

VIGNAUD O. v. TEMPLE CORPORATE SERVICES

2011 SCJ 153

IN CHAMBERS

Record No. CH 26/11

IN THE SUPREME COURT OF MAURITIUS
(COMMERCIAL DIVISION)

In the matter of:

Olivier Vignaud

Applicant

v.

Temple Corporate Services

Respondent

Interlocutory Judgment

This is an application by the beneficiary of a trust created by the beneficiary's now deceased wife, directed against Temple Corporate Services, a management company which is at present the sole trustee for the said trust.

The purport of the application made to the Judge in Chambers is two-fold: firstly, to seek an order directing the respondent to release the sum of 35,000 USD from the trust which sum is purportedly to be used as deposit required in respect of the application for an occupation permit by the beneficiary to enable the latter and his minor son, Lucas Camille Vignaud, the other beneficiary to the trust, to continue residing in Mauritius. Secondly, to seek an order directing the respondent to communicate to the applicant a copy of the trust deed. The application is resisted by the respondent.

In his affidavit in support of the application, the applicant has averred that his late wife Christine Vignaud was the holder of an occupation permit issued by the Board of Investment. Mrs. Vignaud set up a trust with the family money and the sole beneficiaries under that trust are

now the applicant and their minor son Lucas Camille and the respondent is the sole trustee as at present. The applicant, his late wife and their minor son settled in Mauritius and relocated their assets to this country. The child is a student at L'Ecole du Nord and the applicant is a designer by profession.

Mrs. Vignaud passed away on 22 October 2010 and the applicant has obtained an extension of his visa to enable him to sort out the affairs of the family. It is his wish and in the best interest of Lucas and himself, to continue staying in Mauritius. He has been advised by the respondent that in order to continue staying in Mauritius, he needs to apply for an occupation permit as self employed. In order to obtain such a permit he needs to have 35,000 USD deposited in a bank account.

His request to the respondent to release such a sum from his share in the trust and which sum he is willing to take as a loan which he will refund, has not been acceded to and such refusal is causing him irreparable prejudice. Hence his application before me.

The respondent has raised five preliminary objections to the application and on the merits has averred that the applicant has not been engaged in any remunerative employment whilst in Mauritius and his residence status has at all times been as dependent of his late wife. The respondent did not admit that the trust was set up with the family money and averred that the settlor had conveyed to the respondent's *préposés* that the trust assets consisted of the personal funds of the settlor and was specifically focused, upon the child's best interest. The fund was mainly for the latter's needs up to the time of his coming of age and being financially independent. The settlor appointed herself as protector of the trust and in her deliberate judgment, decided not to involve the applicant in the affairs of the trust and the respondent is now the only qualified trustee with the entire discretion of managing the trust.

Since the death of the settlor, it has been agreed between the applicant and the respondent that the funds of the trust would remain invested as decided by the settlor.

The respondent has further averred that since his arrival in Mauritius, the applicant has not had any remunerative form of employment and was financially maintained by the settlor. The applicant is well aware that the object of the trust was to cater for the educational requirements of his minor son. The distribution of the trust funds for the applicant's personal needs as self employed, is not consistent with the wishes of the settlor and would have the effect of depleting the trust fund. At any rate the trust funds are invested in fixed investments under the control and management of professional investment managers appointed by the settlor herself.

The orders prayed for in this application are two-fold: firstly, the release of the specified sum and secondly, an order for disclosure of the trust deed. I propose firstly to deal with the preliminary objections raised by the respondent.

The fifth objection may be quickly disposed of. It is to the effect that:

“The respondent resists the present application on the ground that the Commercial Division of the Supreme Court has no jurisdiction to hear the present application inasmuch as the present application is in relation to a private trust created by a private person having as beneficiaries her husband and her minor son and without any commercial purpose or dimension.”

This ground which challenges the venue of the application has, in my view, no merit. I find no impediment for the present application which concerns a trust managed by a management company and professional investment managers to be dealt with before this court. The fact that the trust is a private one created by a private person and having as beneficiaries,

members of her own family namely her husband and son, does not oust the jurisdiction of this court.

The first three objections in effect challenge the jurisdiction of the Judge in Chambers to entertain and pronounce upon the application. They read as follows:

1. *The respondent resists the present application on the ground that the applicant has failed to specify which aspect of the jurisdiction of the Judge in Chambers has been invoked in contravention with Rule 3 of the Supreme Court (Judge in Chambers) Rules 2002.”*
2. *The respondent avers that the Judge in Chambers has no jurisdiction to entertain the present matter inasmuch as the Trust Act 2001 (the Act), gives jurisdiction to the Supreme Court in relation to the orders sought for in the application.*
3. *The respondent avers that the Judge in Chambers has no jurisdiction to entertain the present application inasmuch as the remedy sought is in the nature of a mandatory injunction which should be entered more appropriately by way of motion and affidavit before the Supreme Court.*

The relevant provision of the law is **Rule 3 of the Supreme Court (Judge in Chambers) Rules 2002** hereunder reproduced:

3. (a) *Subject to paragraph (c) of this Rule, where an application is made to a Judge in Chambers, the praecipe shall clearly specify which aspect of the jurisdiction of the Judge in Chambers is being invoked, in accordance with the requirements set out in paragraph (b) of this Rule.*
- (b) *Where the jurisdiction being invoked –*
 - (i) *is that of the Judge in Chambers as “Juge des Référés under article 806 of the Code of Civil Procedure, it shall be so specified;*
 - (ii) *is laid down in any other specific enactment, that enactment shall be mentioned and the precise provision of that enactment shall, where applicable, be specified.*

Counsel for the respondent has pointed out that the application fails to comply with Rule 3 of the Supreme Court Rule inasmuch as the provision of law upon which it is purportedly being made, has not been specified. She argued that if it is the jurisdiction of the Judge in Chambers under Article 806 of the Code Civil as Juge des Référéés which is being sought, such jurisdiction lies only in “*matters requiring celerity so as to implement a clear legal right to the exercise of which there is no serious or bona fide defence*” (see **Ragavoodoo v. Appaya & Anor** [\[1985 MR 18\]](#)) and such an order from the Judge in Chambers cannot be final in its effect (**Gujadhur v. Gujadhur** [\[2005 SCJ 187\]](#)). In the present case she argued the criteria for seeking the jurisdiction of the Judge in Chambers under the Civil Code are not met in the circumstances of the case given that there has been no due diligence on the part of the applicant and further the prayers sought are not interlocutory or interim ones but are rather in the nature of final orders that will dispose of the application.

Counsel for the applicant argued that the application is made under the provisions of the Civil Code. She argued that the principles relating to trusts are set out at article 1100 of the Civil Code and the fact that the rules and regulations applicable to trusts are embodied in the Trusts Act 2001, cannot be construed as conferring upon the said statute, the status of a cause of action forming the basis of the present application, the statute is a mere enactment of the principles of trust contained in the Civil Code. She referred to the case of **Sofap v. Mauvilac** [\[2009 SCJ 420\]](#) and concluded that there was no necessity to mention the Trusts Act in the application.

Counsel further referred to the provisions of Rule 3(c) which is to the following effect:

“In the case of an application for an Order for the issue of a writ habere facias possessionem or an interim or interlocutory injunction, no compliance is required with paragraphs (a) and (b) of this Rule.”

It is her contention that Rule 3(c) finds its application here inasmuch as the application concerns the issue of an interim or interlocutory injunction in a matter of urgency and which requires celerity.

It is not disputed that there is in fact no mention in the praecipe of any specific enactment under which the application is being purportedly made nor is it specified whether it is the jurisdiction of the “*Juge des Référés*” under **article 806** of the **Code of Civil Procedure**, which is in issue.

This is not necessarily fatal to the application as there is further provision under Rule 3(d) for the Judge in Chambers to give the applicant’s attorney an opportunity to comply with the Rule so that this lacuna may be cured. I have nevertheless deemed it fit for me to look into the issue of jurisdiction and the relevant provisions of the law.

I agree with the arguments put forward by the respondent and I find that the application does not fall within the jurisdiction of the Judge in Chambers as Juge des Référés, inasmuch as the orders sought do not relate to any clear legal right to the exercise of which there is no serious or *bona fide* defence and furthermore, they are not of an interlocutory but rather of a final nature. I have considered whether the application would fall within the relevant statute namely The Trusts Act (The Act) albeit that it has not been so specified in the application but to which my attention has been drawn by counsel for the respondent notably, sections 33 and 63 thereof.

Counsel for the respondent has in the course of her arguments pointed out that the provisions of section 33 of the Act cater for disclosure by the trustee to the persons specified for the specific purposes mentioned therein and subject to the conditions laid down in the said

section. Under the said section, the Judge in Chambers or the Court can make an order for disclosure only in two circumstances i.e. (i) at the request of the Director of Public Prosecutions (DPP) where such information is *bona fide* required for the purpose of any enquiry or trial relative to drugs, arms trafficking or money laundering offences or (ii) at the request of a person having an interest in the trust where the disclosure is required for the purpose of civil proceedings. She has argued that the present application does not fall within the above provisions and the Court cannot make the order prayed for.

Section 33 entitled **Disclosure by trustee** reads as follows:

(1) Subject to the other provisions of this section, a trustee shall, on receipt of a request, provide accurate information as to the state and amount of the trust property and the conduct of the trust administration –

(a) to the Court;

(b) to the settlor, the enforcer, or the protector of the trust, unless the trustee has reason to believe that such person is making the request under duress;

(c) where the terms of the trust so authorise –

(i) to any beneficiary of the trust of full age who has legal capacity and having a vested interest in the trust;

(j) to any charity for the benefit of which the trust was established.

I agree that no order for disclosure can be made under section 33 in the circumstances of the present case. Section 33(1) does not cater for orders of disclosure made at the instance of the court. It deals with disclosure by **a trustee** upon receipt of a request by the persons and authorities mentioned in that section. In the present case the applicant being a beneficiary of the trust of full age and who has legal capacity and has a vested interest in the trust would under section 33(1)(c)(i) be entitled to be communicated the trust deed by the trustee if the deed allowed such disclosure. Section 33(1)(c) makes it clear that such disclosure is subject to the

proviso that the terms of the trust must so authorise. In the present case the respondent has at paragraph 16(f) of its affidavit dated 7 February 2011 averred that the trust deed is silent on the issue of disclosure. In the absence of any express provision in the trust deed authorising disclosure of the information, the trustee cannot disclose such information to the applicant.

Section 33(2) of The Act makes provision for the **Court or the Judge in Chambers** to order disclosure for a reason **specified in subsection 3** to a person legally entitled to it under subsection (1). Section 33(2) reads as follows:

“Except where ordered by the Court or a Judge in Chambers for a reason specified in subsection (3), a trustee shall keep as confidential and shall not be required to disclose to any person not legally entitled to it under subsection (1), or be required to produce or divulge to any Court, tribunal, committee of enquiry or other authority in Mauritius or elsewhere, any information or document in his possession or under his control relating to“ the matters specified at subsection (a) (b) (c) (d) (e) of the said section.

The reasons specified in subsection (3) are hereunder reproduced:

“Notwithstanding any other enactment, the Court or the Judge in Chambers shall not make an order for disclosure or production of any confidential information referred to in subsection (2) except on the application of the Director of Public Prosecutions and on proof beyond reasonable doubt that the confidential information is bona fide required for the purpose of any enquiry or trial into or relative to –

(a) the trafficking of narcotics and dangerous drugs and to the proceeds of such trafficking, contrary to the Dangerous Drugs Act 1986, arms trafficking or economic crime and money laundering under the Economic Crime and Anti-Money Laundering Act 2000;

(b) any act done, otherwise than in Mauritius which, if done in Mauritius, would have constituted an offence of trafficking or economic crime and money laundering under the Economic Crime and Anti-Money Laundering Act 2000.”

As such under section 33(3) the Court or Judge in Chambers can only make an order for disclosure on the application of the DPP for the above stated reasons. Section 33(3) accordingly has no application in the present case.

There is further another relevant provision dealing with applications for disclosure from persons having an interest in the trust namely section 33(5) which reads as follows:

*“Where on application by a person having an interest in the trust, the **Court** is satisfied that the disclosure is bona fide required for the purpose of any civil proceedings, the Court may order the disclosure of information or document or part of it, subject to such conditions as it thinks fit to impose for the purpose of protecting the information or document so obtained from abuse.”*

Under the provisions of section 33(5) the Court is empowered to make an order for disclosure for the reason mentioned in that section i.e. where it is satisfied that the disclosure is *bona fide* required for the purpose of any civil proceedings.

It is interesting to take note of the common law position in the United Kingdom on the issue. Whilst there is an implied obligation of confidentiality between a trustee and a settlor such that the trustee is under a duty not to disclose information, there is also the right of a beneficiary to have access to information. Where there is no provision in the trust instrument relating to disclosure as in the present case, the views expressed by Lord Wrenbury in the case of **O’Rourke v. Darbishire [1920] AC 581, 626** are that:

“[A beneficiary] is entitled to see all the trust documents because they are trust documents and because he is a beneficiary. They are in a sense his own. Action or no action, he is entitled to access to them. This has nothing to do with discovery. The right to discovery is a right to see someone else’ document. A proprietary right is a right to access to documents which are your own”.

Subsequently in the case of **Schmidt v. Rosewood Trust Ltd [2003] UKPC 26** /**[2003] 2 WLR}** the Privy Council held –

“... although a beneficiary’s right to seek disclosure of trust documents could be described as a proprietary right, it was best approached as one aspect of the court’s inherent and fundamental jurisdiction to supervise and if appropriate in the administration of a trust, including a discretionary trust ...”

As such the Court as part of its inherent discretion and general power to supervise the administration of a trust and the actions of the trustees, may authorise disclosure of the trust instrument itself or the relevant parts thereof where appropriate and subject to conditions it deems fit.

The following extract from **Schmidt** is relevant –

“... no beneficiary ... has any entitlement as of right to disclosure of anything which can/plausibly be described as a trust document. Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves, and third parties. Disclosure may have to be limited and safeguards may have to be put in place.”

It must be pointed out that the above cases were lodged before the Court and were not made by way of application before the Judge in Chambers. Similarly it is to be noted that under section 33(5) jurisdiction is given to the **Court**, which in the interpretation section to the Act, section 2 refers, is defined as the Supreme Court. The present application which is before the Judge in Chambers, has not been entered before the proper forum and further it has not even been averred by the applicant that the disclosure of the deed is required for the purpose of any civil proceedings.

The provisions of The Act relating to disclosure are clearly inapplicable in the present case and it has not been shown under what other provision of the law, if any, that the Judge in Chambers has jurisdiction to grant the order prayed for.

As regards the second issue in relation to the release of the funds, counsel for the applicant has argued that the trustee has a duty of impartiality to all the beneficiaries of the trust and cannot favour any particular one. It is her contention that the funds should be released so as to enable the applicant to effect the necessary deposit towards obtention of an occupation permit. Such a permit would be in the interests of both beneficiaries and will ensure that the child's studies are not disrupted so that he can pursue his studies in Mauritius.

In her reply counsel for the respondent has pointed out that the purpose of the trust is to cater for the studies of the child, the respondent will not disburse any sum for the purpose invoked by the applicant unless so ordered by the court as this would be contrary to the settlor's wishes. She has submitted that the settlor made her intentions regarding the trust clear and in her deliberate judgment, decided not to involve the applicant in the affairs of the trust and further the release of the funds for the applicant's personal needs, will deplete the trust fund.

In so far as the release of the funds is concerned, this, in my view, would fall within the administration of the trust, thus falling under **Part XI of The Act** entitled **Powers of Court**, more specifically under **section 63** entitled **General Powers of Court**. Section 63 (1) stipulates as follows:

*“On the application of any person having an interest in the trust, the **Court** may -*

(a) make an order in respect of -

(i) the execution, administration or enforcement of a trust”

The applicant being a beneficiary, is undoubtedly a person "having an interest in the trust". As such he is entitled to make such an application. However such an application can only be made to the "Court" which, as already pointed out is the Supreme Court".

I therefore hold that this application cannot be entertained by the Judge in Chambers.

There are two further grounds namely grounds 3 and 4. They are to the effect that in view of the nature of the application, the existence of facts which are hotly contested, a divergence between the decision of the respondent as qualified trustee of the trust and the alleged interests of the beneficiaries of the trust, it would be best that the matter be thrashed out in a main case.

I have already stated that I cannot entertain the application for the reasons which I have given. Moreover, I agree with grounds 3 and 4 above; I note that there are many material issues which are hotly contested notably the source of the trust funds i.e. whether they consist of the settlor's sole resources or also involve an input by the applicant, the purported wishes allegedly conveyed by the settlor in relation to the trust to the respondent's *préposés*, as well as the reasons for and the pertinence of the settlor's decision not to involve the applicant in the affairs of the trust. All these issues would have an incidence upon the orders prayed for, and need to be thrashed out in open court in the course of a full hearing when *viva voce* evidence will be adduced and tested under cross examination.

For the above stated reasons I decline to grant the orders prayed for and set aside the application. With costs.

I certify as to Counsel.

**R. Mungly-Gulbul
Judge**

30 May 2011

For Applicant: Miss V. Bunwaree, of Counsel together with Mr. M. Sauzier, SC
Mrs. Attorney A. Jeewa

For Respondent: Mrs. N. Jugessur together with Mrs. U. Boolell, both of Counsel
Mrs. Attorney D. Ghose