

IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. MacGregor (PCA), A. Fernando (J.A), B. Renaud (J.A)]

Civil Appeal SCA13/2016

**(Appeal from Supreme Court Application MA 249/2014
& Civil Appeal CS 34/2013)**

Intershore Banking Corporation LTD

Appellant

Versus

Central Bank of Seychelles

Respondent

Heard: 30 April 2018

Mr. P. Boulle appearing in person as a Director of the Appellant company.

Mr. G. Thachett for the Respondent

Delivered: 11 May 2018

JUDGMENT

A.Fernando (J.A)

1. This is an appeal by the Appellant against the judgment of the Supreme Court dismissing the interlocutory application of the Appellant in case number MA 249/2014 and the Appellant's appeal against a decision of the Board of the Central Bank, which was the main appeal in the action CS 34/2013.

Background

2. The Appellant had applied to the Central Bank of Seychelles (hereinafter referred to as CBS) for a banking licence pursuant to section 5 of the Financial Institutions Act 2004. The application had been refused by the CBS by their letter dated 17th July 2013.

3. The Appellant had thereafter appealed the CBS decision to the Board of the Central Bank pursuant to section 16(1) of the Financial Institutions Act 2004. The Board had denied the appeal and communicated the reasons for its decision by its letter dated 18th October 2013.
4. The Appellant had then appealed the decision of the Board of the Central Bank to the Supreme Court pursuant to section 16(3) of the Financial Institutions Act 2004 in case number CS 34/2013. When the matter first came up for hearing in the Supreme Court, it had been decided that the procedure to be adopted for such appeals was that applicable to civil appeals from the Magistrate Court to the Supreme Court. Section 16(3) of the Financial Institutions Act 2004, states: *“If an aggrieved party is not satisfied with the final decision of the Central Bank under this section, the aggrieved party may appeal to the Supreme Court within the time and in accordance with the procedures applicable to civil appeals to that Court.”* Therefore the learned Judge ordered that all relevant documents pertaining to the decision of the CBS be served on the Appellant to facilitate the Appellant to prepare its Memorandum of Appeal. The Appellant filed its Memorandum of Appeal relying on six grounds. Two of the said grounds were in relation to the use of confidential information disclosed to the CBS under conditions of confidentiality in terms of section 6(1)(d)&(j) of the Financial Institutions Act 2004, by the CBS, in arriving at its decision; to refuse the Appellant’s application for a banking licence.
5. On the same day the Memorandum of Appeal was filed, the Appellant had also filed an application, under case number MA 249/2014 requesting an order compelling the Respondent to complete the records filed in the Supreme Court by disclosing the confidential information relied upon by the Board in terms of section 6(1)(d) and 6(1)(j) of the Financial Institutions Act or alternatively requesting a referral to the Constitutional Court to determine a constitutional issue relating to the Appellant’s Constitutional rights to information under article 28, to equal protection of the law under article 27 and to a fair hearing under article 19(7) of the Constitution.
6. The learned Supreme Court Judge after hearing submissions referred the matter for the determination of the Constitutional Court pursuant to **article 46(7) of the Constitution**, which reads as follows:

“46(7) Where in the course of any proceedings in any court, other than the Constitutional Court or the Court of Appeal, a question arises with regard to whether there has been or is likely to be a contravention of the Charter, the court shall, if it is satisfied that the question is not frivolous or vexatious or has already been the subject of a decision of the Constitutional Court or the Court of Appeal, immediately adjourn the proceedings and refer the question for determination by the Constitutional Court.”

7. The following questions were referred :

“1. Does the failure of the Board of the Central Bank of Seychelles to set out the reasons for its non-approval of the banking licence requested by the applicant on the ground that such approval is denied on the confidential information disclosed to it under section 6(3)(b) and (ii) of the Financial Institutions Act... directly or indirectly violate the applicant’s right to access to official information in terms of Article 28(1) and 28(2) of the Constitution?

2. Does the above failure of the Central Bank to disclose confidential information to the appellant infringe any other article of the constitution?”

8. The Constitutional Court by its judgment provided the following reasoning and remitted it back to the Supreme Court :

“It is our view that the learned trial judge having been made privy to the nature of the said information, could decide whether access to the information could be denied as it falls under the limitations contained in article 28(2) or whether limited or full disclosure could be permitted as it partially falls or does not fall within the ambit of section 6(3)(b)(ii) of the FIA and Article 28(2) of the Constitution....We direct the Hon. Attorney General to provide the learned trial judge the information, in order that the learned trial judge could verify the nature of the information after being made privy to it and decide whether or not the information falls within the ambit of Article 28(2) of the constitution and make a suitable ruling in respect of same.” (emphasis added by us)

9. The learned Chief Justice who heard the case after it was remitted back to the Supreme Court, at paragraph 20 of her judgment had identified the answers to the two questions given by the Constitutional Court, and what was expected to be done by the Supreme Court, by the Constitutional Court; as follows:

“1. The Appellant’s access to the confidential information should be decided by the trial judge after assessing whether the information supplied to it falls under the limitations contained in article 28 (2) of the Constitution.

2. The failure to disclose the confidential information would only breach the Appellant’s right if it fell outside the limitations set out in Article 28(2) of the Constitution, that is, those prescribed by law and are necessary in a democratic society.” (emphasis added by us)

The appeal case against the decision of the Board of the Central Bank to the Supreme Court

10. The learned Chief Justice who heard the case on its remittance back to the Supreme Court had stated at paragraph 1 of her judgment: “What stands before me are two cases

that I intend to dispose of with one judgment. The first case is a remittance from the Constitutional Court to the Supreme Court to take a decision in an interlocutory application, this matter was heard under the case number MA 249/2014 and arose in the course of the second case, the Appellant’s appeal against a decision of the Board of the Central Bank, which matter is the main appeal in this action, CS 34/2013. Both cases concern a common central question which relates to whether the respondent has legal grounds to refuse the disclosure of information which pertains to the Appellant and upon which it relied in the course of its decision. Due to the overlapping nature of the two central matters, I will dispose of both in the same judgment.”

11. In disposing of the two cases at paragraph 58 of the judgment the learned Chief Justice had said:

“The Court is bound by the proviso to section 6(3)(b) of the Act. In the exercise of its discretion the Central Bank need not give reasons for its decision if it is grounded on information disclosed to it under conditions of confidentiality. This Court would be ill placed to substitute its decision for that of the Central Bank where that discretion has been exercised within the parameters of the provisions of law.”

Strangely there is no mention whatsoever of article 28 of the Constitution, which was the sine qua non of the case.

12. **Section 6(3) of the Financial Institutions Act** states:

“Within 90 days after the receipt of a complete application, the Central Bank shall

—

(a) grant a licence; or

(b) inform the applicant that it has refused to grant a licence giving the reasons for the refusal:

Provided that the Central Bank shall be under no duty to give reasons

where —

(i) it is precluded by law;

(ii) information has been disclosed to the Central Bank under conditions of confidentiality between the Central Bank and any public sector agency or law enforcement agency; or

(iii) information has been disclosed to the Central Bank under conditions of confidentiality between the Central Bank and any other foreign regulatory agency pursuant to a memorandum of understanding, an agreement or a treaty entered into by the Central Bank or the Republic of Seychelles.”

This provision has to be read subject to article 28 of the Constitution which deals with a person’s Right of access to official information.

13. The learned Chief Justice in detailing out the reasoning behind her decision to deny access to the Appellant to the confidential information had said: “I can certainly see the reasons for which this information may be sought to be kept confidential, particularly to the extent that it involves an ongoing investigation by the disclosing agency, here the Financial Intelligence Unit.” (emphasis added by us)
14. We have carefully examined the confidential letter dated 8th April 2013, sent by the Director of the FIU to the Governor of the Central Bank of Seychelles, which was forwarded by the Attorney General by his letter dated 24th March 2016 to the learned Chief Justice on a directive by the Constitutional Court and the Chief Justice herself; and find that there is nothing stated therein of a specific “ongoing investigation” by the FIU against the Appellant company and that such investigation would be hampered by the disclosure of the confidential information to the Appellant. The last paragraph of the letter of the FIU is as follows: “While none of the above approach a criminal threshold of proof, the aggregate of these individual risk indicators is I believe, enough grounds for assessing the granting of this licence as undesirable on the grounds that as it represents an increased and unacceptable risk of money-laundering in the jurisdiction and an ownership structure that is firmly at odds with international anti money-laundering/terrorist-financing standards and with the intent of the Seychelles legislature. It is therefore recommended at this point in time that a licence is not awarded to the Applicant. The FIU shall continue to investigate and make inquiries in relation to this matter and will keep the Central Bank duly informed of the outcome.”
15. Up to the time of the judgment of the Supreme Court on the 17th of May 2016 (3 years had elapsed from date of F.I.U.s letter) or for that matter up to date of hearing before this Court (5 years have now elapsed from date of F.I.U.s letter), there is no evidence of any criminal charges been filed against the Appellant or the continuation of any investigation against the Appellant. In a case similar to this case, namely, **All Value Bank Limited VS Central Bank of Seychelles [MA 182/2016 arising in Civil Side: CA 19/2015]** the learned Chief Justice had, commenting on a delay of 3 years had said: “It is not in the interests of justice that investigations carry on unimpeded with no closure and suspects kept in limbo. The Central Bank should consider whether the confidential information is still relevant and /or to disclose the same to the Appellant” and had given the Central Bank two months to comply with the Court’s direction and to convey its decision to the parties and the Court.
16. The risk indicators set out in the letter are as follows:

- a) That Mr. Phillip Boule, who is a lawyer and who plays a key role in the current application for a banking licence represents persons with whom the F.I.U has engaged in the course of its statutory remit,
- b) That he is an owner of a Corporate Service Providers company and also representing an association calling itself ‘Seychelles Association of Offshore Practitioners’ (SAOPRA), According to the FIU “These are indicators of a lack of judgment, probity and competence with respect to international AML standards and responsibilities which we believe should discourage the award of a banking licence”,
- c) That Intershore challenged, before the courts in 2007, the disclosure of client information to the Attorney General’s request for information based on the Mutual Assistance Act,
- d) That Mr. Boule supported an action against the Republic and the FIU lodged before the New York courts by Mr. Xiao and provided an affidavit to the New York courts; and that the FIU has ‘confidential information’ that Mr. Boule had fees for representing Xiao in Seychelles paid to an offshore account in Latvia and thereby evading his taxes.
- e) That Mr. Boule, wrote to SIBA as the Chairman of SAOPRA, advocating a number of points against the provisions Anti-Money Laundering law and generally defamatory of the FIU and its personnel and had it circulated internationally, including institutions such as the World Bank and IMF,
- f) That Mr. Boule appears to have generally cultivated a disrespect for the existing AML and POCA legislation, and facilitated the spreading of misunderstandings about the operation of the FIU, e.g. that it trawls through bank accounts, takes commissions from court cases or settlements. Etc.
- g) That Mr. Boule has been involved in the formulation of a suggestion that SAOPRA CSPs place a warning on their websites telling their prospective clients that the FIU has an arbitrary 180 day freeze and suggesting that they may wish to open their bank accounts in a different jurisdictions such as Mauritius,
- h) That on the basis of classified intelligence provided to the Seychelles FIU on a non third party disclosure basis from reliable law enforcement agencies of other states, and other confidential sources, the FIU has grounds for believing that a banking licence awarded to the Applicant would represent a significant risk to the international standing and good repute of the Republic of Seychelles.

17. We are of the view that the risk indicators stated from (a) to (g) above are not indicative of any ‘ongoing investigation by the FIU against the Appellant company’. They are only allegations against Mr. Boule and indicative of a derogatory attitude against him. They certainly do not suffice denial of the Appellant’s right to the confidential information on the basis of the derogation to that right, for “the protection of national security” or “preventing and detecting crime and the enforcement of the law”, as provided in article

28(2) (a) or (b) of the Constitution. Risk indicator (g) would go against the very interests of the Appellant who is seeking to open a bank in the Seychelles. The very loosely worded risk indicator (h) above is not indicative of any ‘ongoing investigation’ by the FIU against the Appellant company. It is only a “ground for believing that a banking licence awarded to the Applicant would represent a significant risk to the international standing and good repute of the Republic of Seychelles”. They do not fall under the derogation to the right, for “the protection of national security” or “preventing and detecting crime and the enforcement of the law”, as provided in article 28(2) (a) or (b) of the Constitution.

18. In the letter dated 17th July 2013 of the CBS refusing the licence, nor in the letter dated 18th October 2013 signed by the Governor of the CBS conveying the decision of the Board in relation to the appeal by the Appellant nor in the affidavit of the Governor of the Central Bank dated 28th October 2014 filed before the Supreme Court, there is any specific averment to the effect that there was an ‘ongoing investigation’ against the Appellant, which may have brought the matter under the derogations provided under article 28(2)(a) or (b), so as to prevent disclosure.
19. The learned Chief Justice has not answered the fundamental questions raised by the Constitutional Court, as stated at paragraph 9 above, when it remitted the case back to the Supreme Court, namely, whether the information supplied to the CBS by the FIU, falls under the limitations contained in article 28 (2) of the Constitution, and whether the proviso to section 6(3)(b) of the Financial Institutions Act is a permissible derogation to the Appellant’s right of access to information on the basis that such derogation is “necessary in a democratic Society”. All that the learned Chief Justice had said in this regard at paragraph 48 of her judgment is, “I can see that it is capable of being the sort of information that may be deemed confidential for the purposes of section 6 of the Act,” and that section 6 of the Act provides a lawful derogation of article 28.
20. Section 6 of the Financial Institutions Act per se, does not provide a lawful derogation of article 28 and only speaks of confidentiality. Section 6 of the Financial Institutions Act does not make reference to article 28 of the Constitution and therefore had to be examined vis-a-vis article 28(1) of the Constitution which guarantees the right of access to official information and the derogations to that right provided in article 28(2). The error the learned Chief Justice appears to have fallen into is to identify ‘confidential information’ as another basis for the derogation of the right enunciated in article 28(1) of the Constitution. This is not permissible and amounts to re-writing the Constitution, by adding, another derogation, to the right enunciated at article 28(1) at 28(2). If the learned Chief Justice is right, the FIU can deliberately write something false and derogatory about an applicant for a banking licence, against whom it may have an axe to grind, and

take cover under the blanket of confidentiality to get the Central Bank to refuse the license.

21. The Appellant had informed this Court as per the proceedings of the 13th of March 2018 that there are only two grounds of appeal, namely:

- a) that the Appellant's appeal against a decision of the Board of the Central Bank, which was the main appeal in the action CS 34/2013 had been dismissed without it been heard.
- b) that the learned Judge erred in holding that the Central Bank was right in refusing to divulge the confidential information it had received.

22. In the Skeleton Arguments dated the 6th of April 2008, the Appellant had elaborated on the above said grounds of appeal as follows:

- A. (1) the learned trial judge erred in finding that there were two cases before the court.
 - (2) the dismissal of the appeal by the learned trial judge was an erroneous and invalid exercise of jurisdiction.
 - (3) the finding of the learned trial judge that the appellant made arrangements in relation of the subject matter of the appeal is flawed and misconceived.
 - (4) the learned trial judge erred in taking into consideration any statement by the appellant regarding the appeal in the process of adjudication on the matter of the Motion before the court.
- B. (1) the finding of the learned trial judge that the right to a fair trial is greatly diminished by the fact that the appellant knows the identity of the informant and seems to know part of the content of the information, is misconceived and erroneous.
 - (2) the learned trial judge erred in its finding that the appellant should have challenged the constitutionality of s.6(3)(b) of the Financial Institutions Act
 - (3) the finding of the learned trial judge that from the content of the confidential information, could be seen the reason for the Central Bank not to disclose the information as it involved an ongoing investigation is erroneous and an unsound process of adjudication.
 - (4) the finding of the learned trial judge that the letter from FIU was never on the records and had not formed part of the records under s.7 and s. 8 of the Courts Act (Appeal Rules) as the reference to confidential information was only made by the Central Bank in its letter dated 17th July 2012 is erroneous and contrary to the evidence on record.
 - (5) The final conclusion of the learned trial judge which finds that the court is bound by s.6 (3)(b) of the Financial institutions Act, is flawed and a misinterpretation of the law.

By way of relief the Appellant had prayed:

- (i) Reversing the dismissal of the appeal in the Supreme Court.
- (ii) Granting the Motion before the Supreme Court ordering that the confidential information be added to the records of the appeal before the Supreme Court.
- (iii) Ordering that the appeal in the Supreme Court be heard.

23. The learned Chief Justice had expressed doubts as to the correctness of the remittance of the case back to the Supreme Court without the Constitutional Court making a pronouncement on the questions referred to it. At paragraph 22 of her judgment, citing article 129(1) of the Constitution she had stated: “In my view, by delegating the functions stated above to the Supreme Court, the Constitutional Court has divested itself of its functions...It is abundantly clear from those provisions that a Constitutional Court, and not a single judge of the Supreme Court, should carry out the functions of interpreting the Constitution even when this merely amounts to assessing whether acts (in this case the non-disclosure of information of a person or body) breaches the Constitution or falls within the parameters of the derogation to the charter right.” According to article 129(1) of the Constitution, matters relating to the application, contravention, enforcement or interpretation of the Constitution shall be exercised by the Constitutional Court by not less than two Judges of the Supreme Court sitting together.

24. In our view this case did not involve an interpretation of the Constitution but rather a verification of the nature of the confidential information to decide whether or not the information falls within the ambit of Article 28(2) of the Constitution as correctly stated by the Constitutional Court. If however the learned Chief Justice had doubts about this issue she could have sought a clarification from the Constitutional Court without complaining about its decision. However, instead she had decided to act in accordance with the decision of the Constitutional Court.

25. At paragraph 35 of her judgment the learned Chief Justice had said: “In this undertaking I have expressed my reservations as a single judge of the Supreme Court with regard to my constitutional mandate. However, I do believe that the Constitution is a living, aspirational document, brought into our national democratic story in order to infuse all law with the principles on which our society is founded. Supreme Court judges have the honour of sitting on the Constitutional Court panels when the duty arises to hear matters concerning the application, contravention, enforcement or interpretation of the Constitution. Similarly, when they are sitting alone on the bench they are not to take off their constitutional hat and disregard these same principles. We are to perform our duties through the prism of the Constitution, in order to fulfil our individual mandate

to “uphold the rule of law based on the recognition of the fundamental human rights and freedoms enshrined in this Constitution and on respect for the equality and dignity of human beings”. (Preamble to the Constitution). Every day we are called upon to give meaning and interpretation to the laws of the land, many of which originated in our law prior to the modern constitution. It would be incongruous with our constitutional mandate to prefer interpretations and applications of the law which do not seek to promote the principles of the constitution.”

26. We are in agreement with the observations made by the learned Chief Justice at paragraph 23 above and of the view that this Court should now determine the appeal in case number MA 249/2014. **Article 120(3) of the Constitution** states: *“The Court of Appeal shall, when exercising its appellate jurisdiction, have all the authority, jurisdiction and power of the court from which the appeal is brought...”*
27. At paragraph 23 of her judgment the learned Chief Justice states: “Be that as it may, this matter has been dragging in the courts for a number of years and its conclusion is of paramount importance for all concerned and in order to allow the appeal to progress, I called for the said confidential information and the same was duly delivered to my Chambers on 28th March 2016. I am of the view, however, that I need not examine it in detail for the purpose of this judgment for the reasons I explicate hereunder.” The last sentence of this paragraph runs contrary to what the Constitutional Court had said as to what the judge should do in examining the confidential information, namely “verify the nature of the information”, and “after assessing the information” as referred to at paragraphs 8 and 9 above and this is probably the reason the learned Chief Justice erred in her judgment.
28. The only question that came to be determined by the Supreme Court on its remittance back to the Supreme Court as per what the learned Chief Justice said in her judgment was: “Mr. Boullé submitted that although the Appellant had pursued its appeal on six grounds, should the ground relating to the disclosure of confidential information not be successful, there would be no point in pursuing the rest of the grounds of appeal. The present appeal now therefore rests mainly on the ground: whether or not the Appellant is entitled to the disclosure of the confidential information on which the Central Bank partly based its decision to refuse it a bank licence.” It is clear that the vital question to be determined by this Court in this appeal is the same. This has been confirmed by the Appellant before this Court as per the proceedings of the 13th of March as set out at paragraph 19 above.
29. The learned Chief Justice had thereafter gone on to, at paragraphs 34 and 35 of her judgment, identify the issues before her court which we set out below:

“34 It is perhaps important at this juncture to recap on the issues before the Court as the ground of appeal could easily be obfuscated by the submissions of Counsel which may have little relevance to the core issue before this Court. In a nutshell, Mr. Boullé for the Appellant has applied for an order granting disclosure of the confidential information to complete the record of proceedings so that he could formulate further grounds of appeal or failing that, a referral to the Constitutional Court to rule whether failure to disclose such information violated the Appellant’s rights under Articles 19, 27 and 28 of the Constitution.

35 As the second option was chosen by de Silva J, I am now asked by the Constitutional Court to firstly consider granting the Appellant access to the confidential information by assessing whether it falls within the limitations contained in article 28 (2) of the Constitution. Secondly to consider whether failure to grant such access has breached the constitutional rights of the Appellant.” (emphasis added by us)

30. Having adorned the constitutional mantle as stated by the learned Chief Justice at paragraph 35 of her judgment and as referred to at paragraph 23 above it was incumbent on the learned Chief Justice to examine closely the provisions of article 28 of the Constitution which deals with the Right of access to official information.

31. **Article 28 of the Constitution** reads as follows:

“28. (1) The State recognises the right of access of every person to information relating to that person and held by a public authority which is performing a governmental function and the right to have the information rectified or otherwise amended, if inaccurate.

(2) The right of access to information contained in clause (1) shall be subject to such limitations and procedures as may be prescribed by law and are necessary in a democratic society including-

- (a) for the protection of national security;*
- (b) for the prevention and detection of crime and the enforcement of law;*
- (c) for the compliance with an order of a court or in accordance with a legal privilege;*
- (d) for the protection of the privacy or rights or freedoms of others;*

(3) The State undertakes to take appropriate measures to ensure that information collected in respect of any person for a particular purpose is used only for that purpose except where a law necessary in a democratic society or an order of a court authorises otherwise.

(4) The State recognises the right of access by the public to information held by a public authority performing a governmental function subject to limitations contained in clause (2) and any law necessary in a democratic society.”(emphasis added)

32. In expounding on this right of access to official information under article 28 of the Constitution, the learned Chief Justice had stated at paragraphs 43 of her judgment:

“The right of access to information is a fundamental right contained in the Constitution. In addition, Seychelles has signed and ratified a number of international conventions in which these rights are enshrined, namely the International Covenant on Civil and Political Rights, the Universal Declaration on Human Rights and the African Charter on Human and Peoples Rights. However, regrettably, Seychelles has yet to enact access to information legislation to give further meaning to this right. However the failure to enact legislation does not undermine the content of the right contained in article 28 in its present form.” (emphasis added).

33. What is to be noted on a reading of article 28(1) of the Constitution is the right of access of a person to official information relating to the person is a fundamental right enshrined and entrenched in the Constitution. In reality there is no need to enact legislation to give further meaning to this right as the right has been very clearly stated. The only legislation that may be needed are to place restrictions on this right guaranteed under article 28(1), as envisaged by article 28(2) of the Constitution and that for the purposes extraneous to the person, namely for national security, public order, compliance with court orders, legal privilege and privacy and rights and freedoms of others. Such restrictions to be valid should be by a law, necessary in a democratic society.
34. The right to information is not affected by the reason why a person seeks information or even by what the public authority perceives to be the reason for seeking the information. There is no limitation as to the type of persons’ entitled to the right, since it is available to every person inclusive of body corporates; there is no limitation as to the type of information for which access may be sought, so long as the information relates to the person, nor is there a limitation to the type of public authority from whom the information may be sought, so long it is one performing a governmental function.
35. We have also given serious consideration to the provisions of section 6(3)(b)(ii) of the Financial Institutions Act and as to why the Legislature has provided that “*the Central Bank shall be under no duty to give reasons where information has been disclosed to the Central Bank under conditions of confidentiality between the Central Bank and any public sector agency or law enforcement agency*”. Public Sector or law enforcement agencies will be discouraged to disclose information to the Central Bank, if the person about whom they have provided information has a right to sue them in the event of any inaccuracies in the information provided. This will be a major setback in our efforts to combat financial crimes and prejudice the effectiveness of the operational fight against financial crimes. For this reason, it is our view, that in granting access to information, that has been disclosed to the Central Bank under conditions of confidentiality between the Central Bank and any public sector agency or law enforcement agency, the person’s right to such information should primarily be to have the information “rectified or otherwise amended, if inaccurate” and to challenge any wrongful decision based on the inaccurate information. It is our view that a person’s constitutional right under article 28(1), under such circumstances has to be balanced as against the public interest which is sought to be protected under section 6(3)(b) of the Financial Institutions Act.
36. It had been the view of the learned Chief Justice that the Appellant should have challenged the provisions of the Financial Institutions Act, more particularly section 6(3) (b) (i)-(iii). At paragraph 47 of the judgment, she had said: “It would certainly have been an avenue available to the Appellant to bring a constitutional case to argue that the restraint as contained in the proviso to section 6(3)(b) was an impermissible limitation

to the right of access to information.” Again at paragraph 48 of the judgment: “In the present case, since legislation appropriately grants discretion to the Central Bank to not disclose information provided under conditions of confidentiality and there is no constitutional challenge to section 6(3) of the Act, the Court cannot *ex meromotu* consider the constitutionality of the provisions.”

37. In our view there is nothing unconstitutional *per se* in section 6(3)(b) of the Financial Institutions Act, as to be challenged. All laws have to be read and interpreted in consonance with the Constitution. The constitutionality or otherwise of the provisions of section 6(3)(b) will be entirely dependent on whether it falls under any of the derogations to article 28(2). For instance if the “information that has been disclosed to the Central Bank under conditions of confidentiality between the Central Bank and any public sector or law enforcement agency” is on the basis “for the protection of national security” or “for the prevention and detection of crime and the enforcement of law”, then the right of access to such information may be denied. This needs an examination of the information by the Court hearing the case as the Constitutional Court had pronounced. Also if the information falls under article 28(2)(d) of the Constitution then again access to such information may be denied. To illustrate what we have said earlier, if a law were to provide that the punishment for a particular offence is death or that no person in Seychelles may own land, the said laws would be in direct conflict respectively with article 15 of the Constitution which guarantees to everyone the right to life and article 26 of the Constitution which guarantees to every person, the right to property and such laws would have to be challenged as being unconstitutional.
38. Further in making these statements the learned Chief Justice had failed to realize that this was a case arising from a referral to the Constitutional Court on an application by the Appellant under article 46(7) of the Constitution as referred at paragraphs 5 & 6 above. Further the decision of the Constitutional Court was for the Supreme Court to decide, after verifying the nature of the information, whether access to the information, could be denied as it falls under the limitations contained in article 28(2) of the Constitution. Also the Constitutional Court in its judgment dealt with this matter when it said at paragraph 10 of its judgment: “We are aware that the challenge of the Petitioner is not in respect of the fact that the Central Bank failed to give reasons but his challenge is that he is entitled to the information in order that he could challenge the decision taken to refuse his licence. Neither does the Petitioner in his submissions challenge the substantive law as contained in section 6(3) (b) (ii) of the FIA as unconstitutional.” In view of the pronouncement made by the Constitutional Court it was inappropriate for the learned Chief Justice to agitate this matter again.
39. The learned Chief Justice had also relied on sections 84 of the Seychelles Code of Civil Procedure, section 7 & 17 of the Courts Act, the Civil Procedure Rules of England to deny disclosure of the information to the Appellant on the basis that it had not formed part of the records. The learned Chief Justice had said at paragraph 55 of her judgment “In the present case the document sought to be disclosed was never on the court record or record of the Board.” But contradicting herself the learned Judge in the very next sentence therein states “The reference to confidential information was only made by the Central Bank in its refusal dated 17th July 2013, in which it was stated that the Appellant did not meet the requirement of section 6(1)(j) of the Financial Services Act. This was repeated in the letter of the Board rejecting the Appeal on 18th October 2013.” In the

affidavit of the Governor of the Central Bank dated 28th October 2014 filed before the Supreme Court it is averred: “I aver that the Board of the Central Bank in coming to its decision based on section 6(1)(j) and 6(1)(d)...relied upon information disclosed to the Central Bank by the Financial Intelligence Unit...”. The letter dated 8th April 2013, sent by the Director of the FIU to the Governor of the Central Bank of Seychelles, which contained the confidential information was forwarded, by the Attorney General by his letter dated 24th March 2016, to the learned Chief Justice on a directive by the Constitutional Court and the Chief Justice herself. Thus it is clear that the information was part of the Board record and also the Supreme Court record. The recorded proceedings of the 29th of March 2016 clearly show that the Attorney General, Mr. Boulle and the Court have all accepted that the letter of the FIU containing the confidential information was before the Board. We fail to understand how the learned Chief Justice despite the very clear provisions of article 28(1) of the Constitution, could have denied giving access to the information in relation to the Appellant by placing reliance on the provisions of the procedural law stated above.

40. Article 28(1) categorically speaks of the right to have the information rectified or otherwise amended, if inaccurate. How could one exercise his fundamental right to have the information rectified or otherwise amended, if inaccurate without having access to information relating to it, which is itself a fundamental right? We have stated earlier that this is a case where the derogations set out in article 28(2) do not apply.
41. The learned Chief Justice had at paragraph 38 of her judgment stated: “I recognize that the Appellant is hampered in prosecuting its appeal when it is unaware of the material disclosed to the decision maker which informed the decision making process in this case. This, it must be admitted, runs counter to principles of fairness. The dissatisfaction of the Appellant with the decision and appeal process, although forcefully expressed, is perhaps understandable.” The learned Chief Justice’s decision in this case not to grant access to the confidential information goes against her own pronouncement, referred to above.
42. There is nothing in the judgment to indicate that the learned Chief Justice had considered whether the denial of access to the information in the circumstances of this case fits into any of the derogations set out in article 28(2) of the Constitution and more so from the point of being necessary in a democratic society. The word ‘democratic society’ according to **article 49 of the Constitution** envisages a pluralistic society in which there is proper regard for the fundamental rights and freedoms and the rule of law. The right guaranteed under article 28 viewed in the circumstances of this case is necessarily linked to the right to dignity guaranteed under **article 16 of the Constitution**, the right to a fair hearing guaranteed under **article 19(7)** of the Constitution, and the right to work, namely the right of every citizen to earn a dignified living in a freely chosen occupation...or trade guaranteed under **article 35(b)** of the Constitution. According to **article 19(7) of the Constitution**: “*Any court or other authority required or empowered by law to determine the existence of any civil right... shall be independent and impartial; and where proceedings for such determination are instituted by any person before such a court or other authority the case shall be given a fair hearing...*” There cannot be a ‘fair hearing’, whether it is before the Supreme Court or the Board of the Central Bank, when a party to litigation or inquiry is denied access to information which he is entitled to under article 28(1) of the Constitution. The

baseless allegations in the letter of the FIU to the Central Bank affect the reputation of the Appellant and that of Mr. P. Boule.

43. One of the reasons for not acceding to the application of the Appellant for disclosure of the information is the Learned Chief Justice's belief that the Appellant has had "access to the confidential information". For she had stated at paragraph 39 of her judgment "that both the identity of the informant's in this case and the contents of the confidential information or at the very least part of the contents seemed to have been in the knowledge of the Appellant. This is evident from the record of proceedings before the Board and also before the Court..." It had been the learned Chief Justice's view that "the application for disclosure would be a sham." As correctly stated by the Appellant in the Skeleton Arguments, the above finding is misconceived as the knowledge of the Appellant in part or in full is totally irrelevant and that a finding by the trial judge that the Appellant knows part of the information should be a compelling reason to disclose the entirety of the information. Further this could never have been a reason for the Supreme Court to deny information to the Appellant in the face of the provisions of article 28 of the Constitution and the decision of the Constitutional Court that was transmitted to it.
44. As regards ground A1 of appeal it is clear from the recorded proceedings of 29th March 2016 as set out in page 79 of the appeal brief the learned Chief Justice had informed the parties concerned that she will give her decision on confidentiality on the 17th of May 2016 at 1.45 pm and fix the hearing of the main appeal in Intershore Banking VS Central Bank for the 24th of May 2016 at 9.00am. Having notified the parties to that effect, the learned Chief Justice had delivered the judgment as stated at paragraph 10 above on the 17th of May 2016 and the record of proceedings do not bear out that the appeal proper in CS 34/2013 was heard. This is sufficient to allow the first ground of appeal.
45. In view of what has been stated above we are of the view that the Appellant is entitled to have access to the confidential information supplied by the Financial Intelligence Unit to the Central Bank. We are also of the view that the dismissal of the appeal by the Supreme Court in case number CS 34/2013 without the Appellant having had an opportunity to contest the contents of the confidential information supplied by the Financial Intelligence Unit to the Central Bank and without a proper hearing, and also hearing on the other grounds of appeal was erroneous.
46. We therefore allow the appeal and order that the relief sought by the Appellant in the Skeleton Arguments, referred to at paragraph 22 above, be granted. The confidential information hereby ordered to be added to the records of the appeal before the Supreme Court should primarily be made use of to rectify or otherwise amend it and to challenge any decision based on the confidential information by the Central Bank to refuse the Appellant's application for a banking license.

A.Fernando (J.A)

I concur:.

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B. Renaud (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 11 May 2018