

**IN THE SUPREME COURT OF SEYCHELLES**

**Civil Side: MC8/2016**

**[2016] SCSC 88**

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**WAVEL JOHN CHARLES RAMKALAWAN**

Petitioner

versus

**THE AGENCY OF SOCIAL PROTECTION**

Respondent

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Heard: 9<sup>th</sup> February 2016

Counsel: Bernard Georges and Annette Georges for petitioner

The Attorney General for respondent

Delivered: 15<sup>th</sup> February 2016

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**ORDER ON MOTION**

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**M. TWOMEY, CJ**

[1] This is an application for an order of discovery under Norwich Pharmacal principles as provided for in Rule 31.16 of the Civil Procedure Rules of the Supreme Court of England (White Book).

- [2] It is not disputed that the Supreme Court of Seychelles has jurisdiction to make such an Order. This is by virtue of the fact that since the Seychelles Code of Civil Procedure does not provide for such an Order, the Supreme Court being vested with all the powers, privileges, authority and jurisdiction capable of being exercised by the High Court of Justice may exercise its equitable jurisdiction to grant such relief (See sections 5, 6 and 17 of the Courts Act).
- [3] The applicant is the petitioner in an election petition filed before the Constitutional Court.
- [4] The respondent is not described in the application or affidavit but this court takes judicial notice of its functions as contained in the Agency for Social Protection Act 2012, namely that it administers social assistance and payments of benefits in accordance with the Social Security Act, 2010.
- [5] The applicant has averred in this application that by letter dated 28<sup>th</sup> December 2015 his attorneys acting on his instructions wrote to the respondent seeking information in its possession and that it had received a response to the letter. As will become evident in the course of this ruling, such letter was not sent to the respondent.
- [6] The information sought by the applicant is contained in the Notice of Motion for this Application namely:
- “The number of payments per day and the total daily value of these payments made to recipients in the period of 1 to 17 December 2015, both dates inclusive, the categories of these payments; and the same information for the same period in 2014.”
- [7] The other averments contained in the affidavit of the applicant are to the effect that the respondent may well be an innocent party to the payment of monies to recipients, acting on orders of the government.
- [8] The Chief Executive Officer of the respondent agency, one Marcus Simeon, has sworn a counter affidavit in which he avers that the action as filed is not maintainable in law as it

was not made in connection with any main case as is required by section 84 of the Seychelles Code of Civil Procedure.

- [9] He further avers that on the advice of his legal advisers the applicant's pleadings amount to seeking judicial relief in the nature of a writ mandamus and is therefore incorrectly brought.
- [10] He also avers that a Norwich Pharmacal Order normally issues where the disclosure sought is from an innocent third party and who has nothing to do with the principal suit whereas in the present suit the respondent has already been cited in an election petition case as allegedly carrying out illegal practices tantamount to the commission of criminal offences under the Elections Act.
- [11] He adds that the application is an attempt to fish for information.
- [12] He also avers that the information sought would if disclosed breach the constitutional rights of individuals namely the protection of their privacy.
- [13] He concludes that in the circumstances the application is an abuse of court process and that if such Order were to issue on an application that is bad in law, the result would be the opening of flood gates for similar bad applications with the aim of accessing information about others.
- [14] Before considering the merits of the application for the Order I must consider the objections of the respondent relating to alleged procedural irregularities of the Application.
- [15] As I have already outlined above Norwich Pharmacal Orders are unknown to the Seychelles Civil Code of Procedure. In England an application for a Norwich Pharmacal Order is commenced by originating summons either as an application for sole relief or ancillary to other relief.
- [16] An originating summons is defined in Rule 4 of Order 1 (RSC 1965 (White Book) as

“...every summons other than a summons in a pending cause or matter...”

It is clear therefore that no parent pleading is necessary for an application for a Norwich Pharmacal Order. The reason is obvious: the respondent in an application for a Norwich Pharmacal Order is not intended to be a respondent in the action for which the information is sought.

[17] There is no Originating Summons known to the civil procedure laws of Seychelles. Summons are issued in Seychelles at the entering of plaints in the registry. Section 30 of the Seychelles Code of Civil Procedure provides:

“When the plaint has been entered in the register of civil and commercial suits, the Registrar shall issue a summons, under the seal of the court and signed by him, to each defendant calling upon him to appear in the Supreme Court at a date and time therein stated, to answer the claim...”

[18] Notices of Motions in accordance with Form 17 of the Seychelles Code of Civil Procedure have been used in previous applications for Norwich Pharmacal Orders. They are supported by affidavits of the applicants. In comparing the prescribed form of Originating Summons in England and that of a Notice of Motion in Seychelles I am of the view that they are similar and achieve the same purpose.

[19] In the first application in Seychelles for a Norwich Pharmacal Order in the case of *DanoneAsiaPte Limited and ors v Offshore Incorporations (Seychelles) Ltd* CS 310/2008, the suit was instituted by way of Notice of Motion supported by affidavit. The same procedure has since been followed (see *Otkritie Securities Ltd v Barclays Bank (Seychelles) Ltd* (2012) SLR 67, *Shchukin v Mayfair Trust Group Limited*, 2015 SCSC, *Global Energy Horizons Corporation v Victoria Corporate (Proprietary) Limited* 2014S CSC 10).

[20] I am loathe to allow a departure from procedure when this is clearly established by rules but there are some circumstances where procedures to be followed are not entirely clear. In such cases, as Domah JA has pointed out in *Ablyazov v Outen & Ors* [2015] SCCA 23:

“...procedure is the hand-maid of justice and should not be made to become the mistress even if many hand-maids would aspire to become mistresses.”

(On this point see also *Gill v Film Ansalt* (2003) SLR 137; *Mary Quilindo and Ors v Sandra Moncherry and Anor* SCA 29 of 2009; *Toomany and Anor v Veerasamy* [2012 UKPC 13]).

[21] Insofar therefore, that the respondent objects to the form by which these proceedings are brought I am of the view that these objections cannot be sustained.

[22] I now turn to the substantive issues raised by this application.

[23] Norwich Pharmacal Orders are grounded in equity and emanate from the case of *Norwich Pharmacal v Commissioners of Customs and Excise* (1974) AC 133. As is stated in Halsbury's Statutes Vol 11(3) (2013 reissue), under the *Norwich Pharmacal* jurisdiction, where wrongdoing has, or is thought to have, occurred, upon an application by the claimant, a court may make an order compelling a third party who is involved in the wrongdoing, however innocently, to disclose any information that may be relevant to the case. (See title Courts, Judgments and Legal Services and s 20(1) and the note “Orders under this section”).

[24] The conditions which must be satisfied before a Norwich Pharmacal Order may be granted were summarised by Lightman J in *Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] EWHC 625 (Ch), [2005] 3 All ER 511 at 21, namely:

"(i) a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer; (ii) there must be the need for an order to enable action to be brought against the ultimate wrongdoer; and (iii) the person against whom the order is sought must: (a) be mixed up in so as to have facilitated the wrongdoing; and (b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued."

[25] Although Lightman J's formulation of the test refers to 'facilitation' of the wrongdoing, Mann J held in *Various Claimants v News Group Newspapers Ltd* [2014] 2 WLR 756.,

after a detailed review of the authorities, that the true principle is that the third party's engagement with the wrongdoing must have been such as to make him more than a mere witness, and that facilitation of the wrongdoing is just one way in which that test might be satisfied.

**[26]** It is in the light of these propositions that I intend to examine the averments of the affidavit. Let me state categorically from the outset that the affidavit supporting the application is sadly lacking in essential particulars. It is sketchy and does not display full and frank disclosure by the applicant which is required for Orders of this kind.

**[27]** The following are the only essential averments sworn by the applicant.

1. That based on information made available to the applicant and from his own observation, extraordinary payments were made by the respondent in the lead up to the December 2015 elections.
2. That a letter dated 28<sup>th</sup> December 2015 was sent to the respondent requesting the information in respect of the payments.
3. That a response to the letter was received.
4. That the information sought is relevant to prove the allegation made.
5. That the respondent may well be an innocent party to these payments.

**[28]** One of basic tenets of a Norwich Pharmacal Order is that full and frank disclosure of all facts pertaining to the applicant's case must be made. This is one of the traditional safeguards the courts have put in place for the protection of respondents. The applicant also has to show an extremely strong case given the draconian nature of the remedy.

**[29]** In respect of the first averment as set out above, it is not stated what information was received by the applicant and what he observed and what payments were made or suspected to be made. This averment lacks detail.

- [30] In respect of the second and third averments the attachments show that the letter of 28<sup>th</sup> December was not sent to the respondent but to a third party. These averments lack accuracy.
- [31] In respect of the fourth averment it is not explained how the information sought will prove the allegation that extraordinary payments were made. This averment lacks detail.
- [32] In respect of the fifth averment an equivocal statement is made. This averment lacks accuracy.
- [33] The learned Attorney-General has submitted that the information sought in this application case is linked to the election petition filed by the respondent in CS1/2016 and relates to its paragraph 25 where it seeks to establish illegal practices by one of the respondents in the election petition.
- [34] The applicant for this order has averred that the respondent, that is the Agency for Social Protection, may well be an innocent party in this case. The inverse is also true, that is, that the respondent and/or its employees may also be wrongdoers. In this respect, the learned Attorney General has submitted that Norwich Pharmacal orders are made against third parties who are mere witnesses not wrongdoers themselves.
- [35] That may well have been the position when Lord Reid was considering the *Norwich Pharmacal* case (supra) itself. The courts have however been very flexible in granting such orders and case development has resulted in the approach now being that the third party from whom information sought not necessarily being an innocent third party: he may be a wrongdoer himself (see *CHC Software Care v. Hopkins and Wood* [1993] FSR 241, *Arsenal Football Club PLC v Elite Sports* [2003] FSR 26).
- [36] However, two matters weigh against the granting of the Order.
- [37] Firstly, in dismissing the application for a disclosure order in *Mitsui & Co Ltd* (supra) Lightman J stated that since the Norwich Pharmacal Order is a remedy of last resort there must be a necessity to grant the order, in that :

“[t]he necessity required to justify exercise of this intrusive jurisdiction is a necessity arising from the absence of any other practicable means of obtaining the essential information.”

- [38] Learned counsel for the applicant, Mr. Georges has himself admitted that he can think of two ways of obtaining the information he needs. I dare say that the most obvious way of obtaining the information sought is by writing to the respondent. This has not been done. Another way is by summoning the party to give evidence. Given these alternatives and others, the application for a Norwich Pharmacal Order in this case may be akin to using a sledgehammer to crack a nut, a precedent which if set will result in the court being flooded with such applications where parties simply absolve themselves of the need for pre-litigation work.
- [39] Secondly, as has been submitted by the learned Attorney General, given the sketchy affidavit and the lack of cogent information and full and frank disclosure it may well be that this application is a fishing expedition, an enterprise not permitted for orders of this nature (see *Axa Equity and Law Life Assurance Society Plc and others v National Westminster Bank (PLC)* [1998] CLC 1177, *Arab Satellite Communications Organisation v Al Faqih & Anor* [2008] EWHC 2568, QB).
- [40] The application in this case is far from what was conceived in the original Norwich Pharmacal Order. In that case the applicants could not sue the infringers because they did not know who they were, and all they wanted was names and addresses. Here the applicants know the alleged tortfeasors. They want to assess if the information is enough to sustain a case being made out against a respondent in an election petition. It is clearly a fishing expedition.
- [41] For these reasons, the application is refused with costs.



Signed, dated and delivered at Ile du Port on 15<sup>th</sup> February 2016.

**M. TWOMEY**  
Chief Justice