

Island Fertilisers Ltd v Mauritius Chemical and Fertilizer Industry Ltd

2005 SCJ 244

CHAMBERS

IN THE SUPREME COURT OF MAURITIUS

In the matter of:-

Island Fertilisers Ltd

Applicant

v.

Mauritius Chemical and Fertilizer Industry Ltd

Respondent

And

In the presence of:-

- 1.The Dangerous Chemicals Control Board
2. Ministry of Agro-Industry and Fisheries
3. Commissioner of Police
4. Prime Minister's Office
5. The Ministry of Environment and National Development Unit
- 6.The Mauritius Ports Authority
7. The Ministry of Health and Quality of life
8. The Chief Government Fire Officer
9. Island Trading and Shipping Private Ltd

Co-respondents

JUDGEMENT

On October 14, 2005, the applicant applied for a summons calling upon the respondent and co-respondent no. 1 to 8, pending a main case to be entered praying for a perpetual injunction, to show cause why an

interlocutory order in the nature of an injunction should not be issued restraining and prohibiting the respondent from (a) unloading ammonium nitrate based fertiliser grade 30-06-00 into Mauritius; and (b) importing anymore ammonium nitrate based fertiliser 30-06-00. There was also a prayer for any order that I may think fit and reasonable to issue in the circumstances.

The matter was called on Tuesday 18, 2005 at 9.30 hrs. On that day, counsel appearing for co-respondent no.9 had moved to intervene as it was the company which represented the ship. As there was no objection, the motion was granted. The matter was then fixed to October 20, 2005 to be in shape and in view of the urgency of the matter as the ship was to arrive during the weekend, it was agreed that all affidavits must be exchanged in the mean time and the case was set for hearing on Monday 24, 2005 at 1.30 p.m.

I have before me affidavits sworn by and on behalf of the applicant and affidavits in rebuttal sworn on behalf of the respondent. Similarly the representative of co-respondent no. 2 and no.9 had sworn an affidavit.

It is common ground that the applicant is a competitor of the respondent and it did also apply for a permit to import ammonium nitrate and/or ammonium nitrate based granule 30-06-00. It was authorised to import only ammonium nitrate based granule 30-06-00 and not pure ammonium nitrate. Apparently, the applicant would not be importing ammonium nitrate based granule 30-06-00 fertiliser because of the dangerous nature of the substance. The respondent had been authorised to import 7000 tons of ammonium nitrate based granule 30-06-00 and the consignment has arrived by the time the case is heard. The question raised before me is whether ammonium nitrate based granule 30-06-00 is a dangerous chemical and if it so, whether an EIA licence is required for the unloading of that substance and not whether an EIA licence is required for the "storing or handling" of that substance having regard to the proceipe.

At the time of the hearing, despite the fact that learned counsel for co-respondent no.9 had stated that some 4000 tons of fertilisers had been unloaded, learned counsel appearing for the applicant, on being asked whether he should not reconsider his case, stated that he proposed to submit that ammonium nitrate based fertiliser is a dangerous substance and that the storing and handling of the dangerous substance required an EIA licence as provided by the Environment Protection Act 2002 (the Act) and that since the respondent had admitted that it did not have an EIA licence, the applicant has shown that it has an arguable case and the order prayed for should be issued pending the main case.

It was submitted by learned counsel for the respondent that the respondent had obtained the necessary permit to import ammonium nitrate based granule 30-06-00 from co-respondent no.1 and that

ammonium nitrate based granule 30-06-00, which is different from pure ammonium nitrate is not a dangerous substance and consequently there was no requirement for an EIA licence. Anyway, it was said that the respondent had obtained an EIA clearance when it constructed the shed which was meant to store the fertilisers. Submission was also made as to the delay the present application was entered and that there was no urgency since the application was not made ex-parte but for a summons to show cause. It was argued that the applicant besides being a competitor of the respondent had no locus standi to enter the present action. It was further argued that the balance of convenience was in favour of the respondent as it was not denied by the applicant that the community of planters is waiting for fertilisers. Finally, it was said that the applicant had not given any undertaking as to damages nor in a further affidavit referred to the point raised by the respondent and that great prejudice would be caused to the respondent who would be liable for extra charges for the immobilisation of the ship at port.

Learned counsel appearing for co-respondents no.1 to 8 concurred with the submission of learned counsel for the respondent and added that there was no need for an EIA licence. Learned counsel for co-respondent no.9 was mainly concerned with the unloading of the fertilisers which had already taken place.

After hearing learned counsel for all the parties, I am of the view that as regards prayer (b), it is not within my province to prevent the importation of ammonium nitrate based granule 30-06-00 fertilisers. There is the Dangerous Chemicals Control Board set up under section 6 of the Dangerous Chemicals Control Act 2004 (the said Act) which issued permit for importation of dangerous chemicals as provided for under section 10 of the said Act. It is an administrative decision by a statutory body and any action against the decision of the board should be by way of judicial review and not to the judge in chambers (vide *Le Petit Morne Ltée v Town and Country Planning Board* [1998 SCJ 141]).

As regards the order to prohibit the unloading of the fertilisers, by the time the ruling is handed down, all the consignment would have surely been unloaded from the ship with the result that the judgment would be an academic one and no order would be made in vain. For this reason alone, the application would not be entertained.

However, in all fairness to the applicant, I would consider the submission raised as to whether ammonium nitrate based granule 30-06-00 fertiliser is a dangerous chemical and whether an EIA licence is required.

Ammonium nitrate is classified under the list of dangerous chemicals under the First Schedule to the said Act and it is not 'an extremely dangerous chemical' under the Second Schedule to the said Act. Under section 2 of the said Act, 'dangerous chemical' is defined as "a chemical

substance specified in the First Schedule and includes an extremely dangerous chemical; and any pesticide.” Under the same section of the said Act, ‘chemical substance’ is defined as “any chemical element, product or preparation, and its compound in the natural or manufactured state.” In the light of the above definition and notwithstanding what the various experts had stated in their affidavits placed before me, ammonium nitrate based granule 30-06-00 fertiliser, is certainly “a compound in the manufactured state” being a mixture of ‘ammonium nitrate’ and ‘phosphate’ and consequently, a “dangerous chemical”, import of which requires a permit under section 10 of the said Act. My view is confirmed by the fact that co-respondent no.1 had delivered a permit to the respondent for the importation of ammonium nitrate based granule 30-06-00 fertiliser.

I shall now turn to the EIA requirement. Section 3 of the Act has defined an “undertaking” to mean “such enterprise or activity, or any proposal, plan, programme in respect of an enterprise or activity by a public department, local authority, or any person, as is prescribed in the First Schedule, and includes any modification, change, alteration or addition of an undertaking”. Part B of the First Schedule to the Act gives a list of undertakings requiring an Environment Impact Assessment licence. At 29, there is undertaking concerned with the “manufacture of chemical fertiliser” which is not applicable in the present case of importation and under 31, there is undertaking in respect of the “manufacture, handling and storage of dangerous chemicals and pesticides”.

The relevant section of the Act dealing with the requirement of an EIA licence is section 15(2) and it reads as follows:-

“ No proponent shall commence, proceed with, carry out, execute, or conduct or caused to be commenced, proceeded, carried out, executed or conducted-

- (a)
- (b) an undertaking specified in Part B or Part C of the First Schedule, without an EIA licence;
- (c) an undertaking, more than 2 years after the issue of an EIA licence in respect of that undertaking.”

As alluded to earlier, the respondent is neither manufacturing chemical fertiliser nor is it manufacturing dangerous chemicals and pesticides although by importing ammonium nitrate based granule fertiliser 30-06-00, the respondent would eventually be handling it and eventually storing it in its warehouse.

At no time is there a requirement for an EIA licence either to import ammonium nitrate based granule fertiliser 30-06-00 and or for its unloading. It may well be argued that in process of unloading, there would

be handling. The question which would still be posed is who would be doing the unloading of the ship and it is surely not the respondent but authorised agents of the Port Authority specialised in the loading and unloading of cargos. Be that as it may, in view of its prohibitive nature, the Act must be interpreted restrictively. In case of doubt, it must be read in favour of the undertaking. Anyway, I have it from learned counsel appearing for co-respondent no. 1 to 8 that no EIA licence is required. I only note that an EIA licence is required for an undertaking which manufactures fertilisers and nothing is said of handling and storing of the finished products. Anyway, if ever there was a requirement of an EIA licence for an activity not provided for under Part B of the First Schedule, it is still within the power of the Minister to 'request the person carrying out or proposing to carry out the project or activity to submit a preliminary environmental report or an application for an EIA licence' as provided for by section 17(1) of the Act. There is no suggestion that there was any request in this case.

The respondent has produced a letter signed by the Director of Environment of the Ministry of Environment dated July 24, 2003 showing that the Department of Environment had no objection to the proposed extension of the existing warehouse for the storage of about 7000 tons of bagged fertilisers at the respondent's premises. That letter was in fact a preliminary environment report which was required under section 16 of the Act. Despite the present application, the relevant authorities as represented by some of the co-respondents consider that there was no need for an EIA licence.

I need not consider the issue of balance of convenience, the absence of undertaking for damages or the locus standi of the applicant, since I am of the view that there was no need for an EIA licence for the unloading of fertiliser which was the application before me having regard to the procipe and irrespective of what had been said in the affidavits in support.

For the reasons given, the application is set aside with costs. I certify as to counsel.