IN THE SUPREME COURT OF SEYCHELLES

Reportable

MC 69/22

THE GOVERNMENT OF SEYCHELLES **Plaintiff**
(rep. Mrs. Nissa Thompson)

Versus

ANTHONY BOUE **Respondent**
(rep. Mr. Frank Elizabeth)

Neutral Citation:	*The Government of Seychelles vs Anthony Boue MC 69/2022*
Before:	D. Esparon Judge
Summary:	Plea in Limite Litis
Heard:	19th May 2023
Delivered:	14th December 2023

ORDER

Pleas in Limine Litis- The 1st and 6th Plea in Limine Litis are hereby dismissed .The 2nd and 3rd Plea in Limine Litis is to be disposed of at the hearing of the merits of the case. The admissibility of the documents and the issue of defectiveness of the Affidavit of Inspector Roseline as to the 5th plea In Limite litis should be determined and disposed of at the hearing of the merits of the case. The legal text of the law cited in French falls within the exception to regulation 2 under regulation 3 of the Constitution (use of official language) Regulations. The Applicant is allowed to file a translated version of an Affidavit in the Registry of the Supreme Court of which the deponent in his Affidavit relies on the said Affidavit as exhibit which Affidavit is in the French language. The documents have been properly authenticated under the Mutual Assistance in Criminal Matters Act.

RULLING

D.ESPARON JUDGE

[1] This is an Application under section 4 of the proceeds of crime (Civil Confiscation Act) seeking for an Order prohibiting the Respondent or any other person from disposing of or otherwise dealing with whole or any part of the property set out in the table appended to the Notice of motion which relates to namely 22 pieces of 23 carat gold weighing 23.5 kg which is valued at approximately SCR 17,266,992.32. Secondly the Applicant is seeking for an order for a receiver to be appointed under section 8 of the Proceeds of crime (Civil confiscation) Act over all or part of the said property to manage, keep possession or dispose of, or otherwise deal with any part of the property in respect of which he is appointed.

[2] The Application is supported by the Affidavit of Terrence Roseline being an inspector in the Seychelles Police Force. The Respondent in his reply to the Application has raised the following Plea In Limine Litis:

I. *The Application is an abuse of process since the Applicant had previously filed the same or substantially similar Application against the Respondent in Miscellaneous cause No 215 of 2022, MA 03 /2022, which it subsequently withdrew and which is still pending before the Court of Appeal.*

II. *The Application is misconceived and wrong in law as the Application is based on an alleged prohibition of exportation of gold from Madagascar but does not prove that the gold was the proceeds of criminal conduct as required by law.*

III. *The Applicant has failed to discharge the burden of proof under section 9 of the proceeds of crime (Civil Confiscation) Act as amended and the Application ought to be dismissed with cost.*

IV. *The documents which the Applicant seeks to rely on to support the Application are not admissible in law.*

V. *The Affidavit of inspector Roseline is defective in law and the Court cannot rely on it to adjudicate over the matter.*

VI. *The Application is bad in law as it contravenes the Proceeds of Crime (Civil Confiscation) Act.*

SUBMISSIONS OF COUNSELS

[3] As regards to the 1st Plea Inline Litis namely that the Application is an abuse of process since the Applicant had previously filed the same or substantially similar Application against the Respondent in Miscellaneous cause No 215 of 2022, MA 03 /2022, which it subsequently withdrew and which is still pending before the Court of Appeal, Counsel for the Respondent has submitted to the Court that this Application is an abuse of process of Court since the Applicant had filed the same or strikingly similar Application on the 2nd February 2022 against the Respondent in Miscellaneous cause No 215 of 2022, MA 08/2022 which it unceremoniously withdrew after the Respondent had filed submissions. According to Counsel, the said submissions on the law clearly showed that the Application was legally defective and rather than allowing the Court to rule on the matter, the Applicant withdrew the Application, rehashed and corrected some of the defects and refile the case again.

[4] Counsel for the Respondent further submitted to the Court that the practice of filing cases against the Respondent forcing the Respondent to incur cost and expenses in defending the case and then withdraw it at the last minute only to refile again is clearly an abuse of process of Court and the Court should not condone such practices. The Respondent relied on section 92 of the Seychelles Code of Civil Procedure which sets out the law relating to inherent powers of the Court to prevent its process from being abused.

[5] Counsel relied on the case of Georgie Gomme of which the Court of Appeal relied on the case of Greenhalgh V/s Mallard (1947) 2 All ER 255 at 257. Counsel for the Respondent also relied on section 4 of the Courts Act referring to the Courts equitable Jurisdiction and relied on the case of Barry Laine and Ors V/S Lise Bastienne CS No of 2018, where it was held that the court shall strike out the whole Plaint where there has been an abuse of process and the Plaint being frivolous and

vexatious. Counsel also relied on the case of Bradford and Bingley Building society where the Court made a distinction between res Judicata and abuse of process of Court and submitted to the Court that the Applicant is unjustly hounding the Respondent, given the earlier history and the Court should not condone the Applicants unnecessary filing against the same Respondent seeking to annoy the Respondent and forcing him to incur unnecessary legal expenses in defending the same matter twice and dragging on litigation forever, oppressing the respondent by successive suits. Counsel for the Respondent respectfully submits that the Court should exercise its discretion to strike out the pleadings and dismiss the Application since it is incumbent on the Applicant throughout to ensure that its case is prepared and ready to be filed before commencing legal action against the Respondent and that the Court should not condone the Judicial harassment of one party by another and at the same time abusing the process of Court.

[6] As regard to the 2nd Plea In limine Litis namely that the Application is misconceived and wrong in law as the Application is based on an alleged prohibition of exportation of gold from Madagascar but does not prove that the gold was the proceeds of criminal conduct as required by law. Counsel for the Respondent relies on section 4 of the Proceeds of Crime (Civil Confiscation) Act. Counsel submitted to the Court that the law requires the representative of the Applicant, Inspector Roseline, to do five things in order to meet the statutory evidential thresh hold namely that the Respondent is :

I. *In possession or control of-*

II. *Specified property and*

III. *That the property constitutes directly or indirectly benefit of criminal conduct; or*

IV. *Specified property that was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes the benefit form criminal conduct and the value of the property or total* *value of the property referred to in sub-paragraphs (i) and (ii) of paragraph (a) is not less than R 50,000.*

[7] Counsel for the Respondent submitted to the Court that the law requires the Applicant to discharge certain evidentiary burden before the burden will shift to the Respondent in law. Counsel further submitted that unless until the Applicant discharges the statutory evidentiary burden under section 9 of the POCCA, the Respondent is not required to do anything at all.

[8] The third point of law is namely that the Applicant has failed to discharge the burden of proof under section 9 of the proceeds of crime (Civil Confiscation) Act as amended and the Application ought to be dismissed with cost. Counsel for the Respondent submitted to the Court that the Applicant has failed to discharge the burden of proof under section 9 of the proceeds of crime (Civil Confiscation) Act. Counsel relied on section 59 of the said Act and submitted to the Court that in order to satisfy section 4 (1) the Applicant must satisfy the statutory evidentiary thresh hold as set out in Section 9(1) of the Proceeds of Crime (Civil Confiscation) Act and that Inspector Roseline is under a statutory obligation to conduct reasonable enquiries and investigations and to base his belief evidence on credible and reliable information and that the said officer cannot rely on inadmissible evidence to discharge his obligations under section 9,and as such counsel submitted to the Court that the said officer is barred by law from filing an Application under section 3 or 4 of the Act, unless he submits evidence of his belief after reasonable enquiries and investigations in accordance to section 9 of the POCCA.

[9] Counsel for the Respondent submitted to the Court that from his Affidavit and documents thereto attached, it is abundantly clear that inspector Roseline has failed to meet the statutory threshold in order to justify the orders being sought and that the evidentiary burden only shifts to the Respondent only after the Applicant has discharged its statutory and evidentiary burden as provided under sect 9(2) and (3) of the POCCA and that according to counsel the Applicant has failed to do so. He further submitted that inspector Roseline in his Affidavit fails to mention what

reasonable enquires and investigation he has conducted and that he fails to mention the crime allegedly committed by the Respondent. Counsel further submitted that this could hardly be said to amount to reasonable enquiries. Further inspector Roseline fails to show the nexus or connection between the crime or crimes having allegedly committed and the gold found in his possession.

[10] Counsel further submitted that the documents of which inspector Roseline rely on are hearsay evidence and not admissible in Court and that his opinion and conjunctures are also inadmissible in law of which the Applicant is relying on inadmissible evidence, bad photocopies of documents without explanation of whereabouts of the originals, opinions, unsubstantiated hearsay, innuendos, rumors, anecdotes, conjunctures and generally inadmissible evidence.

[11] Further Counsel for the Respondent further submitted that there is a huge difference between exporting a product which is prohibited by law and on the other hand showing that a product constitute proceeds of crime on the other hand and thus it is the exporting of the product which is unlawful not the mere possession of the product and that inspector Roseline has failed to adduce an iota of evidence to justify his belief that the gold is the proceeds of crime and hence it is a statutory requisite under section 9 of the Act for inspector Roseline to adduce evidence that of the belief that the property is the proceeds of crime before the burden can shift to the Respondent to show otherwise and as such there is no evidence before the Court that the gold is the proceeds of crime and that the Respondent has benefited from criminal conduct and as such the Applicant has failed or neglected to state how the property either constitute the benefit of criminal conduct or was acquired with or in connection with property that constitute criminal conduct.

[12] Counsel for the Respondent submitted to the Court that the pleadings of the Applicant are wanting in several material particulars as was held in Monthy V SLA, the case of Tex Charlie V Marguerite Francoise Civil Appeal N0 12 0f 1994 (unreported) and the case of lesperance V Larue SCA 15 of 2015 (unreported)..

[13] As regards to ground 4 and ground 5 of Appeal, counsel for the Respondent submitted to the Court that the Applicant's Affidavit is defective in law and does not comply with rule 6 of the Proceeds of Crime (Civil Confiscation) (procedure) Rules 2016 and also rule 4(1) of the same Rule therefore the Court should dismiss the Application. According to Counsel rule 4 (1) requires the Applicant to file an Application in accordance with form 1 of the schedule. Furthermore the Affidavit attached to the motion is defective in that it relies on inadmissible hearsay evidence contained in photocopies of documents and not originals as required. Further that foreign documents on which inspector Roseline seeks to rely are not notarized or duly notarized or certified copy of the original as required by law.

[14] Counsel for Respondent submitted to the Court that according to Rule 6C3) and (4) of the Rules, the Applicant is required by law to exhibit all documents it seeks to rely on in an Affidavit and to exhibit the original and not copies of documents. Such is also in breach of section 34 of the Mutual Assistance in Criminal Matters Act as none of the documents attached to inspector Roselines's affidavit are originals and are copies and not been authenticated or notarized, or duly notarized as required by law and as such are inadmissible and that the Court should apply the penalty provided for by rule 3 (8) (a) and dismiss this Application.

[15] Counsel for the Respondent submitted to the Court that none of the documents received from Madagascar as a result of the Mutual Assistance request complies with section 34 of the Mutual Assistance in Criminal matters Act and hence hey are inadmissible in law.

[16] Such documents according to counsel are the documents from the purported custom officer from Madagascar since it is produced by a third party it is hence hearsay evidence and the documents are not originals of which only copies have been produced in contravention of section 34 of the Mutual Legal Assistance in Criminal Matters Act and furthermore it has not been authenticated inn accordance with the said provision.

[17] Counsel submitted to the Court that secondly the Affidavit of Johny Malvina is a copy and not an original document and contravenes section 6(1) of the Rules.

[18] Counsel for the Respondent submitted to the Court that thirdly the copy of the certificate of analysis of gold is 23 carats from Marie Imaduwa is inadmissible since it is a copy of the original and furthermore her qualification has not been attached in order to show that she is an expert and as such the contents of the document amounts to hearsay evidence,

[19] Counsel further submitted that the documents received from Madagascar through mutual legal assistance are inadmissible in evidence since they have not been authenticated in accordance with section 28(1) of the evidence Act and they are copies of originals contravening rule 6(1) of the rules.

[20] Furthermore according to Counsel copies of photographs of the gold are inadmissible since they are hearsay evidence and that the documents attached does not show that there is no such tempering with the pictures i.e. by showing where it was processed and who processed it.

[21] As for the charges attached, counsel submitted to the Court that as it is not an original document and that it has not been certified as a true copy of the original or extract in contravention of section 7 of the Evidence Act and hence it is inadmissible and furthermore there is no Affidavit by the Registrar of the Supreme Court to produce such document as exhibit;

[22] Counsel further submitted that the laws of Madagascar attached to inspector Roseline affidavit to show that there is a prohibition on exportation of gold is inadmissible in law since they are copies and not originals and both Hery Rakotosolofo and inspector Terence Roseline are not expert in law and that the document have not been translated into English in accordance the Constitution(use of official Languages) regulations SI 83 OF 1976, the language of the Court by an expert translator and would have made an Affidavit attaching his qualification and certifying the accuracy of the law. Furthermore the documents should have been

authenticated pursuant to section 34 (A) of the Mutual Assistance in criminal matters Act in terms of section 28(1) of the evidence Act since Madagascar is not a member of the Hague convention and in order for documents to be admissible it needs to be authenticated of which counsel for the Respondent relied on the case of Joy Kanga V Ministry of Employment and Immigration and Civil Status (2020) SCSC 657 and the case of Attorney General V/S Nassim Onezime(CP 01 /2021). counsel for the Respondent also relied on the case of Robert Poole V Government of Seychelles (Constitutional case no 3 of 1996)

[23] Furthermore according to Counsel, the witness Hery Rakotosolofo is not being tendered as a witness and as such has not sworn an Affidavit and thus he is not going to be subjected to rigorous cross-examination to test the veracity of his evidence and furthermore the document he seeks to rely upon such as the Madagascar law does not satisfy the requirements of section 15 of the evidence Act since according to counsel they are computer generated documents.

[24] In conclusion counsel for the Respondent relied on rule 8(11) of the said rules and moves the Court to dismiss the Application.

[25] On the other hand Counsel for the Applicant has submitted to the Court as for the first point of law namely that the Application is an abuse of process of Court that the Application is not an abuse of process since the process has not been done in bad faith and or without purpose as means of vexation or oppression or for ulterior purposes or misused the process. Counsel for the Applicant submitted to the Court that the reason for refiling the matter is due to a defect it has detected in its Affidavit, pertaining to the grounds thereof which even the Respondent has failed to raise in its preliminary objection. Furthermore according to Counsel the Applicant has simply re-filed a single cause of action with short comings herein and that the Applicant is not simply dragging the litigation and /or oppressing the defendant by successive suits.

[26] Furthermore Counsel for the Applicant submitted to the Court that the Applicant denies that it is rehashing the same issue as in the case of Gomme V/S Maurel and

others and that it has not omitted part of its case in the previous nor introduced new issues in the present Application but simply cured a defect which could have simply jeopardize the entire Application in the future and that the Applicant withdrew the matter before the preliminary hearing at the first reasonable opportunity. Furthermore the assertion that the Applicant wanted a second bite of the cherry is without merit given the ruling had not been delivered in the matter.

[27] As regards to the 2^{nd} and 3^{rd} plea in limine Litis, counsel for the Applicant submitted to the Court that Inspector Roseline has uncovered sufficient evidence to have found as his belief. Counsel for the Applicant relied on the case of Government of Seychelles V/S John Siflore (2019 SCSC 612) of which superintendent Prinsloo was allowed to rely upon information told to him by others. Counsel further relied on the case of Murphy V/S GBM; PB, PC Ltd, GH Gilligan V CAB (2001) 4IR 113 whereby the Supreme Court of Ireland confirmed that an Applicant can rely on opinion evidence.

[28] Counsel for the Applicant submitted to the Court that the sheer depth and volume of evidence presented by inspector Roseline, including the fact that the Respondent had pleaded guilty to being in possession of unlawful/ stolen property namely gold, is a testament to the reasonable enquiries and investigations that he has carried out and that furthermore this can be adequately dealt with at the hearing stage (Geology- Ltd V Govermment of Seychelles SCA MA 31/2022).

[29] As for the 4^{th} and 5^{th} plea In Limine Litis namely that the documents that the Applicant seeks to rely on are inadmissible in law and the Affidavit of Inspector Roseline are inadmissible since it does not comply with the proceeds of crime (civil confiscation) Rules. Counsel submitted to the Court that since all documents has been exhibited of which the Applicant intends to rely and hence it complies with rule 6(3) of the said Rules.

[30] On the issue that Inspector Roseline 's Affidavit is defective since it fails to comply with rule 6(4) of the said rules and submits that the majority of the documents from Madagascar has been notorized except for a copy of correspondence from

Madagascar (TR1), a Note verbal JM1) and a set of photographs (TR2). Counsel for the Applicant relied on Rule 3(3) and Rule 3(4) which according to counsel permits the Court to give its own direction departing from rule 6(4) in the interest of the efficient administration of justice. According to Counsel TR1 and JM1 were never 'original documents, in that the documents that he considered as part of the investigation were copies and that it is up to the Applicant to bring relevant witnesses at the hearing stage to prove its case at which stage issues as to admissibility of evidence can be raised.

[31] As to the issue of the form of the notice of motion as to the prescribed form as per rule 4(1) of the POCCA Rules. According to counsel, the Court has a discretionary power provided for under rule 3(2) of which such schedule to these Rules shall be used and adapted a circumstances may require.

[32] As for the said document not being in compliance to section 34 of the Mutual Assistance in criminal matters Act since it has not been authenticate of which Counsel for the Applicant submits that the Act has been repealed and the Mutual Assistance in Criminal Matters Act came into force on the 6th May 2022. Furthermore that the said MLA request was transmitted to the Applicant for the purpose of a criminal matter CR 110/2021 and hence according to Counsel there is no need to authenticate the said document for the purpose of this case as the documents were already in Seychelles intended to be used as part of criminal proceedings of which it was not used since the Respondent had pleaded guilty.

[33] As regards to the admissibility of French documents, Counsel for the Applicant relied on paragraph to the schedule under the Constitution (use of official languages) Regulations which according to Counsel provides that one of the exception to Regulation 2 above is ' for the purpose of stating or referring to any subject matter expressed in French'. Furthermore since the Respondent is a French national there is no prejudice that is going to be caused to the Respondent.

[34] The Respondent has prayed to this Honourable Court to dismiss the Respondent pleas in Limine Litis.

ANALYSIS AND DETERMINATION

[35] The first point of law to be determined is whether this Application is an abuse of process of Court since the Applicant had previously filed the same or substantially similar Application against the Respondent in Miscellaneous cause No 215 of 2022, MA 03 /2022, which it subsequently withdrew and which is still pending before the Court of Appeal.

[36] In the case of Gomme V/s Maurel, Court of Appeal 6/ 2010, the Court relied on the case of Bradford and Bingley Building society V/S Sedon Hand Cock and Org (1999) 1 WLR 1482 where the Court held ;

> *'The rule of abuse of process encompasses more situations than the three requirements of res- Judicata. Courts cannot stay unconcerned where their own processes are abused by parties and litigants. There is a time to decide enough is enough, where lawyers have not advised their clients. Abuse of process will also apply where it is manifest on the facts before the Court that advisors are indulging in various strategies to perpetuate litigation either at the expense of their clients who may be hardly aware or at the instance of their clients who have some ulterior motive such as harassing parties against whom they have brought actions or others who may not be parties. Courts have a duty to intervene to put a stop to such abuses of legal and judicial processes'.*

[37] In the case of Bradford and Bingley Building Society (supra) Auld LJ Stated the following;

> *' In my judgment, it is important to distinguish clearly between res judicata and abuse of process not qualifying as res judicata, a distinction delayed by the blurring of the two in the Courts ' subsequent application of the dictum. The former, in its cause of action estoppel form, is an absolute bar to re-litigation, and in its issue estoppel form also save in ' special cases ' or special circumstances see Thoday V Thoday (1964 P. 181 197-198 per Diplock LJ and Arnold V National Westminster Bank PLC (1991) 2 AC 93. The latter,*

which may arise where there is no cause of action or issue estoppel, is not to be unjustly hounded given the earlier history of the matter'.

[38] In the case of Gomme V/S Maurel (supra) Domah J stated the following;

'Abuse of process is not a new discovery under the rule of law and the Court's control of cases coming to Court. The source of the doctrine of abused of process' may be traced to a 1947 decision of Somervell LJ in Greenhalgh v mallard (1947) 2 All ER 255 at 257. The scope may be found in the following pronouncement of the Court that abuse of process is:

...not confined to the issues which the Court is actually asked to decide, but ...covers issues or facts which are so clearly part of the subject matter of litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them'.

[39] The Court in the Case of Gomme (supra) stated the following;

'So much for the scope. Now for the limit that may be found in what Lord Wilberforce delivering the opinion of the Board of Brisbane City Council V Attorney General for Queensland (1979) AC 411 at 425, stated when he confined it to its ' true basis' the prohibition against re-litigation on decided issues. Abused of process-

.... ought only to be applied when the facts are such as to amount to an abuse, otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation'.

[40] The Court held in the above-mentioned case the following;

'To come back to the present Appeal, we have gone through the record of the history of the dispute which started 11 years ago. The decision of the Chief Justice cannot be impugned when he found that the Appellant was engaged in re- litigation. The case of Bradford and Bingley Building society (supra) is pretty clear on this point

that even parties who were not originally in the case may be caught by the doctrine of abuse of process if seek a re-litigation of a case which has already decided upon'.

[41] In the case of Ascent Projects (Sey) Ltd V/S Evelyn Fonseka and Ors, CS 19/2017 whereby in this matter a Plea In Limine Litis was raised that the plaint is an abuse of process of Court Since identical plaints between the same parties raising the same cause of action were dismissed by this Honoiurable Court in CC 01/2013 and CC 27/2014. The Court in this case relied on the case of Board of Brisbane Council V/s Attorney general for Queens land (1979) AC. 411, 425, the case of DPP V/S Humphrys (1970) A.C 1 at 46 and the case of Hui Ming VR (1992) 1 A.C 34, Judge S Govinden as she was then stated the Following;

'Now in the case, this Court based on the above analysis of the facts in line with the rule of abuse of process and its irrelevant criteria as set out by case law both in the Jurisdiction and other relevant Jurisdictions. I find that the Plea in Limine Litis as raised, has no reasonable basis, for there is no evidence ex-facie the pleadings of any manipulation and or misuse of the process of the Court so as to deprive the defendants of a protection provided by law or to take advantage of a technicality and or that the defendants will be prejudiced in the preparation or conduct of their defense'.

[42] The facts of the present matter is that the Applicant had filed a similar Application before the Court which it had subsequently withdrawn after the Respondent had filed their Plea In Limine and had filed their submissions on the said plea In Limine litis. This Court notes that the said Application had not yet been decided on its merits and I also note that the new Application filed had not attempted to correct any of the said defects of which the Applicant had brought forth as points of law in their Plea In Limine Litis as part of their reply to the previous Application since it is clear that these point are now being re- canvassed in the reply of the Respondent as Plea In Limine Litis to the present Application.

[43] This Court is of the view that the Applicant by filing a new Application before the matter had been decided on its merits as in the present case does not amount to the

Respondent being unjustly hounded by the Respondent filing a new Application after its withdrawal given the earlier history of the matter. In fact this Court finds that there is no prejudice caused to the Respondent in the preparation or conduct of their defense since I find that there is no evidence ex-facie the pleadings of any manipulation and or misuse of the process of the Court so as to deprive the defendants of a protection provided by law or to take advantage of a technicality in view that the new Application filed by the Applicant did not try to correct the matters raised by the Respondent in the previous Plea In Limine Litis filed in reply to the previous Application which was subsequently withdrawn by the Applicant.

[44] The above is said bearing in mind that of what was said in the case of Gomme (supra) that;

'So much for the scope. Now for the limit that may be found in what Lord Wilberforce delivering the opinion of the Board of Brisbane City Council V Attorney General for Queensland (1979) AC 411 at 425, stated when he confined it to its ' true basis' the prohibition against re-litigation on decided issues. Abused of process-

.... ought only to be applied when the facts are such as to amount to an abuse, otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation'.

[45] This Court has perused the said Application in the instant matter and without going into the merits of the case, this court is of the view that there may be a danger in the present matter of a party namely the Applicant being shut out from bringing forward a genuine subject of litigation.

[46] For the above reasons, this Court finds that there is no abuse of process of Court in the Applicant re-filing the present Application after subsequently withdrawing the previous above in the circumstances as highlighted above and I accordingly dismiss the 1st Plea In Limine Litis.

[47] For the purpose of this ruling, this Court shall deal with the 2nd and 3rd pleas In Limine Litis since they can be conveniently be dealt with together. The second Point of law raised in its reply to the Application by the Respondent is that the Application is misconceived and wrong in law as the Application is based on an alleged prohibition of exportation of gold from Madagascar but does not prove that the gold was the proceeds of criminal conduct as required by law. Thirdly that the Applicant has failed to discharge the burden of proof under section 9 of the proceeds of crime (Civil Confiscation) Act as amended and the Application ought to be dismissed with cost.

[48] In the case of **Hackl v Financial Intelligence Unit (fiu) & Anor** (1 of 2009) [2010] SCCC 1 (2 June 2010) the court stated that, "...in an inter parties application the burden is first placed on the applicant to first satisfy court in the presence of the respondent, the requisites contained in section 4(1) (a) (i) (ii) and (b) and the respondent to the application or aggrieved party is next given an opportunity to satisfy court that such an order should not be made in terms of section 4(1)(b) (i) and (ii) of the POCA. Thereafter the court if satisfied on a balance of probabilities may issue an interlocutory order in terms of 4(1) (b). Analyzing the procedure, it is obvious that the applicant must first establish that reasonable grounds exist for such an interlocutory order to issue before the burden shifts to the respondent to the application. The final decision of court would be based on the civil standard of proof namely balance of probabilities..."

[49] As Section 9 of the POCA permits calling of oral evidence with the permission of the court, the Applicant is right in stating that such issues would be adequately dealt with at the hearing stage which will determine further whether the Applicant satisfies the statutory evidentiary thresh hold as set out in Section 9(1) of the POCA in order to satisfy section 4 (1) of the same Act.

[50] This Court has perused the contents of the points of law raised and is of the view that since both points of law are intrinsically linked with the facts of the case since they relate to the burden and standard of proof, this Court is of the view the such

points of law should be argued at the hearing of the Application proper and I so direct that they so be heard in accordance with rule 8(11) of the proceeds of Crime (Civil Confiscation) (procedure) rules, 2016. To do so otherwise would be putting the ox before the cart in the determination of this Application which would not be proper in view of the nature of the Application which are civil proceedings in nature under the proceeds of crime (Civil Confiscation) Act.

[51] As for the fourth point of law namely that the documents which the Applicant seeks to rely on to support the Application are not admissible in law. The Proceeds of Crime (Civil Confiscation) (procedure) rules is applicable as regards to the admissibility of documentary evidence.

[52] This Court hereby reproduces the relevant provisions of the law as regards to Rule 6 of the proceeds of Crime (Civil Confiscation) (Procedure) Rules, 2016 and it reads as follow;

'(3) All documents relied on in an affidavit shall be exhibited to the Affidavit.

(4) The original of any document sought to be relied on in an Affidavit shall be exhibited unless the Court accepts any explanation averred as to its non-production, in which case a notarized or otherwise duly authorized or certified copy shall be exhibited'.

[53] As regards to the documents attached to the Application, this Court notes that all the said documents have been exhibited in compliance with rule 6(3) of the Proceeds of Crime (Civil Confiscation) (Procedure) Rules, 2016.

[54] This Court also takes note that amongst the documents exhibited in respect to the Application, that the majority of the documents from Madagascar has been notarized except for a copy of correspondence from Madagascar (TR1), a Note verbal JM1) and a set of photographs (TR2) of which according to the Applicant, it intends to produce witnesses to produce such documents in Court at the hearing of the matter.

[55] This Court hereby reproduces Rule 3(3) of the proceeds of Crime (Civil Confiscation) (Procedure) Rules, 2016 which provides the following;

'Other than as prescribed in the Act and these Rules, the Court may regulate its own procedure in the interests of the efficient administration of justice'.

[56] Rule 3(5) of the proceeds of Crime (Civil Confiscation) (Procedure) Rules, 2016 which provides the following;

'Directions as to procedure which depart from the requirements of these Rules, including directions extending any time limit, may be made only for good cause'.

[57] This Court hereby reproduces rule 3(8) of the proceeds of Crime (Civil Confiscation) (Procedure) Rules which provides the following;

'Where a party materially fails to comply with any provisions of these rules, the Court shall-

(a) dismiss the matter;

(b) disregard any non- compliant document or part thereof; or

(c) proceed by default,

Unless the Court for good cause otherwise directs'.

[58] The reason given by Counsel for the Applicant for not producing the original is that in view that the said documents were already in Seychelles and that they intend to adduce oral evidence in the matter in order to produce such original documents.

[59] As a result of the above provisions of the law, in view that the Court can regulate its own procedure in the interest of efficient administration of justice and that the Court can give directions as to procedure which depart from the requirements of these rules only for good cause of which the Applicant intends to bring oral evidence in the matter , I agree with counsel for the Applicant that it is at the hearing stage of the matter that the issue of admissibility can conveniently be raised

in the matter. Hence this Court exercises its discretion in accordance to rule 3(8) of the proceeds of Crime (Civil Confiscation)(Procedure) Rule of which I accordingly direct that the issue of admissibility of the said document as to the production of the original shall be conveniently disposed of and determined at the hearing on the merits of the matter.

[60] Counsel for the Respondent submitted to the Court that the foreign documents attached to the said Application do not comply with the law as they ought to have been authenticated and referred to section 34 of the MACMA 1995.

[61] This Court hereby reproduces Section 34 of the Mutual Assistance in Criminal Matter Act (1995),

> *I.* *Not with standing any other written law, in a proceeding under this Act or a proceeding under or pursuant to a written law relating to the tracing, seizure, confiscation or forfeiture of the proceeds of a crime arising directly or indirectly from a request made under this Act, a document that is duly authenticated is admissible in evidence.*
>
> *II.* *A document is duly authenticated for the purposes of subsection (1) if—*
>
> *(a). It purports to be signed or certified by a Judge, Magistrate or officer in or of a foreign country; and*
>
> *(b). It purports to be authenticated by the oath of a witness or an officer of the Government of the foreign country or of a Minister of State.*
>
> *III.* *Nothing in this section prevents the proof of any matter, or the admission in evidence of any document, in accordance with any other written law.*

[62] However, Applicant submits that MACMA Act 1995 as well as section 34 has been repealed and replaced by MACMA 2022 which came into force on 6th of May

2022. Under section 53 of the said Act of the MACMA 2022, this provision has been somewhat reproduced. Under 53(2) it is stated that;

' (2) A document is duly authenticated for the purposes of subsection (1) if —

(a) It purports to be signed or certified by a Judge, Magistrate, or officer in

or of that foreign State; and

(b) Either —

I. It is verified by oath or affirmation of a witness or of an officer of the government of the foreign State; or

II. It purports to be sealed with an official or public seal of that foreign State or of a Minister, department or officer of the government of that foreign State.

(3) All courts in Seychelles shall take judicial notice of the official or public seal referred to in subsection (2).

(4) Nothing in this section prevents the proof of any matter or admission in evidence of any document in accordance with any other provision of this Act or any other law of Seychelles'.

[63] This Court notes that this Application had been filed before the Mutual Assistance in Criminal Matters Act (1995) had been repealed and replaced by MACMA 2022 and as such it is the Mutual Assistance in Criminal Matters Act (1995) which is applicable in the present matter which lays down emphasis that it is only documents duly authenticated before the above mentioned persons that will be accepted and relied upon for any legal purpose in the Seychelles. This ensures that documents from overseas have been properly authenticated by a person with an official character.

[64] Art. 21. 2 de la Loi n°2020-010 du 14 juillet 2020 portant loi de finances rectificative- Madagascar, indicates that « ° L'Administration des Douanes est l'autorité compétente en matière d'authentification des certificats d'origine».

[65] In view of the above provision of the law of Madagascar, this Court agrees with the submissions of counsel for the Applicant that the document has been authenticated duly pursuant to section 34(2) of the MACMA 1995 since the declaration has been signed by a customer officer, le receveur de douane representing the authorities of Madagascar and stamped by the Minister of Justice.

[66] Lastly as regards to the point raised by counsel for the Respondent that certain legal text of law from Madagascar is in French and according to him this is not following the law relating to the language of the Court which is in English which is not translated from French to English as such whether there is an exception to this rule as to a legal provision which is in French.

[67] As regards to the admissibility of French documents, Counsel for the Applicant relied on paragraph to the schedule under the Constitution (use of official languages) Regulations which according to Counsel provides that one of the exception to Regulation 2 above is 'for the purpose of stating or referring to any subject matter expressed in French'. Furthermore, since the Respondent is a French national there is no prejudice that is going to be caused to the Respondent.

[68] This Court hereby reproduce **Halsbury's Laws of England Fourth Edition,** paragraph 321, page 223 on the filing of affidavits —

" (8) FILING AND OFFICE COPIES OF AFFIDAVITS

321. Filing affidavits. [...]. In the case of an affidavit in a foreign language, there must be filed with it a translation and an affidavit from the translator verifying the translation and annexing both the original affidavit and the translation. [...], see Re Sarazin's patent (1947) 64 R. P. 51."

[69] The Supreme Court Practice 1976, para 41/12/5 provides that;

"Filing Affidavit in Foreign Language. — "When it is desired to file an affidavit in a foreign language the usual course is to obtain a translation of such affidavit by a qualified translator, and to annex the foreign affidavit and the translation as exhibits to an affidavit by the translator verifying the translation. The three documents are filed together, filing fees being paid for two affidavits. " See Re Sarazin's patent (1947) 64 R. P. 51."

[70] Constitution (use of official languages) Regulations provides that;

'2. English shall be the sole official language for the transaction of Government business (including the business of the Courts) save as provided in regulation.

*3. **French may be used for all matters specified in the Schedule hereto.***

1. Correspondence with overseas Governments and international bodies, institutions or organizations.

2. For the purpose of stating or referring to any matter expressed in French.

3. In Bills, Acts, Statutory Instruments or other instruments for the purpose of identifying or referring to matters of French law.

4. The citation in any judicial proceedings of any text or authority expressed in French.

5. The notification in any public place of any matter for the purpose of bringing it to the attention of the public.

6. Official announcements on the Government radio or in the Government press.

7. In any circumstances where French has been hitherto used in Seychelles'.

[71] As regards to the Affidavit namely exhibit TR5 relating to the Affidavit of Rakotosolofo Hery Francois, this Court notes that the said Affidavit has not been translated in English in accordance with regulation 2 of the Constitution (use of official languages) Regulations and the above authority as cited above. This Court

holds the view that the said Affidavit does not fall within any exception as provided for in regulation 3 of the said regulation. In the case of Stefano Renato Petrescou V/S Stephan Adrian Iliescu (2023) SCA 5 arising in 22/2021 whereby the Court had to determine a similar issue, Justice Robison sated the following;

'This procedure has not been followed in the present case. For the reasons stated above we cannot receive the evidence of Renato in the form of an Affidavit for the purpose of being used in this matter'.

Justice Robinson stated further at paragraph18 of her ruling;

'In the present case the defect is fatal. In the circumstances, as Renato's application is improperly supported, the case is dismissed with cost'.

[72] In the present matter the situation is different from the above case law since there is an Affidavit in support of the Application that is in English. The Affidavit that is being contested is the Affidavit which the deponent intends to rely which is produced as exhibit. Since counsel for the Applicant has put before the Court that she intends to adduce oral evidence before the Court and that the Respondent is a French National of which the said affidavit which the deponent is relying upon is in the said national language of the Respondent and no prejudice will be caused to the Respondent, I will hence exercise my discretion to accept the Affidavit in view that no prejudice will be caused to the Respondent and give the following directive in accordance with rule 3(4) read with rule 3(3) of the proceeds of crime (Civil Confiscation) (procedure) Rules that the said Affidavit shall be admitted as exhibit under the rules of conditional admissibility on condition that the Applicant adduces oral evidence in the matter and produces a translated version which shall be translated by a qualified interpreter in the form of an Affidavit filed beforehand at the Registry of the Supreme Court in the language of the Court namely in English under regulation 2 of the Constitution (use of official languages) Regulations after paying the necessary filing fees.

[73] As regards the Applicant attaching the French legal text to the Application, this Court is of the view that this falls within the exception as provided for in regulation (2) and (3) of the said Regulation referred to above as it provides for the purpose of stating or referring to any matter expressed in French and as such since it falls within such exception such legal provisions of the law of Madagascar since it is expressed in French and as such is admissible in evidence.

[74] As to the 5th plea In Limine Litis, since the point raised is that the Affidavit of the inspector Roseline is defective since it relies on inadmissible evidence, I hereby hold that this point should be determined at the hearing on the merits of the matter, since I have already ruled that the determination of the admissibility of the documents of which the Affidavit is relying upon will be determined by the Court at the stage of the merits of the case of which it is the view of this Court that this Plea In Limine Litis is intrinsically linked with the Court's determination on the admissibility of the said documents..

[75] As regards to the submissions of Counsel for the Respondent that the Application is not in compliance with rule 4 (1) of the proceeds of Crime (Civil Confiscation) (Procedure) Rules. 2016 which requires the Applicant to file an Application in accordance with form 1 of the schedule, this Court hereby reproduces the said provision of the law which provides as follows;

'An application to the Court under the Act shall be made by notice of motion in accordance with form 1 supported by an affidavit'.

[76] This Court has considered the form of the Application as prescribed in the Schedule and has perused the Application filed by the Applicant and notes that the missing part in the Application when compared with the form in the schedule is that it does not contain the notices being given to the Respondent in the event the Respondent decides to oppose to the Application including the entry of Appearance and filing of Affidavits in reply and the time limits thereto.

[77] In the case of **Mary Quilindo and ors V/S Monchery and ors, (2012) SCCA 29 2009,** where the Court relied on the Privy Council decision in the case of **Toomany and Anor v Veerasamy (2012) UKPC 13**, where the Court held the Following;

> *"That such technicalities raised to shut out litigants from the Court system constitute a blot of the administration of Justice".*

[78] In the case of Mary Kilindo (supra), Twomey JA held that "where no prejudice was suffered by the proceedings being initiated by petition and not by plaint as such technical objections should not affect the fair administration of Justice".

[79] This Court hereby reproduces rule 3(8) of the proceeds of Crime (Civil Confiscation) (Procedure) Rules which provides the following;

'Where a party materially fails to comply with any provisions of these rules, the Court shall-

(d). Dismiss the matter;

(e). disregard any non- compliant document or part thereof; or

(f). proceed by default,

Unless the Court for good cause otherwise directs'.

[80] This Court has taken notice of the above non-compliance of the Application to the form as prescribed in the said schedule and note that there is no objection taken by the Applicant as a result of the non-compliance of the said rule as regards to time limit and hence the Respondent has not been prejudiced as a result of not averring such notices and time limits in the Application as a result of non-compliance to the rules. Since this is considered by the Court to be a good cause, I hereby exercise my discretion not to dismiss the Application as a result of non-compliance as to the prescribed form in the schedules to the rules and hence direct the Respondent to file his Affidavit in reply to the Application in accordance with the said rules. As a

result, I find that the 6th Plea in Limine Litis has no merits and accordingly dismiss the said plea In Limine Litis.

[81] Since a lot of the directives are based on the Applicant adducing oral evidence in the matter. This Court finds it important to state the following in obiter. In the case of **Hackl v Financial Intelligence Unit (FIU) & Anor** (1 of 2009) [2010] SCCC 1 (2 June 2010) the court stated for the purpose of obtaining an interlocutory order after an application has been made in terms of section 4(1) of the POCA '…The court in this instance issues an interlocutory order after evidence either by way of affidavit or oral evidence in terms of subsection (8) is led in the presence of both parties as this is an inter parties application. […] At this stage a court is free to use its discretionary powers to decide on whether or not to call for oral evidence, documentary evidence, in the interest of justice and could even permit cross-examination if the necessity demands as this is an inter parties application. However, such discretionary powers are vested strictly with the trial court'.

[82] A quick look at section 4 of the POCA and section 9 of the same Act, with respect to interlocutory proceedings, though the parties submit affidavit evidence, it is possible with the permission of the court to call oral evidence. There are no restrictions in the provisions dismissing the right to cross-examine a maker of an affidavit, should the adverse party require to do so.

Signed, dated and delivered at Ile du port on the 14th December 2023.

D.Esparon

D.Esparon

Judge

DAVID ESPARON SUPREME COURT SEYCHELLES SUPREME COURT JUDGE