BHUNJUN V. v HON. ATTORNEY GENERAL & ORS

2022 SCJ 219

Record No. 122327

THE SUPREME COURT OF MAURITIUS

In the matter of:

1. **BHUNJUN Veekram**
2. **Betamax Ltd**

Applicants

v.

1. **Hon. Attorney General**
2. **Hon Green-Jokhoo**
3. **Mr. T. Parbhunath**
4. **Mr. K. Mosafeer**
5. **The State of Mauritius**

Respondents

In the presence of:

1. **The Director of Public Prosecutions**
2. **The State Trading Corporation**

JUDGMENT

[1] The applicants are applying for leave to judicially review an order given by the President of the Republic to appoint a Commission of Inquiry (*vide* GN 1109 of 2021) with three main terms of reference numbered 1 to 3:

> 1. a) the circumstances which led to the signing of a contract of affreightment between the State Trading Corporation ("the STC") and the second applicant ("Betamax");

there are four subheadings (i) to (iv) which specify for enquiry into (i) the pre-contract negotiations and signing of a Contract of Affreightment ("CoA") between the 2nd applicant ("Betamax") and the 2nd co-respondent ("STC"), (ii) the amendments brought to the Public Procurement Act and Public Procurement Regulations prior to the signing of the CoA, (iii) the provision of guarantee by the Government of Mauritius and (iv) the termination of the CoA.

b) the decision-making process of the relevant public bodies and public officials concerned by (a)(i) and (ii) above;

c) the contract terms contained in the contract of affreightment with regards to financial, commercial and procurement considerations;

d) any matter ancillary or incidental to (a) to (c) above.

2. consider and report on whether the national interests of Mauritius were safeguarded by public bodies and public officials concerned with the contract of affreightment.

3. make appropriate recommendations that will contribute to the strengthening of the integrity of the procurement system in the public sector.

[2] The grounds of judicial review are that the decision to appoint a Commission of Inquiry are:

- illegal, *ultra vires*, irrational and Wednesbury unreasonable;
- in contravention of sections 1, 3 and 10 of the Constitution and interference with the administration of justice;
- there is appearance and/or real possibility of bias.

[3] The applicants are furthermore requesting a stay of the proceedings of the Commission of Inquiry and an injunction against the second, third and fourth respondents.

[4] The first respondent ("Attorney General") and the fifth respondent ("the State") are objecting to leave being granted on the following grounds:

a) the first applicant has no *locus standi* to enter the present application;

b) the present application has been wrongly directed against the Attorney General and the State;

c) the application being defective, the prayer for stay does not have any "*raison d'être*" the more so that, on the facts disclosed in the applicants' affidavit dated 3 February 2022, the balance of convenience does not lie in the applicants' favour.

[5] The second, third and fourth respondents have adopted the stand whereby they will abide by the decision of the court and only offer submissions in law. This has been in relation to the motion for stay made by the applicants.

[6] Co-respondent no. 1 is abiding with any decision of the court and has not offered any submissions. Co-respondent no. 2 has left default.

[7] Under the first ground of objection, the Attorney General and the State submit that none of the terms of reference refer directly or indirectly to the first applicant ("Mr V. Bhunjun"). They submit that the fact that Mr V. Bhunjun is a director of the second applicant ("Betamax") is not sufficient. They also submit that a particular averment made in the applicants' affidavit at paragraph 30 refers to a joint-venture and to the Bhunjun group. The Attorney General and the State distinguish between the different legal entities and personalities involved and submit that Mr V. Bhunjun is a separate legal personality from Betamax. Finally, they draw attention to the fact that Mr V. Bhunjun has stated he has nothing to do whatsoever with any alleged criminal conspiracy between the relevant government ministries and Betamax.

[8] Briefly the submissions of the applicants are that the testing of Mr Bhunjun's standing should be a two-stage process and that at the present stage which is one for leave, the test to be applied is to turn away hopeless or meddlesome applications only. When the matter comes to be argued, the test would be whether the applicant can show a strong enough case on the merits in relation to his own concern, *vide* **Betsy v Bank of Mauritius [1992 MR 231]**.

[9] Even a cursory look at the affidavit of the applicants as well as the background set out, reveals that at the very least, Mr V. Bhunjun is personally aware of many of the facts which are relevant to the terms of reference relating to 1(a) to (d). We are not prepared to uphold the objection that Mr V. Bhunjun has no *locus standi*.

[10] The second objection by the Attorney General and the State is that the present application is wrongly directed against them. It is the contention of Mr Jean-Louis, Assistant Parliamentary Counsel appearing for these two respondents that because it was the Cabinet of Ministers which took the decision that there should be a Commission of Inquiry, therefore it was the appropriate party to this application rather than the Attorney General or the State of Mauritius.

[11] The President appointed the Commission of Inquiry under the Commissions of Inquiry Act in accordance with the advice of the Cabinet which has an existence of its own under section 61 of the Constitution. This section provides that:

> 61. *(1) There shall be a Cabinet for Mauritius consisting of the Prime Minister and other Ministers.*
>
> *(2) The functions of the Cabinet shall be to advise the President in the Government of Mauritius and the Cabinet should be collectively responsible to the Assembly for any advice given to the President by or under the general authority of the Cabinet and for all things done by or under the authority of any Minister in execution of his office.*

[12] This section is being relied upon to support an argument that it provides for the possibility of the Cabinet of Ministers being a party in legal proceedings. In addition to this, Mr. Jean-Louis relied on the judgment of the Privy Council of Antigua and Barbuda whereby the respondent was the Cabinet of Ministers of that country, **HMB Holdings Ltd v Cabinet of Antigua and Barbuda (Antigua and Barbuda) [2007] UKPC 37**.

[13] We have considered this judgment and we are of the view that it is not authority for the premise that the requisite party to proceedings can only be the Cabinet of Ministers. It is merely an illustration of a case whereby the Cabinet of Ministers is a party in a case before the courts. It is to be noted that this case concerns compulsory acquisition of land under the Land Acquisition Act of Antigua and Barbuda. Contrary to Mauritius where it is the Minister of Housing and Land Use and Planning who has the power under our equivalent statute, in Antigua and Barbuda it is the Cabinet of Ministers which considers whether land should be acquired for a public purpose. This judgment does however state that the decision of the Cabinet of Ministers can be subject to judicial review. But this is not the objection taken nor the point under consideration.

[14] The submissions of the applicants are that the Attorney General and the State of Mauritius can be parties to the present proceedings and that they are able to represent the Cabinet of Ministers for the purposes of this judicial review. We agree.

[15] As a matter of fact, section 10(3) of the State Proceedings Act 1953 provides that civil proceedings against the State are to be instituted against the appropriate authorised government department. As far as we are aware and it has not been submitted otherwise, the Cabinet of Ministers is not a government department. The section carries on to state that civil proceedings can be instituted against the Attorney General when there is a reasonable doubt as to which department is appropriate to be made a party. We also note that all Counsel were

unable to provide any previous judgment of the Supreme Court whereby the Cabinet of Ministers has been a party and where this issue has been addressed. We are of the view that the distinction sought to be made by Mr Jean Louis is artificial and that the State and the Attorney General are appropriate and adequate parties in this judicial review. This is in any event not fatal to a judicial review at this stage v*ide* **Chenney M A v Independent Broadcasting Authority [2017 SCJ 111]**.

[16] We therefore do not find that the two objections raised by the Attorney General and the State are of substance and we do not uphold them.

[17] We now consider the motion of stay of the proceedings of the Commission of Inquiry. This is pertinent if leave is granted on the first leg of the application. We have found that upon a close consideration of whether there is a serious issue to be tried and in deciding whether a stay should be granted or not, this has led us to necessarily consider whether the threshold for leave has been reached for a judicial review.

[18] In England, applications for judicial review are governed by rules in the White Book Order 53, though we are not strictly bound by the rules, we do refer to them for guidance and sometimes follow it closely. It is therefore highly pertinent that in England leave to apply for judicial review is initially done *ex parte* before a single judge without a hearing. As per Order 53/1, this is to eliminate frivolous, vexatious, all hopeless applications for judicial review without the need for a substantive *inter partes* judicial review hearing and also to ensure that an applicant is only allowed to proceed to a substantive hearing if "the court is satisfied that there is a case fit for further investigation at a full *inter partes* hearing". The decision is subject to an appeal procedure.

[19] In our jurisdiction, the manner in which an application for judicial review is dealt with is fluid. There has been a cursus that the application for judicial review is initially called before the Chief Justice in Chambers, often the matter is called *inter partes* and is then referred to a hearing in court before two judges as to whether leave should be granted. This is what occurred in the present matter which has been referred to open court before two judges by the Chief Justice and where the statement of case as well as the affidavit of the applicants have been filed. The respondents have not filed affidavits and have raised preliminary objections.

[20] Therefore the first opportunity the bench has to assess the application for leave occurs at a later stage and *inter partes*. We find that we are empowered and able to consider whether in the

present matter, as was expounded in **A. Luchmun v The Mauritius Sugar Terminal Corporation [1990 MR 343]**, "*leave should be granted, if on the material then available the court thinks, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant*". This is in fact mirroring the provisions found in the White Book O.53, r.14: "*leave should be granted, if on the material then available the court thinks, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant*".

[21] We are of the view that we are empowered and need to be satisfied "... whether there is or not an arguable case upon consideration of the papers". The relevant issues have been alluded to in the extensive written submissions of the parties on the issue of stay.

Leave sought to challenge the decision to institute a Commission of Inquiry

[22] Now, the laws allowing the appointment of a Commission of Inquiry are found in the Constitution and the Commissions of Inquiry Act. The Cabinet of Ministers is empowered to advise the President to appoint a Commission of Inquiry. The President upon advice of the Cabinet of Ministers, has the power to appoint a Commission of Inquiry.

[23] The cited laws are not challenged and it is not in issue as to whether the Cabinet of Ministers is able to advise the President as to the appointment of a Commission of Inquiry, this is found both in the Constitution and in the Commissions of Inquiry Act.

[24] What the applicants are alleging is that these powers have been exercised in the present instance:

- "illegally, irrationally, unreasonably, is tainted with the appearance and/or real possibility of bias and in breach of the applicants' right to the protection of law and in contravention of sections 1, 3 and 10 of the Constitution.
- In the alternative, the advice to the President appoint to the Commission of Inquiry is wrong for the same reasons as above.
- Again, for the same reasons as above it is seeking a declaration that the appointment of members of the Commission of Inquiry is tainted with the appearance and/or real possibility of bias".

Grounds for review

[25] The applicants' challenge "*go to the root of the setting up of the Commission of Inquiry, i.e., they seek to challenge the decision of the President acting upon the advice of Cabinet and/or the advice of Cabinet itself to the President to appoint the Commission of Inquiry under its terms of reference."* (paragraph 54 of applicants' written submissions dated 19 February 2022). Apart from the question of the legality of the decision to set up the Commission of Inquiry, the applicants also challenge the proceedings of the Commission of Inquiry. However, the reason for challenging the proceedings of the Commission of Inquiry has not been expanded upon and there is only a reference to this in the affidavit of Mr. Bhunjun at paragraph 97. In addition, the statement of case does not refer specifically to this issue.

[26] It is to be noted that the applicants are not attacking the terms of reference or even some of them, but the decision to institute a Commission of Inquiry.

[27] The statement of case propounds that the decision leading up to the appointment of the Commission of Inquiry is illegal, *ultra vires*, irrational, Wednesbury unreasonable, tainted with the appearance and/or real possibility of bias and interferes with the administration of justice, contempt of court and in breach of the applicants right to the protection of law and/or is in contravention of sections 1, 3 and 10 of the Constitution. We therefore consider each "ground".

[28] Illegal, *ultra vires*, irrational, Wednesbury unreasonable are the umbrella terms which have been used by the applicants. The applicants in their written submissions dated 01 December 2021 at paragraph 37 refer to the appointment of the Commission of Inquiry and to the terms of reference which they submit relates to matters which have the force of "*l'autorité de la chose jugée*". **Sooknah C. v Central Water Authority [1998 SCJ 115]** is cited in relation to the "principle of conclusiveness".

[29] Learned Counsel for the applicants submits that "*l'autorité de la chose jugée s'attache également aux sentences arbitrales*" from **Encyclopédie Dalloz Vo Chose Jugée**.

[30] The applicants aver that any proceeding, execution and reporting by the Commission of Inquiry pursuant to its terms of reference amount to a usurpation of the functions of a court of law inasmuch as the first and second terms of reference of the Commission of Inquiry, relate to matters which are *res judicata,* final and binding and have force of "*l'autorité de la chose jugée*"

as they have been finally determined by the tribunal and upheld by the Judicial Committee of the Privy Council ("the JCPC") in **Betamax Ltd v State Trading Corporation [2021] UKPC 14**.

[31] We do not agree for the following reasons. Firstly, a Commission of Inquiry is not carrying out a judicial function and giving judicial decision. Therefore, the question of the usurpation of the functions of a court of law does not arise. We adopt and agree with the following statement found in the Court of Appeal of Canada **Beno v Canada [1997] 2 FC 527** which defines a commission of inquiry in the following manner:

> *"A public inquiry is not equivalent to a civil or criminal trial … In a trial, the judge sits as an adjudicator, and it is the responsibility of the parties alone to present the evidence. In an inquiry, the commissioners are endowed with wide-ranging investigative powers to fulfil their investigative mandate … The rules of evidence and procedure are therefore considerably less strict for an "inquiry" than for a Court. …"*
>
> The underlining is ours.

[32] The principle of *res judicata* or "*l'autorité de la chose jugée*" cannot apply, even though the terms of reference overlap with what has been considered partly by the Supreme Court of Mauritius and the JCPC namely the arbitration and the enforcement of its award. It was the arbitrator who considered the issue of illegality including whether there was a conspiracy to benefit Betamax. The applicants have averred in their affidavit (at paragraph 104) that there were agreed facts in the course of arbitration which fall squarely under Term of Reference 1(a)(i). This reveals therefore that even the arbitrator did not necessarily examine and adjudicate upon the agreed facts and circumstances leading to the CoA. It is also relevant that the aforementioned courts did not make findings of facts *per se* but considered issues of law.

[33] We observe that the main purpose of parties electing for arbitration is to avoid court hearings and proceedings and the court's involvement is highly limited by what is for all intents and purposes a procedure agreed to in a contractual agreement between the parties.

[34] The Commission of Inquiry in question, is in fact involved in what is termed an *ex post* inquiry as opposed to an *ex ante* inquiry. An *ex ante* inquiry would form part of a decision-making process leading to a final decision. The *ex post* inquiry here is being held after the event and therefore necessarily involves "an accountability mechanism that serves to scrutinise and facilitate critical reflection upon that process and its fruits" (17.3 *Ex post* inquiries fifth Edition Administrative Law, Elliot & Varuhas). The Commission of Inquiry is delving into the circumstances which led to the awarding of CoA.

[35] The applicants have referred to the political undertones in the affidavit to underline their concerns in the institution of the Commission of Inquiry. It is a truism that any democratic State has an elected government at its helm and therefore in the Cabinet of Ministers who tendered its advice to the President. This will be the case for any government and any Commission of Inquiry appointed, however there are checks and balances within the system.

[36] We find it apt to refer to the following article which refers to the functional separation between law and politics and Drewry in "Judicial Inquiries and Public Reassurance" [1996] PL 368 he sets out the following passage from Shklar, Legalism (Cambridge, Mass 1964) at 111):

> *"There appears to be virtually unanimous agreement that law and politics must be kept apart as much as possible in theory no less than in practice. The divorce of law from politics is, to be sure, designed to prevent arbitrariness, and that is why there is so little argument about its necessity. However, ideologically, legalism does not stop there. Politics is regarded not only as something apart from law, but as inferior to law. Law aims at justice, while politics looks only to expediency. The former is neutral and objective, the latter the uncontrolled child of competing ideologies."*

[37] Any decision of any Cabinet of Ministers can rightly or wrongly be characterised as a political decision. It is the role of the courts to act as a safeguard if a political decision is wrong in law. This would occur upon the court being properly seized. The present application does not reveal any such transgression.

[38] The applicants in their written submissions have referred to the case of **Bird v The Attorney General of Antigua and Barbuda 2010** where leave for judicial review was granted and as well as a stay which we have considered and we note that it has certain similarities with the matter at hand. Here too, it was contended that the political party which was in power had made many adverse remarks in public and that it had caused the setting up of a commission of inquiry. There are however crucial differences between the case of **Bird** and the applicants' situation. The two notable ones being that there were pending civil proceedings and that there was a specific term of reference "*to establish whether any persons/corporations found to be involved in the diversion of these funds acted unlawfully or improperly and/or whether persons must conduct themselves in public office or in the management of any department of the public service"*.

[39] We have also come across the following at paragraph 103 of the judgment of **Bird** which is of interest:

> *The rules regarding abuse of the court's process and interference with the course of justice are potent based on the foregoing dicta[1]. Contextually, to these must be juxtaposed dicta from number of cases decided in a number of Commonwealth common-law jurisdictions have established a number of rules regarding commissions of inquiry which include the following: a commission of inquiry is not a court of law and as such cannot perform the functions of a court of law; a Commission need not follow the rules of evidence which must apply in a court of law[2], a commissioner cannot express any opinion as to criminal liability of any person or on the death of a person, and a commission of inquiry cannot be used to circumvent the federal criminal law; the courts cannot contemplate for a moment the transference to the executive of the responsibility for seeing that the process of law is not abused.[3]*
>
> The underlining is ours.

[40] To return to the matter at hand, from the terms of reference for the present Commission of Inquiry, it would at first sight invite recommendations as to policies and procedures in relation to the procurement system in the public sector, presumably to lead to changes and to avoid any failings which have occurred in the past. The second term of reference does lead to a focus on the applicants[4] and the decision-making process of the public bodies and public officials[5] concerned with the CoA. The first term of reference, could entail the need for legal representation but this would be for the Commission of Inquiry to decide in what manner it conducts the hearing. It is pertinent that in previous Commissions of Inquiry in Mauritius witnesses who are summoned have been able to be accompanied by Counsel.

[41] Betamax has already succeeded in the claim which was a monetary claim and it has already been compensated. The Commission of Inquiry will not be able to go against that decision nor will any of its findings affect the payment which has already been made to the applicants when it won the award which was ultimately upheld by the Privy Council. Most importantly, the Commission of Inquiry is not exercising a judicial function leading to any enforceable decision.

[42] We fail to see any arguable case or substance in this ground.

Rights of applicants under the Constitution

[43] It is contended that the rights of the applicants to the protection of the law pursuant to sections 1, 3 and 10 of the Constitution would be flouted.

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[1] Hammond v The Commonwealth [1982] 152 CLR 188 at paragraph 17 Gibbs CJ
[2] Canada (A.G.) v Canada (Kleever Commission) [1997] R.S.C. 442
[3] Per Lord Devlin in Connelly v DPP [1964] AC 1252,1298.
[4] Terms of reference 1(a)(i) of the Commission of Inquiry
[5] Terms of reference 1(b) of Commission of Inquiry

[44] Section 1 states that Mauritius is a sovereign democratic state. Section 3 is headed fundamental rights and freedoms of the individual and refers to *inter alia* the right of the individual to the protection of the law, the freedom of expression and that the rights and freedoms are subject to limitations, namely that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

[45] Section 10 has provisions securing the protection of the law. Section 10(1) – (11), (12) of the Constitution relate to where a person is charged with a criminal offence and provides for various rights and guarantees such as the presumption of innocence, facilities for the preparation of defence and a fair hearing within a reasonable time. All of these relate to a person who is charged with a criminal offence. As far as we are aware from the application, this is not the case at present and in any event cannot be a bar to the institution of the Commission of Inquiry. The fact that there may be potentially a criminal investigation, inquiry and prosecution subsequent to the Commission of Inquiry giving its findings, though a possibility, is still speculation. Some of the issues have already been considered under the previous ground. This is not sufficient to find that a decision to appoint the Commission of Inquiry with the present terms of reference is in breach of the Constitution. As for section 10(8) – (10) of the Constitution, these subsections refer to a court or an authority required or empowered by law to determine the existence or extent of any civil right or obligation. It is clear that the present Commission of Inquiry is not determining the existence of a civil right or obligation. Its terms of reference are limited to the making of recommendations after hearing relevant evidence. We have considered the submissions of the applicants (paragraph 36(b)) which refers to paragraph 151 – 162 of the applicants' affidavit. Again, we return to the definition and role of a Commission of Inquiry which in no way can be equated to a court of law; see the definition referred to us by respondents nos. 2, 3 and 4:

1. **Gopee v Rault QC [1987 MR 181]** – "*the findings of Commission of Inquiry do not have the character of those of a Court of law or of a tribunal having similar jurisdictional powers and that those findings do not have any juridical effect*".

2. **Clough v Leahy [1904] HCA 38** – "*In the present case, it is true that there has been litigation between the Unions mentioned, and it is said that, in the course of it, certain defects were suggested to have been found in the Act. It is for the legislature to amend the Act if it thinks fit. If, in the view of the investigations of the Commission, they come to a different conclusion from that of the Court of Arbitration what harm is done? The Commission does not affect any rights declared by the Court to exist as between the parties, and the judgment of the Court given in*

> *favour of one party still stands in his favour. It may be that the legislature, if it thinks it fit, will say, that in the future the law shall be different. The Court may have been right or wrong in its decision. Every Court is liable to err. If the Commission reports, after inquiry, that the law is so and so, the legislature may leave it as so declared, or may alter it; but how is it any interference with the rights of any person to make an inquiry to ascertain whether the Court came to the right conclusion on the facts or the law? It in no way impeaches the proceedings of the Court, and in no sense can it be called an interference with the course of justice".*

[46] It bears mentioning that if there is a breach of the Constitutional Rights of applicants, the remedy against the Commission of Inquiry is available. This application cannot pre-empt the conduct of the hearings.

[47] Again, we fail to see any arguable case under this ground for review.

Contempt of court

[48] Contempt of court in relation to arbitration is limited as explained in the following extract from Halsbury's – Laws of England fifth edition, volume 22 [2012]

> "77. Arbitration awards. Where leave has been given to enforce an arbitration award as a judgment or order and judgment is entered in terms of the award, an application for committal may be made in the event of a breach of that judgment or order[1].
>
> 1. This is because an arbitration award may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect."

[49] Contempt of court has been explained in the judgment of **Badry L. v The DPP from The Supreme Court of Mauritius** [1981 PRV 4] in the following manner:

> The classical description relevant to this class of contempt is contained in the judgment of Lord Russell of Killowen C.J. in **R. v. Gray [1900] 2 Q.B. 36** at page 40 when he said:
>
> *"Any act done or writing published calculated to bring a Court or a Judge of the Court into contempt, or to lower his authority is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court."*

[50] It is the enforcement of the arbitral award which can be a contempt of court but in the case at hand the award has already been complied with.

[51] In the present set of facts, the institution of a Commission of Inquiry cannot be a "contempt of court" as it can neither have an impact on the enforcement of the arbitration award nor can its creation obstruct or interfere with the due course of justice.

[52] As for the decision of the Supreme Court, this was overturned on appeal by the Privy Council and therefore it is the judgment of the JCPC which is pertinent. The Privy Council at paragraph 52 of its judgment **Betamax** clearly stated the arbitral tribunal's decision was on fact and law and held that the contract was not illegal, and that this decision is final. Further on at paragraph 95, "*the Board is of the view that the Supreme Court was not entitled to review the finding in the Award on illegality and that the CoA was not in any event illegal, it is neither necessary nor helpful to address the third issue in the appeal. Considerations in relation to the scope and extent of public policy in relation to an illegal contract are best considered in circumstances where the illegality is established and its seriousness can be judged in that context. Moreover, a determination of the public policy of the Republic of Mauritius in relation to any such illegality is an issue on which it would be necessary, particularly in relation to public procurement, to have close regard to the determination of the Supreme Court when such an issue actually arises. The Board therefore does not consider it desirable to lengthen this judgment by consideration of this issue*". It is also apposite to note that the judgment has been delivered and it is public knowledge that payment of the amount involved in the arbitral award has been made to Betamax. As stated in paragraph 5 under grounds for challenging the decisions in the statement of case, the applicant itself has stated that the award binds not only the STC but also the Government. The JCPC is the apex court in our judicial system and what it has stated in the **Betamax** judgment concern the Mauritian Courts. Its findings cannot be interpreted as excluding the institution of a Commission of Inquiry.

[53] As to the costs hearing being made before the Privy Council, we fail to see how any enquiry by the Commission of Inquiry or even any findings it could make would impact upon the decision of the Privy Council. The Commission of Inquiry is not a party to any costs hearing being made before the Privy Council nor would the JCPC be impacted or influenced by the fact that a Commission of Inquiry is sitting. We are unable to discern any potential contempt of court from the papers submitted to us.

[54] When any findings are made by the Commission of Inquiry, even if it were to address issues which have been raised before the Supreme Court and the Privy Council, the Commissioners

would be aware. Again, we cannot speculate as to what the Commission of Inquiry will include in its findings and whether this could possibly be contempt of court.

[55] We have already considered the judgment of **Bird** as well as the apprehension of the applicants as to the outcome of the Commission of Inquiry leading indirectly to criminal proceedings against them. Such an apprehension, in the present circumstances is not sufficient to grant leave for judicial review. The applicants would if prosecution did occur, be entitled to their rights under section 10 of the Constitution.

Appearance and/or real possibility of bias

[56] The averment of bias has been raised from the point of view of the applicants but the test of whether there can be perceived to be bias is that of the reasonable man.

[57] There are two issues here, firstly that the third respondent ("Mr. Parbhunath") was appointed by the Government of the day to be a member of the Commission of Inquiry. All Commissions of Enquiry and the members are appointed by the Government of the day which over the decades have not been of the same political party/parties in Mauritius. Therefore a blanket presumption has been made about assessors appointed to a Commission of Enquiry. There need to be specific reasons to allege bias.

[58] Here the specific reason raised is the tenor of the statement made by Mr. Parbhunath after he took the oath of office on 13th September 2021. It is appropriate to set out the oath he took which is found under the First Schedule of the Commission of Inquiry Act before turning to the statement he made to the press which the applicants allege reveal bias.

First Schedule
[Section 5]

> I ……..… having been appointed under a commission, dated the ….. day of ……. 20…… issued by the President, to be a Commissioner to inquire into the matters specified in the commission, do swear that I will faithfully, fully, impartially, and to the best of my ability, discharge the trust and perform the duties devolving upon me by virtue of the commission.

[59] The statement of Mr. Parbhunath to the press as set out by the applicants in the affidavit supporting their application is as follows:

> "*Je suis très honoré de la confiance qui a été placée en moi et j'espère de tout cœur que je vais pouvoir comme-ci assumer ces responsabilités au meilleur de*

> *mes capacités … right … et je suis … je suis content. Peut-être j'appréhende un peu parce que cette responsabilité est assez lourde mais quand même c'est une occasion pour moi de … comme-ci … d'aider le gouvernement, de participer et encore une fois je … je suis fier en même temps et tout en étant conscient de la responsabilité … beh …ils m'ont fait confiance. Je pense que je vais être à la hauteur*".

[60] He stated to the Press that he was honoured by the trust placed on him by the Government and that he would endeavour to do his best to fulfil his role and to help the Government. The reading of the extract indicates that it was not a prepared statement which was read out as one can see Mr Parbhunath searched for words at certain points, did not complete sentences and included hesitations. The applicants pinpointed this statement in its ground for challenge which includes all the members of the Commission of Inquiry.

[61] We find that the statement of Mr Parbhunath is a formulaic one which is usually made when persons are called upon to perform various public duties. A statement of such a general nature is often made upon the administration of the oath before the President and in public, we find again that this is not substance for an arguable case. In any event, there are 3 members of the Commission of Inquiry and the applicants will potentially have the opportunity to challenge any alleged biases when findings of the Commission of Inquiry are formulated. We also find that this ground cannot involve the two other assessors as individuals.

[62] For the reasons given above, we therefore find after considering the motion paper, the affidavit of the applicants, the statement of case and the grounds put forward for judicial review and the submissions that there is no arguable case and therefore leave is not granted. As the application has not met the required threshold for leave to be granted, the issue of stay is not relevant. The application is set aside with costs.

R. Teelock
Judge

J. Benjamin G. Marie Joseph
Judge

22 June 2022

Judgment delivered by Hon R. Teelock, Judge

For Applicants:	Ms Z. I. Salajee, SA Mr R. Pursem SC together with Mr A. H. Sookhoo, of Counsel
For Respondent Nos 1 & 5:	Mr D. K. Manikaran, Principal State Attorney Mr Y. C. Jean Louis, Acting Assistant Solicitor General together with Mr M. K. Meettook, Senior State Consel
For Respondent Nos 2, 3 & 4:	Ms S. Angad, Principal State Attorney Ms. N. Ramsoondar, Acting Deputy Solicitor General together with Ms K. K. Domah, Senior State Counsel
For Co-Respondent No 1:	Principal State Attorney Mrs B. Prayag-Rajcoomar, Senior State Counsel