to acquire the shares of respondent No. 1 as some of the *conditions suspensives* had not been satisfied according to them. The third party and respondents Nos. 2 and 3 were so informed.
5. As the option did not materialise, applicant No. 1 did not benefit from the goods imported from Indonesia and which have remained in the possession of respondent No. 1. Hence, it is the case of the applicants that respondent No. 1 is bound to reimburse the sums of Euros 13,214,44/- and Rs 129,114/- to applicant No. 1, which sums have remained unpaid in spite of a *mise-en-demeure* served on respondent No. 1. The sum of Rs 2,500,000/- paid on 27 August 2020 as *dépôt séquestre* at the time of the signature of the option has not been reimbursed to applicants Nos. 2 and 3.
6. On 12 May 2021, the applicants have lodged a plaint with summons before the Commercial Division of the Supreme Court in relation thereto.
7. The applicants have averred that respondent No. 1 owns only one immoveable property being *Lot No. 2 d'un groupe d'immeubles connu sous le nom de "SUNSET BOULEVARD III".*
8. It has come to the knowledge of applicants that respondent No. 1 has put up for sale the said immoveable property through an advertisement.

First limb of the preliminary objections - Hypothèque Judiciaire

Respondents' arguments

It is the contention of learned Counsel for the respondents that an *hypothèque judiciaire* is granted in exceptional circumstances given the wording of Article 2173-1 of the *Code Civil Mauricien* which reads as follows-

> *"L'hypothèque judiciaire peut être exceptionellement accordée par le juge à la demande du créancier, lorsque celui-ci invoque la nécessité de garantir sa créance dont le recouvrement paraît compromis par le comportement ou la situation du débiteur."*

It has been submitted that for an application to succeed under Article 2173-1 of the *Code Civil Mauricien*, the applicant must show an indebtedness of the respondent towards the applicant and that there must be a *créance* which is due and demandable and that the recovery of that *créance* is compromised on account of the *comportement* or the state of affairs of the debtor. Reliance has been sought on the case of **Gopal B. S. S. v Desai R. A.** [2022 SCJ 176] where the Court referred to the case of **La Banque Française Commerciale Océan Indien v Lauret** [2011 SCJ 403] whereby the trial judge held that judicial mortgage is not given for the mere asking but is granted exceptionally under certain proven conditions.

It has been argued that the applicants in the present matter have not established satisfactorily the existence of a *créance* and also have failed to show how the recovery of the alleged *créance* is compromised on account of the *comportement* or the state of affairs of the debtor. I have been referred to the case of **Ha Shun G. P. H. T. V. & Others v Ha Shun D. K. C. H. T. V.** [2020 SCJ 185] where the Court stated that *"There is no formal definition of what constitutes a "créance". However there have been several judicial pronouncements on the issue. What emerges from these cases is that whether there exists a "créance" is to be determined on the facts and circumstances of the particular case. A "créance" should not … be understood as a synonym of liability. Not until the facts reveal that a clear legal duty to pay "une somme d'argent" or an "indication chiffrée" of an obligation has arisen that one may say there is a "créance" under article 2173-1".* It has been submitted that the terms of the agreement pursuant to which the goods were bought are hotly disputed so that the applicants cannot establish a clear legal duty to pay and it would, therefore, not be appropriate for the Judge in Chambers to establish the existence of the *créance* basing herself only on affidavit evidence; it would be for the trial Court to do so. Further, it has been submitted on behalf of the respondents that the applicants cannot act on a mere apprehension but should come up with facts which should point to such probability by pointing to the particular conduct of the debtor or to his particular situation to show that the recovery of the debt is compromised. It has equally been argued that respondents Nos. 2 and 3 are citizens of Mauritius and do not intend to leave Mauritius permanently. They have also stated that the recovery of the sums of money is not compromised so that there is no need for an *hypothèque judiciaire* to be inscribed on the immoveable property transcribed in TV 3522/20.

Applicants' arguments

Learned Senior Counsel for the applicants has referred me to the case of **G. Anenden & Anor v D. Rummun & Anor** [2000 SCJ 206] where the test to be applied is one as to the genuineness of the case so that it is incumbent on the applicants to establish through the evidence on record that they have properly discharged such burden of proof. It has been submitted that the existence of a *créance* should be first established. I have been referred to the case of **Bardin M. v Dream Cruise Ltd & Others** [2006 SCJ 4] where it was held that *"At the end of the day, the type of "créance" that needs to be put forth by a creditor to obtain a judicial mortgage, by whatever coined legal term the application is made to rest upon, may not matter a lot since it falls upon the sovereign appreciation of the Judge to decide whether there is sufficient material to convincingly persuade him of its existence".* It has been averred by the applicants that two payments, namely, Euros 13,214,44/- and Rs 129,114/- were effected by applicant No. 1 on behalf of respondent No. 1 upon the request made by the latter acting through its directors, that is, respondents Nos. 2 and 3. I have been referred to averments made on behalf of respondents to the effect that applicant No. 1 was allegedly authorised by respondent No. 1 to purchase a consignment of goods from Indonesia in the name of respondent No. 1 and that applicant No. 1 was never requested to pay for the consignment of goods as well as the Value Added Tax (VAT) on that consignment. Learned Senior Counsel for the applicants has submitted that such averment is misconceived inasmuch as the respondents have lamentably failed to make any specific averments in their affidavits or provide any documents including a board resolution pertaining to any purported authorisation of respondent No. 1 given to applicant No. 1 to show that the latter was authorised to import any consignment on behalf of respondent No. 1. The Exclusive Distributorship Certificate annexed to the respondents' first affidavit bears no relevance with any authorisation; the WhatsApp messages annexed to the applicants' first affidavit show clearly that applicant No. 1 was requested to pay for the consignment as well as for VAT for which orders had been placed since 29 September 2020 by respondent No. 2.

My attention has also been drawn to the fact that the applicants have already entered a main case by way of a Plaint with Summons bearing Cause No. SC/COM/PWS/000222/2021 before the Commercial Division of the Supreme Court to recover the *créance.* It has been submitted that it has not been denied by the respondents that respondent No. 1 possesses only one immoveable property being the property that is *in lite* and there is, therefore, a dire need to protect the rights of applicant No. 1, *vide* the case of **State Bank of Mauritius** [2002 SCJ 154]. It has been submitted on behalf of the applicants that respondent No. 1 intends to dispose of the only immoveable property as may be witnessed by an advertisement that the

said property is put up for sale. I have been invited to disregard the unsubstantiated averments of the respondents as regards their alleged solvency and business affairs inasmuch as the respondents have failed to provide any documents in support of same. It has been argued that the *comportement* of respondent No. 1 has been such that it has attempted to dispose of its only immoveable property and as such any sale of the property would liquidate the asset of respondent No. 1 and thus jeopardise the chances of applicant No. 1 to recover its *créance.*

Second limb of the preliminary objections - Interested Parties

Respondents' arguments

It has been submitted on behalf of the respondents that the contract of purchase of goods is between applicant No. 1 and respondent No. 1 and given that the inscription that is being requested is in relation to the property of respondent No. 1, there was no need to join respondents Nos. 2 and 3 as parties since a company is a legal entity that is separate and distinct from its directors and shareholders and they should be put out of cause.

Applicants' arguments

It has been argued on behalf of the applicants that respondents Nos. 2 and 3 had granted to applicants Nos. 2 and 3 an option to purchase the totality of the shareholding of applicant No. 1 for and in consideration of the sum of Rs 25,000,000/- following which applicants Nos. 2 and 3 have deposited Rs 2,500,000/- with the third party. Whilst respondents have admitted that the option was granted only to applicant No. 1 and that respondents Nos. 2 and 3 have signed the option as directors of respondent No. 1, it has been submitted that a reading of the option would show otherwise, that is, respondents Nos. 2 and 3 have acted in their personal capacity by engaging to sell the shareholding that they hold in respondent No. 1. Hence, it has been submitted that respondents Nos. 2 and 3 have been joined in, in their capacity as shareholders of respondent No. 1. I have been referred to the case of **Salajee Z I & Ors v A & M & T Ltd & Anor** [2022 SCJ 50] where it has been held that it is now settled that if it is demonstrated that a party has an interest in the matter, the Court will be reluctant to accede to a motion to be put out of cause. It has been submitted that the averments found at paragraphs 11 to 13 as well as 19 and 20 of respondents' second affidavit clearly denote that respondents Nos. 2 and 3 have an interest in the matter and should remain as parties as their stand is required in order to determine the issues and the outcome of the application will not only affect the interests of respondent No. 1 but theirs as well.

Findings

I have given due consideration to the oral as well as written submissions of Counsel.

As stated in the case of **Banque Nationale de Paris Intercontinentale v Jean Christian Gerard Lemerle** [2001 SCJ 103], the Judge in Chambers is empowered to grant an *hypothèque judiciaire* in exceptional circumstances with a view to safeguard the rights of a creditor against a debtor whose conduct or situation renders the recovery of the debt uncertain.

I have gone carefully through the affidavit evidence on record and I am satisfied that the conduct of the debtor has given rise to concern to the applicants inasmuch as it had come to the knowledge of the applicants that respondent No. 1 had put up the only immoveable property it owns for sale, thus compromising the interests of the applicants as to the recovery of the *créance* that they hold; such fear is further buttressed by the fact that respondents Nos. 2 and 3 are stated to be French citizens although this is denied by the respondents and at the time the application was entered, respondent No. 2 had left Mauritius and there seemed to be an apprehension that respondent No. 3 was also planning to leave Mauritius. In the circumstances, on the basis of the affidavit evidence, I am also satisfied that the applicants need to safeguard their rights as creditors in view of the fact that respondent No. 1 possesses only an immoveable property in Mauritius, which if sold, will jeopardise their rights to recover any monies that the respondents may owe to the applicants. The averments of the respondents that they are owners of other immoveable property in Mauritius have not been substantiated by any document that would allay the fears of the applicants or comfort the Judge in Chambers that the respondents are solvent. Consequently, the first limb of the preliminary objections is set aside.

As regards the second limb of the preliminary objections, I will reiterate what I stated in the case of **Hemsley Holdings Ltd v Sreetharan Vallipuram & Ors** [2022 SCJ 244]. On the strength of the affidavit evidence on record, respondents Nos. 2 and 3 cannot say that they are so unconnected with the subject matter so as to be removed from the present proceedings. A reading of the option shows that respondents Nos. 2 and 3 have acted in their personal capacity by engaging to sell the shareholding that they hold in respondent No. 1. Hence, I am satisfied that respondents Nos. 2 and 3 have been joined in, in their capacity as shareholders of respondent No. 1 and thus are interested parties. The second limb of the preliminary objections is also set aside in the circumstances.

In the light of the foregoing, there is sufficient material put before me to warrant the granting of the application. It is, therefore, ordered that an *hypothèque judiciaire à titre conservatoire* be inscribed as a protective measure on the property registered and transcribed in TV 3522/20 belonging to respondent No. 1. Costs to be costs in the main case.

I certify as to Counsel.

P. D. R. Goordyal-Chittoo
Judge

24 October 2023

For Applicants	**:**	**Mrs. F. Maudarbocus Moolna, Senior Attorney**
	:	**Mrs. U. Boolell, Senior Counsel together with Mr. F. Soreefan, of Counsel**
For Respondents & Third Party	**:**	**Mrs. A. Jaddoo, Attorney-at-Law**
	:	**Mr. A. R. Jaddoo, of Counsel**