Ministry of Rural Development, Fishery, Craft Industry and Environment of the Union of Comoros *v* Chan Leng Leng and another
[2013] SGHC 81

Case Number : Suit No 716 of 2012 (Registrar's Appeal No 423 of 2012)

Decision Date : 19 April 2013

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Suresh Nair and Daniel Zhu (Straits Law Practice LLC) for the appellant; Christopher Woo and Jeremy Nonis (Lawrence Quahe & Woo) for the first and second defendant.

Parties : Ministry of Rural Development, Fishery, Craft Industry and Environment of the Union of Comoros — Chan Leng Leng and another

Civil Procedure – Costs – Security

International Law – Sovereign Immunity

19 April 2013 Judgment reserved.

Choo Han Teck J:

1 This is an appeal against the Assistant Registrar's order for the plaintiff, the Ministry of Rural Development, Fishery, Craft Industry and Environment of the Union of Comoros, to provide security for costs in the sum of $25,000 for its action against the defendants. The plaintiff is a government department of the Union of Comoros, a sovereign island state located in the Indian Ocean along the eastern coast of Africa. The first defendant Chan Leng Leng is the liquidator of the second defendant Interocean TSM Holdings Pte Ltd, which has entered into a members' voluntary liquidation. The plaintiff obtained a judgment dated 17 March 2010 against the second defendant in the Court of Appeal of the Union of Comoros for the sum of EUR 3,298,000. The first defendant rejected the proof of debt lodged for the judgment sum, and the plaintiff commenced the main proceedings to reverse the first defendant's decision pursuant to r 93 of the Companies (Winding Up) Rules (Cap 50, R 1, 2006 Rev Ed).

2 Counsel for the appellant, Mr Suresh Nair ("Mr Nair"), raised the preliminary objection that the court did not have the power to order security for costs against the plaintiff on the ground that the plaintiff – a government department of a sovereign state – was entitled to certain procedural privileges under s 15(2) of the State Immunity Act (Cap 313, 1985 Rev Ed) ("the Act"). Section 15 states as follows:

> **Other procedural privileges**
>
> **15**.—(1) No penalty by way of committal or fine shall be imposed in respect of any failure or refusal by or on behalf of a State to disclose or produce any document or other information for the purposes of proceedings to which it is a party.
>
> (2) Subject to subsections (3) and (4) —

(a) relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property; and

(b) *the property of a State shall not be subject to any process for the enforcement of a judgment* or arbitration award or, in an action in rem, for its arrest, detention or sale.

…

[emphasis added]

Mr Nair's argument turned on the interpretation of the phrase "any process for the enforcement of a judgment" in s 15(2)(b) of the Act. He submitted that an order for the provision of security for costs was akin to a process for the enforcement of a judgment as the very purpose of ordering security was to compel the plaintiff to bring property within the jurisdiction of the court for the subsequent enforcement of a judgment for costs. Counsel for the defendants, Mr Christopher Woo ("Mr Woo"), submitted that the Act was largely based on the United Kingdom's State Immunity Act (c 33) ("the UK Act"), and brought my attention to the amendments to what is now s 13 of the UK Act – the corresponding provision to s 15 of the Act – in the House of Lords moved by the Lord Chancellor Sir Elwyn Jones during the passage of the United Kingdom State Immunity Bill (see United Kingdom, House of Lords, *Parliamentary Debates* (16 March 1978) vol 389 at col 1520):

> … *Subsection (14)(1), as it now stands, provides that a State shall not be required to give security for costs.* That was thought to be in accordance with the requirements of Article 17 of the Convention. Under the common law a foreign State may be required to furnish security for costs. In the Second Reading debate, the noble Baroness said, as reported at column 62 of the Official Report of 17th January, in relation to security of costs: "In the European Convention, the Article dealing with this particular matter leaves the question open, and I think that the Bill should take a more robust line on this particular aspect." *I am always open to take advice on robustness from the noble Baroness, and we have therefore gone to the extremity of robustness in this Amendment by leaving the subsection out altogether.* … [emphasis added]

Mr Woo argued that while the Parliament of Singapore had modified certain aspects of the UK Act to suit the particular needs and circumstances of Singapore, it had been silent on the enactment of s 15(2) of the Act and must be taken to have agreed with the underlying intent of the United Kingdom Parliament in relation to the corresponding provision. Accordingly, s 15(2) should not be construed as granting immunity to a foreign state from furnishing security for costs, and this was consistent with the common law position. Mr Woo also submitted that as the plaintiff had instituted proceedings in Singapore to seek relief, it was "subject to the jurisdiction of the Singapore courts".

3 Mr Woo's broad argument that the plaintiff had "submitted" to the jurisdiction of this court suppresses the distinction between what has been described as the "adjucative jurisdiction" of the court (which is defined by s 3 of the Act) and the "enforcement jurisdiction" of the court (which is limited by s 15), discussed in Lord Diplock's speech in *Alcom Ltd v Republic of Columbia* [1984] AC 580 at 600C–D. A state is not deemed to consent to the jurisdiction of a foreign court to levy execution on its property or to enforce *in personam* orders merely because she has consented to being made party to an action. The applicability of s 15 of the Act, and the grant of procedural privileges, is therefore independent of the plaintiff's submission to the jurisdiction of the Singapore courts to hear the claim.

4 In my judgment, however, s 15(2)(b) of the Act does not curtail the court's jurisdiction to order security for costs. The Explanatory Statement to the State Immunity Bill (Bill No 20/79) (the

"Explanatory Statement") describes s 15 as follows:

> … No order for penalties, injunctions or specific performance can be issued against a State without the State's consent. There is to be *no execution against State property* without consent except against property which is used or intended to be used for commercial purposes. [emphasis added]

Neither the Explanatory Statement nor the relevant parliamentary debates specifically addresses the issue of security for costs, and I was not directed to any authority on the interpretation of s 15(2)(b). It is nevertheless clear that the purpose of enacting the Act was to move from the common law doctrine of absolute state immunity to a clearly defined legislative framework of restrictive state immunity: see the comments of Mr E.W. Barker ("Mr Barker"), the then Minister for Law and Science and Technology at the Second Reading of the State Immunity Bill in *Singapore Parliamentary Debates*, *Official Report* (7 September 1979) vol 39 at col 408.

5 The structure of s 15 is inclusionary; a state is not granted a general immunity from the enforcement procedures of the forum court save for specified exceptions, but is instead subject to the normal rules and procedures of the forum court unless it is expressly granted immunity under s 15. I am of the view that the plain meaning of the words "any process for the enforcement of a judgment" in s 15(2)(b) refers to a legal procedure of execution or attachment against property in satisfaction of a judgment that has already been rendered; it does not, on the face of the language used, cover pre-judgment measures. An order for security is an order for payment into court of a fixed sum of money or the provision of a guarantee, and is not a process of levying execution against state property as envisaged by the Explanatory Statement. I observe that certain orders that may potentially be made during the course of the proceedings, such as injunctions and penalties for failure to provide discovery or disclosure, are expressly prohibited by ss 15(2)(a) and 15(1) respectively, but the Act is silent on whether security for costs may be ordered against a state. I am not persuaded by Mr Nair's contention that it is "artificial in the extreme" to draw a distinction between the process of enforcement of a judgment and an order for security for costs to bring funds into the jurisdiction against which a judgment for costs may subsequently be enforced. The former involves the coercive seizure of or attachment against property of the foreign state, while the latter is a procedural condition precedent for the continuation of legal proceedings.

6 The legislative debates in the House of Lords that were cited by Mr Woo also support the above construction of the language of s 15(2)(b). I agree with Mr Nair that I should be cautious in attributing to the Parliament of Singapore an intention of the Parliament of the United Kingdom – *ie*, the express exclusion of immunity from the provision of security for costs through the deletion of a clause that previously granted such immunity. I note that Mr Barker stated at the Second Reading of the State Immunity Bill that it was preferable to preclude the direct application of the UK Act to Singapore as there were certain provisions in the UK Act that were not appropriate to Singapore, particularly those concerning the European Convention on State Immunity (see *Singapore Parliamentary Debates*, *Official Report* (7 September 1979) vol 39 at col 408), and there is nothing to indicate that the Parliament of Singapore had considered the desirability of taking a "robust" position towards the provision of security for costs by a foreign state and had intended to adopt a similar position. Notwithstanding my reservations on the imputation of parliamentary intent, I am of the view that the presence of a separate provision in the original United Kingdom State Immunity Bill governing the specific subject matter of security for costs would logically mean that the language of s 13(2)(b) of the UK Act, and hence s 15(2)(b) of the Act which is *in para materia* with s 13(2)(b) of the UK Act, was not drafted to include an order for security for costs. Mr Nair has urged me to interpret s 15(2)(b) in a "purposive" manner that stretches the meaning of the ordinary language of s 15(2)(b), but in the absence of any evidence of parliamentary purpose, I can only determine what Parliament

intended through the words it used, not what Parliament could have intended but did not say.

7 Turning to my discretion to order security for costs under O 23 r 1(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), I consider that it is just in the present circumstances to make such an order. It was not in dispute that the plaintiff is not "ordinarily resident" in Singapore and that the court's threshold jurisdiction to order security is invoked, but Mr Nair submitted that the court should not grant security for costs as the merits were in the plaintiff's favour and the plaintiff's representative had stated on affidavit that the plaintiff could and would pay for the costs of the legal proceedings. Mr Woo contended that the plaintiff's case was legally weak and that security for costs should be ordered as it would be difficult for the defendants to enforce any judgment in their favour. I am not persuaded by both parties' submissions on the importance that I should attach to the legal merits of their respective cases. In *Creative Elegance (M) Sdn Bhd v Puay Kim Seng* [1999] 1 SLR(R) 112, the Court of Appeal held (at [25]) that it was not the law that a plaintiff would not, as a matter of course, be ordered to provide security for costs once he has shown that he has a *bona fide* claim with a reasonable or high probability of success. There are clear factual divergences between the parties that cannot be resolved on affidavit evidence alone, and it was not "demonstrated one way or another that there is a high degree of probability of success or failure" (*per* Browne-Wilkinson VC in *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 WLR 420 at 423). It is for the trial judge to determine the merits of the case, and I do not think it is appropriate at this stage for me to form a preliminary assessment. I therefore accord little weight to this factor in deciding whether security should be ordered.

8 I accept Mr Woo's submission that there was no evidence that the plaintiff had any assets in Singapore and that it might be difficult for the defendants to enforce any judgment for the payment of costs as there is no reciprocal enforcement treaty between Singapore and the Union of Comoros. It was not suggested to me that the plaintiff did not have the ability to provide security or that ordering security would unfairly stifle its claim, and neither was it argued that the sum of security ordered was onerous or oppressive. In response, Mr Nair submitted that considerations of comity should militate against an order for security for costs. The court's discretion to order security is a flexible one, and in my view, there should not be any general presumption against making an order for security when the plaintiff is a foreign state. Mr Nair has not demonstrated why it would be an affront to the dignity or independence of a foreign sovereign if she is asked, as part of the procedural rules of the forum court, to provide security for the costs of judicial proceedings that she has of her own volition instituted in that court. I do not think that recourse to vague notions of courtesy and goodwill are helpful in determining whether it is *just* to order security and also decline to make any comment on the weight that I would attach to the representative's declaration of intent to honour any judgment for costs. Taking into consideration the potential cost and delay of having to subsequently enforce any judgment in the Union of Comoros and the fact that it has not been contended that the order would prejudice the plaintiff in any appreciable manner, I find that the balance is in the defendants' favour.

9 I conclude that it is just in the circumstances to make an order for the plaintiff to furnish security for costs in the sum of $25,000. The appeal is therefore dismissed.

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