

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2022] SCCA 67 (16 December 2022)
Consolidated Appeals: SCA 21/2020
and SCA 35/2021
(Appeal from MC 18/2019, MA
167/2020 AND MA 169/2020)

Gianni Bordino
Deborah Bordino
(rep. by Mr. Frank Elizabeth)

1st Appellant
2nd Appellant

versus

Government of Seychelles
(rep. by Mr. Frank Ally)

Respondent

Neutral Citation: *Bordino and Anor v Government of Seychelles* (Consolidated Appeals: SCA 21/2020 and SCA 35/2021) [2022] (Arising in MC 18/2019, MA 167/2020 and MA 169/2020) (16 December 2022)

Before: Robinson, Tibatemwa-Ekirikubinza, Andre, JJA

Summary: **Appeal against the interlocutory Rulings and orders of the Supreme Court in MC 18/2019, MA 167/2020 and MA 169/2020 arising under the Proceeds of Crime (Civil Confiscation) Act, (POCCCA).**

Under POCCCA proceedings, once the Applicant establishes a prima facie case that the property in issue was purchased with funds from illegitimate sources, the evidential burden to disprove it shifts to the Respondent.

The evidence adduced by a Respondent to discharge the evidential burden they carry must be credible, must be believable, if it is to satisfy the court that it is more likely than not that the source of funds was legitimate.

While considering an application under POCCCA, the court does not consider the hardship that would be caused to the Respondent if court were to make a disposable order.

Heard: 4 August 2022
Delivered: 16 December 2022.

ORDER

The appeal is dismissed and the orders of the Supreme Court are upheld.

JUDGMENT

DR. LILLIAN TIBATEMWA-EKIRIKUBINZA, JA.

The Facts

1. The two consolidated appeals are against the interlocutory orders issued by Twomey CJ in Supreme Court MC 18/2019 prohibiting the Appellants from dealing with property comprised in Parcel V17532 situated at Eden Island, Mahe, Seychelles and an order by Govinden CJ in MA 167/2020 as well as MA 169/2020 declining to vary the said interlocutory orders and holding the Respondent for contempt of Court respectively.
2. The background facts that led to the issuance of the interlocutory orders by Twomey CJ are as follows:
3. The Respondent – Government of Seychelles – applied for a freezing order in the Supreme Court. The Respondent averred that the Appellants were in possession or control of specified property that constituted directly or indirectly, benefit from criminal conduct, or was acquired in whole or in part with or in connection with property that directly or indirectly, constitutes benefit from criminal conduct and amounts to the offence of possession of property with intent to defraud contrary to Section 314 of the Penal Code of Seychelles.

4. The Respondent averred that the 1st Appellant is a foreigner of Italian origin who had moved to Seychelles to do business but had previously defrauded Nord Marine S.N.C (hereinafter referred to as the Italian Company) of its assets as well as profits and purchased property comprised in Parcel V17532 at Eden Island, Mahe, Seychelles. It is this property that the Respondent contended was bought using proceeds of crime and ought to be confiscated and placed under receivership.

5. It is on record that the Respondent was contacted by the Italian Ministry of Justice through a letter dated 15 October 2018 requesting it to arrest the 1st Appellant together with his wife, Malcuori (the 2nd Appellant), for being fugitives and for fraudulent bankruptcy charges in Italy. The alleged fraud instigated by the Appellants was in the following ways:
 - (i) 23 yachts were entrusted to the 1st Appellant and Malcuori, who were both partners and managers of the Italian company, for sale to third parties but after the declaration of bankruptcy, the location of the yachts was concealed so that they cannot be traced.
 - (ii) Furthermore, 13 other yachts were entrusted to the 1st Appellant together with the wife and sold through intermediaries to companies based on false income- related documents. These yachts were also concealed apart from one vessel (Shark) which was discovered in a marina and seized by Italian police. A further 7 yachts were diverted after the declaration of bankruptcy in spite of preventative seizure orders by the Italian court.
 - (iii) The 1st and 2nd Appellants diverted 200,000 Euros from the Italian company to a third party account and concealed the transfer by buying gold bullion bars.
 - (iv) On 17 November 2011, the 1st Appellant incorporated Four Stars Ltd in Seychelles as an International Business Company and was its sole shareholder.
 - (v) On 30 November 2011, the 1st Appellant opened a bank account, number 300000011097, in the name of Four Stars Ltd at BMI Offshore Bank Limited, Mahe, Seychelles, with himself and the 2nd Appellant as signatories to the account, following which the sum of US\$ 460,000 was deposited on 26 December

2011. A further sum of US\$ 319,000.000 was deposited on the said account on 9 January 2012 with both sums having been transferred from account 2908465000 held with the BSI Private Bank in Lugano, Switzerland in the names of both Appellants.

- (vi) Subsequently, the 1st Appellant applied for and was granted a Gainful Occupation Permit (GOP) in Seychelles to work for a company known as Naval Services (1995) Ltd. The GOP was issued on the premise that the 1st Appellant had signed an agreement to purchase shares in AMIS, a company which had a controlling shareholding in Naval Services Ltd. However, no shares had ever been purchased or paid for from the 1st Appellant's bank account, yet, on 23 January 2012 a payment of Euro 14,500 was made to Mameli- a director in Naval Services Ltd in his account 0200018635 at Volsbank, Modau, Germany with details of the transaction entered as "purchase of shares".
- (vii) Similarly, on 23 January 2012 a transfer in the sum of Euro 7,000 was made from Four Stars to one Ermano Luini, (also connected to AMIS) in his account number 58748900001 at the Banque Populaire in Cote d'Azure, Monaco with details of the transaction also entered as "purchase of shares".
- (viii) It was the Respondent's belief that the above payments were made to use the name of the company Naval Services Ltd and the assistance of its director- Mr. Mameli to obtain a legal basis to apply for a GOP and conceal the origin of the illicit funds.
- (ix) Parcel V17532 was then transferred to the Appellant on 6 July 2012 for US\$ 620,000 which money was paid from account number 300000011097 in the name of Four Stars Ltd at BMI Offshore Bank Limited following which residence permits were granted to the 1st Appellant his wife and their two sons Alessandro and Gabriele.

6. It is based on the above information that the Respondent moved Court under Section 4 of the Proceeds of Crime (Civil Confiscation) Act 2008 (hereinafter referred to as POCCEA) for an interlocutory order prohibiting the Appellants from dealing with the property situated at Eden Island, Mahe.

7. The 1st Appellant denied the allegations and stated as follows:
- (i) that all the yachts alleged to have been concealed or diverted were retrieved by the police but that he could not produce the supporting documentation as these were in Italian and were too big and expensive to translate into English.
 - (ii) The money used to purchase the property was drawn from his Swiss bank account and not proceeds from the defrauded Company.
 - (iii) With regard to the allegation of misrepresentation of purchase of shares in Naval Services Limited, the 1st Appellant stated that he had paid a deposit for the shares but had not yet completed the share transfer transaction when he applied for a GOP. When his GOP was cancelled, he bought the house at Eden Island to secure his stay in Seychelles and to protect his family as he could not return to Italy as he feared the Mafia harming him and his family since he had previously been assaulted by them. The Mafia had made demands on him regarding the yachts and money derived from them and this is why he could not pay his taxes, declared bankruptcy and had to get out of Italy. He was not fleeing justice in Italy but the Mafia.
8. Having considered the Respondent's application for issuance of interlocutory orders and the Appellants' affidavits in reply, Twomey CJ held that there was ample evidence to support the belief that the money used by the Appellants to purchase the property in Seychelles was from illicit funds.
9. Furthermore, the Judge held that the burden of proof shifted to the Appellants to show on a balance of probabilities that the properties retained were not from illegitimate sources. Having considered the Appellants' affidavit in reply, the Judge held that the answers were vague and in no way validly explained how the money used to buy the property in Seychelles was obtained. The Judge specifically pointed out that the 1st Appellant's explanation of drawing upon his savings to purchase the property for a rainy day was very unconvincing without any documentation of even a savings account statement or other bank documentation. That if indeed he had made profits from his company in Italy

and had savings for the transaction, all he had to do was to produce bank statements of these accounts but he did not. Similarly, the averment that he received the money as a gift from his father-in-law was not supported by any documentation. Further still, the Judge did not believe the 1st Appellant's explanation regarding the false statements made regarding his shareholding in Naval Services in order to obtain the GOP.

10. Further still, the Judge found that the 1st Appellants' claims that all the assets of the company were recovered by Police had no supporting documentation. She also found that the foregoing averment by the 1st Appellant contradicted his earlier averment that the yachts were his personal possession and had a right to deal with them as he wished.
11. In conclusion, the Judge found that the 1st Appellant failed to satisfactorily explain the legitimate source of wealth used for the purchase of the property at Eden Island.
12. The Judge therefore issued the freezing orders against the 1st Appellant prohibiting him or any other person from disposing or otherwise dealing with the whole or any part of the property at Eden Island. Furthermore, Superintendent Hein Prinsloo was appointed as a receiver of the said property. Costs were reserved for the main cause.
13. Dissatisfied with the Ruling of Twomey CJ, the 1st Appellant together with his wife brought an application vide MA 167/2020 before Govinden CJ requesting for a variation of the interlocutory and receivership orders.
14. The Respondent also brought an application before Govinden CJ viz MA169/2020 which was an application for contempt of court orders against the Appellants. The Respondent averred that the Respondent failed to comply with the court's orders by continuing to live at the property which had since been placed under receivership by the Respondent.
15. In accordance with Section 106 of the Seychelles Code of Civil Procedure, the two applications were consolidated and heard as one matter. For both applications, the 1st Appellant argued that the order of placing his residential property under receivership amounted to an injustice as it consisted of dispossessing him of property in light of the

fact that he had not exhausted all the legal remedies available to him like the right to appeal to the Court of Appeal against the orders issued by Twomey CJ.

16. In respect of the application to vary the interlocutory orders, Govinden CJ noted that the Appellants had a right to appeal to the Court of Appeal and it is that Court that had the power to reverse and alter the interlocutory orders. That since the matter was pending before a court of higher jurisdiction, he had no jurisdiction to consider the merits of the case. The Judge further noted that the averment that possession of his house by the receiver amounted to an injustice was not enough to warrant the court to vary the order given the operation of the law of receivership. That the operation of the law of receivership is to the effect that generally the appointment of a receiver does not alter the ownership rights, change the title to property or affect the title of persons whose property is in receivership ... Rather, the title to the property in receivership continues in the owner/defendant/debtor whose property is in the receivership until divested by court order ... As a result, even if the Seychelles Court of Appeal was to reverse the decision in the main suit, no harm would be caused through a transfer of ownership interest as the Appellant would have been owner at all material time.

17. In respect of the application for contempt of court, Govinden CJ held that the failure by the Appellant to handover property to the Receiver amounted to contempt of the court's orders and they did not show Court that any injustice would be caused to them if possession is taken over by the receiver pending that appeal. Consequently, the Judge ordered the Appellants to handover the property to the Receiver within 14 days from the date of the Ruling or else be committed to prison for 3 months.

18. Being dissatisfied with both the Rulings of Twomey CJ and Govinden CJ, the Appellants appealed to this Court on the following grounds:

In respect of Twomey CJ's Ruling, the grounds of appeal are:

- 1. The learned Chief Justice erred when she disregarded the point of law raised by the Appellant that the Respondent's affidavit was invalid in law and therefore cannot be relied upon to justify a judgment of the Supreme Court.**
- 2. The learned Chief Justice's failure and refusal to adjudicate over the point of law raised by the Appellant in his submissions constitute a violation of the Appellant's constitutional right to a fair hearing.**
- 3. The learned Chief Justice's erred in fact, when she remarked that in essence Superintendent Prinsloo's averments are to the effect that the Appellant defrauded an Italian company, namely, Nord Marine S.N.C. of which he was a partner and manager, by way of asset stripping, that he destroyed company records, transferred and/or convert profits of the company to himself and purchased a villa in Seychelles from these proceeds and that therefore the property in Seychelles is derived from the proceeds of crime and ought to be confiscated.**
- 4. The learned Chief Justice erred in fact when she surmised that Superintendent Prinsloo also stated that in the present case the offence of fraudulent bankruptcy is the predicate offence grounding the section 4 application. And that the offence relates to funds diverted from the company's account in Italy to Seychelles and money laundering by the Respondent occurred when the diverted funds were used to purchase the property in Seychelles.**
- 5. The learned Chief Justice erred when she failed to consider the fact that the Respondent has filed a defective application in that the supporting affidavit to the motion for the interlocutory order does specify the Respondent's belief evidence and grounds for it but rather that this is contained in the motion itself.**
- 6. The learned Chief Justice erred when she concluded that the submissions on the point raised in paragraph 5 above, therefore has no basis and are disregarded.**

- 7. The learned Chief Justice erred when she concluded that there seems to be ample evidence as outlined (in) (sic) above to support his belief that the money used to purchase the property in Seychelles was from illicit funds. I am satisfied on this information, together with his belief evidence that there are reasonable grounds at this stage to suspect that the specified property constitutes directly or indirectly, benefit from criminal conduct, or was acquired in whole or in part with or in connection with property that is directly or indirectly benefit from criminal conduct. The Applicant therefore has established a prima facie case against the Respondent.**
- 8. The learned Chief Justice erred when she concluded that the Appellant's affidavits are vague and although contains denials of Superintendent Prinsloo's averments in no way validly explain the provenance of the money used to buy the property in Seychelles.**
- 9. The learned Chief Justice erred when she held that the explanation of money squirrelled away for a rainy day is very unconvincing without any documentation or even a savings account statement or other bank documentation. This is contrary to the standard of proof required of the Appellant in law.**
- 10. The learned Chief Justice erred when she concluded that the Appellant has not produced any evidence to show that the yachts were not concealed and that they were all recovered by the Italian police.**
- 11. The learned Chief Justice erred when she concluded that the Appellant has not produced any supporting document to show that all the assets of the company were recovered.**

12. The learned Chief Justice erred when she held that the Appellant has failed to satisfactorily explain the legitimate source of wealth used to purchase the property at Eden Island.

13. The learned Chief justice erred when she failed to address the issue of hardship at all in her judgment.

Relief sought by the Appellants:

1. Set aside the Judgment of the Supreme Court.
2. Allow the Appeal.
3. Costs be granted to the Appellant.

In respect of Govinden CJ's Ruling, the grounds of appeal are:

- 1. The learned Chief Justice erred when he held that the Appellants have not been able to prove hardship to justify a variation of the court order.**
- 2. The learned Chief Justice erred when he held that the Appellants have not been able to prove injustice.**
- 3. The learned Chief Justice erred when he ordered the Appellants to hand over physical possession of their property to the Receiver failing which the 1st Appellant would undergo three months in prison.**

Relief sought by the Appellants:

1. Allow the appeal.
2. Vary the court order dated 20th October 2021 in MA167/2020 and MA169/2020 arising out of MC 18/2019 making an order allowing the Appellants to stay and remain in their home at Eden Island, Seychelles until such time as their appeal is heard and disposed of by the Seychelles Court of Appeal.

Court's consideration

19. To avoid unnecessary repetition, the parties' submissions will be reproduced at the point where the Court will be resolving each ground of appeal.
20. I will address the grounds of appeal raised against the decision of Twomey CJ first and thereafter will consider the appeal against Govinden CJ's decision.
21. The Appellants raised 13 grounds of appeal against the decision of Twomey, CJ as reproduced above. It is imperative to state that most of the grounds and the submissions made thereunder are unnecessarily lengthy and repetitive. I will therefore handle similar grounds together. I however note that the Appellants submitted that ground 1 of the Appeal is the most substantial and meritorious grounds of the appeal with the impact of disposing of the rest of the grounds if successful.

Ground 1

22. The first ground of appeal faults the learned Judge for admitting and relying on Prinsloo's defective affidavit. The defect is in respect of the jurat appearing on a different page from the text of averments made by Prinsloo. In support of this submissions, Counsel relied on **Order 41** of the **White Book Supreme Court Practice Rules** as well as the authority of **Daniellay Lablache de Charmoy v Patrick Lablache**¹.
23. The relevant part of Order 41 rule 1 of the White Book provides as follows:

“Form of affidavit

- 1. Subject to paragraphs (2) and (3), every affidavit sworn in a cause or matter must be entitled in that cause or matter.**
- 2. Every affidavit must be expressed in the first person and must state the place of residence of the deponent and his occupation or, if he has none, his description, and if he is, or is employed by, a party to the cause or matter in which the affidavit is sworn, the affidavit must state that fact.**

¹ Civil Appeal SCA MA 08/2019.

5. Every affidavit must be divided into paragraphs numbered consecutively, each paragraph being as far as possible confined to a distinct portion of the subject

6. Jurat - The jurat of every affidavit should contain the full address of the place where the affidavit was sworn, sufficient for identification. Affidavits should never end on one page with the jurat following overleaf. The jurat should follow immediately after the end of the text. The signature of the Commissioner for Oaths should be written immediately below the words "Before me". (Court's emphasis)

24. The Appellants' Counsel also relied on the case of **Daniella Lablache de Charmoy (supra)**. In that case, Counsel for the Respondent raised an objection on appeal to the effect that the affidavit should not be admitted in evidence because of a defect in the jurat. He stated that the jurat must follow immediately on from the text and not be put on a separate page. He also submitted that the affidavit was defective because it does not state the full address of the applicant and occupation. The Court considered the said objections and held as follows:

"The Court considers the submissions of Counsel to be well founded. Irregularities in the form of the jurat cannot be waived by the parties. In Pilkington v. Himsworth, 1 Y. & C. Ex. 612), the court held that: "[j]urats and affidavits are considered as open to objection, when contrary to practice, at any stage of the cause. That is a universal principle in all Courts; depending not upon any objection which the parties in a particular cause may waive, but upon the general rule that the document itself shall not be brought forward at all, if in any respect objectionable with reference to the rule of the Court". [28] Also an affidavit giving no address of the applicant was rejected: see Hyde v Hyde, 59 L.T. 523." (Emphasis of Court)

25. Consequently, the Court in the above case accepted the submissions of Counsel that the affidavit was bad in law and refused to admit the defective affidavit as evidence.

26. It is noted that the Record has two affidavits. The first affidavit was in support of the Notice of Motion and is marked D6-D12. The second affidavit is marked G1-G6.

27. At the trial, the issue of the defective affidavit was handled by the Trial Judge follows:

“In closing submissions, the Respondent has raised some procedural matters for the first time. He has submitted that the Applicant’s second affidavit is invalid as the jurat does not immediately follow the averments. While this is true and would indeed render the affidavit invalid, I note that it was never raised and the late submission (after the closure of the case) on this point has not permitted the Applicant the opportunity to respond. I have nevertheless taken this matter into consideration. Even if I were to exclude the affidavit of 6 May 2020, I note that the averments therein were repeated in evidence in court by Superintendent Prinsloo in his cross-examination by Counsel for the Respondent. Hence the evidence adduced relating to the account number in Italy ... stand to be considered by this Court.”

28. From the above excerpt, it is clear that the Judge was cognizant of the fact that the second affidavit was defective although she stated that the said procedural irregularity was raised at a late stage in the proceedings.

29. However, in the case of **Pilkington v. Himsworth**², which was relied upon by this Court in **Daniella Lablache de Charmoy (supra)**, it was held that: “jurats and affidavits are considered as open to objection, when contrary to practice, at any stage of the cause.” It is thus not surprising that, the Trial Judge went ahead and considered the objection and point of law raised although she reached a finding that even if the impugned affidavit was to be struck out, the evidence given by Superintendent Prinsloo during cross-examination still stood.

30. The Appellants’ Counsel submitted that having found the affidavit defective, the Trial Judge should have gone ahead to strike it out and in effect, there would be no evidence to support the Notice of Motion which contained prayers for issuance of the injunctive orders.

² 1 Y. & C. Ex. 612

31. I am not persuaded by the above submission. As already noted, even if the second affidavit is struck out, the first affidavit which supported the Notice of Motion was not irregular and contained evidence that led to grant of the orders sought by the Respondent.
32. It is also on record that Counsel objected to the defect in the affidavit after cross-examination of the deponent.
33. I have carefully read the proceedings regarding the cross-examination of Prinsloo by the Appellants' lawyer. The answers given by Prinsloo during cross-examination were in respect of the affidavit supporting the Notice of Motion. I have held above that the affidavit which supported the Notice of Motion is proper and contains the evidence that guided the Trial Judge in reaching the decision she made. The Trial Judge was therefore correct to conclude that Prinsloo's evidence given during cross-examination stands.
34. The other defect raised by the Appellants' lawyer was that the Notice of Motion did not conform to the format prescribed in **Section 4 (7) of the POCCCA** as well as Form 1 of the **Proceeds of Crime (Civil Confiscation) Rules 2016**. Counsel argued that the belief evidence stated by Prinsloo in the Notice of Motion should have been placed in the supporting affidavit instead of the motion.
35. **Section 4 (7) of the POCCCA** provides that:

An application made under subsection (1) shall-

- (a) specify the name, address and national identity number (if known) of the respondent;**
- (b) set out the particulars of the property in respect of which the interlocutory order is sought;**
- (c) specify the grounds on which the interlocutory order is sought; and**
- (d) be supported by an affidavit verifying the matters set out in the application.**

(Emphasis of Court)

36. I note that the belief evidence was contained in both the Notice of Motion and the affidavit supporting the Notice of Motion. The belief evidence appearing in the Notice of Motion is a short summary of the evidence which is later elucidated in the supporting affidavit. It is trite law that every Notice of Motion should state in general terms the grounds on which the application is made. This in turn necessitates that those grounds - which often constitute evidence for bringing the application - are summarized and presented in the motion. Therefore, the Appellants' argument that the belief evidence should only appear in the supporting affidavit cannot stand.

37. Be that as it may, even if the Appellants' argument was to be taken as correct, it is still trite law that not every irregularity leads to a document being struck out by Court. I am alive to the principle of "substance over form" which allows a Court to examine the actual substance or contents of a document as opposed to rejecting it on the ground that it does not strictly comply with the form in which it is to be presented. The extra information, if any, which was not supposed to be included in the Notice of Motion would therefore be severed and the remaining content examined by Court. What is important in the present matter is that the Notice of Motion contains the grounds required by **Section 4 (7) (c) (supra)**.

38. From the above analysis, I hold that ground 1 of the appeal fails.

39. Since the first ground which the Appellant stated had the potential to dispose of other grounds is unsuccessful, I will go ahead and consider the rest of the grounds of appeal.

Ground 2

40. It was the Appellants' argument under this ground that by failing to address the point of law regarding the defective affidavit, the Trial Judge infringed on the Appellants' right to a fair hearing provided for in **Article 19 (1) of the Constitution**.

41. Under Ground 1, I have already made a finding that the Judge in fact dealt with the said point of law. Therefore, under this ground, what will be resolved is the applicability of **Article 19 (1) (supra)** to the matters at hand.

42. **Article 19 (1)** of the **Constitution** provides as follows:

“Every person charged with an offence has the right, unless the charge is withdrawn, to a fair hearing within a reasonable time by an independent and impartial court.”

43. In reply to the Appellants’ argument above, the Respondent argued that the POCCCA does not attract the protection of Article 19 (1) of the Constitution. That Article 19 (1) is applicable in matters of a criminal nature which is not the case with this present appeal. In showing the difference between matters arising under the POCCCA and other criminal matters, the Respondent’s Counsel relied on the authority of **Hackl v Financial Intelligence Unit (FIU) & anor**³ where this Court held that:

As we have pointed out recently in FIU v Mares Corp [2011] 2011 SCAA 48, POCCCA sits uncomfortably between civil and criminal law and while it deals with the proceeds of criminal conduct, its provisions are essentially civil in nature. As such, they do not attract the protection of Article 19 (5) of the Constitution.

44. Article 19 of the Constitution provides for the rights of a person charged with criminal conduct. Thus, the various clauses of Article 19 are not applicable to the proceedings before Court. I find no reason to depart from the above authorities of this Court.

45. **I therefore come to the conclusion that Ground 2 of the appeal fails.**

Grounds 5, 6, 7, 8, 9, 10, 11 and 12

46. Besides the issue of a defective affidavit, the Appellants’ Counsel argued under the above mentioned grounds that the Trial Judge erred in coming to a finding that there was ample evidence outlined in Prinsloo’s affidavit showing reasonable belief that the money used

³ (SCA 10 of 2011).

to purchase the property in question was derived from criminal conduct. Counsel again argued that since Prinsloo's affidavit was defective, the evidence contained in that affidavit could not stand. What was left is the Notice of Motion without a supporting affidavit.

47. The Respondent's Counsel on the other hand supported the Trial Judge's finding that there were reasonable grounds put forward by Prinsloo to show that the specified property constituted direct or indirect benefit from criminal conduct. Counsel referred to the affidavit marked D6 which supported the Notice of Motion. He specifically pointed out the averments in paragraphs 4-31 of the said affidavit which was supported by exhibits HP1- HP19 to justify the assertion that the property acquired by the Appellants was connected to funds acquired through illicit means.

48. For brevity of this judgment, I will not reproduce paragraphs 4-31 of Prinsloo's affidavit which the Respondent's Counsel referred to above. I will only reproduce paragraph 33 of the affidavit which contains a summary of the grounds that Prinsloo presented to support his belief. The paragraph states as follows:

"33. That the grounds for my said belief are the averments mentioned in this affidavit including;

i. The diversion and or concealment of various assets including approximately 43 yachts and or boats that were in their possession or under their control during the time of the alleged fraudulent bankruptcy. The yachts were not found by the date of the letter from the Italian Ministry (15th October 2018). The assets could be the source of the purchase amount of the said property mentioned in par. 28 supra.

ii. Neither BORDINO nor MALCUORI were in a position to earn an income at the stage that the specified property was purchased for US\$ 620,000.00, save to say that BORDINO and MALCUORI had access to the suspected proceeds of crime concealed in account number 2908465000 in the name of BORDINO and MALCUORI held at BSI SA Lugarno Switzerland. They had no monthly income other than from the suspected

proceeds of crime and were residents in an area where the monthly living costs are extremely high.

iii. That as a result of the information obtained from the authenticated documentation received from the Italian authorities and the averments in paragraph (i) and (ii) above, I am of the belief that the criminal conduct of which the said properties have been acquired in whole or in part is fraudulent bankruptcy, forgery and money laundering;

iv. Chapter XXXII of The Penal Code of Seychelles deals with "Frauds by Trustees and Persons in a Position of Trust and False Accounting. Section 314(a) states that any person who being a director or officer of a corporation or company receives or possesses himself as such any of the property of the corporation or company otherwise than in payment of a just debt or demand, and, with the intent to defraud, omits either to make a full and true entry thereof in the books and accounts of the corporation or company or to cause or direct such an entry to be made therein; or

v. Section 314(b) states that being a director, officer, or member of a corporation, does any of the following acts with the intent to defraud, that is to say-

i. Destroys, alters, mutilates or falsifies any book, document, valuable security or account, which belongs to the corporation or company, or any entry in any such book, document, or account, or is privy to any such act

ii. makes, or is privy to making any false entry in any such a book, document, or account;
or

iii. Omits or is privy to omitting, any material particular from any such book, document or account;

is guilty of a felony, and is liable to imprisonment for ten years."

49. In paragraph 3 of Prinsloo's affidavit, he averred that he made reasonable investigations in the matter for the application of an interlocutory order as required by Section 4 of the POCCCA. In the paragraphs which followed, Prinsloo stated the nature of investigation that he carried out including accessing a letter from the Italian government which requested for the provisional arrest of the Appellants in respect of fraudulent bankruptcy charges in Italy. Prinsloo stated in paragraph 5 of his affidavit that on 19th November 2018, the order by Judge Alessandro Chionna of the Court of Busto Arsizio in Italy in which the Appellants were declared fugitives was **certified** as a true copy of the original by the Italian Honorary Consul in Mahe. Further still, that accompanying the letter from the Italian government which requested for the provisional arrest of the Appellants, were documents detailing the fraudulent bankruptcy transaction including the concealment of yachts belonging to Nord Marine sold off by the Appellants in order to get a profit and deprive the said company's creditors of their dues.

50. The Appellants' Counsel however argued that there were no reasonable inquiries and investigations carried out by Prinsloo. He also argued that the information on which Prinsloo's belief was based was neither reliable nor credible and that the offence of bankruptcy - which the Italian court convicted them of – and formed the foundation for bringing the application under POCCCA was a matter on appeal.

51. The questions which arise are:

(i) *were the investigations carried out by Prinsloo reasonable and credible so as to shift the evidential burden onto the Appellants?*

(ii) *Was the evidential burden discharged?*

52. In **Hackl v Financial Intelligence Unit**,⁴ Court held that proceedings under the POCCCA are civil in nature. And it is a rule of thumb that in civil cases, the standard of proof is on a balance of probabilities.

⁴ (2010) SLR 98.

53. In **Sarah Carolus & ors v Scully & ors**⁵, this Court noted that the balance of probabilities is the requisite standard of proof by which a trier of fact must determine the existence of contested facts. Saying something is proven on a balance of probabilities means that it is more likely than not to have occurred. It means that the probability that some event happens is more than 50%.
54. Court went ahead in the said case to distinguish between succeeding on the balance of probabilities on the one hand and failing on the balance of probabilities on the other hand. I stated that, **if a judge concludes that it is 50% likely that the claimant's case is right, then the claimant will lose. By contrast, if the judge concludes that it is 51% likely that the claimant's case is right then the claimant will win.**
55. The standard of proof – which is on a balance of probabilities – is discharged when the party with the burden to prove adduces evidence in support of his assertions. If that party fails to discharge that burden, then the other party has no burden to discharge. However, where the burden is discharged, then the other party has the burden to disprove the evidence adduced against them. This is what is referred to as the evidential burden. Once the evidential burden fails, then the claimant wins.
56. Relating the above principles to the matter before court, the Respondent had the burden to establish that there are reasonable grounds for suspecting the Appellants' property to have been a proceed of crime. In doing so, the Applicant must:
- (i) depone that the property directly or indirectly constituted benefit from criminal conduct.
 - (ii) The Applicant must then explain what constitutes criminal conduct – what activity in the circumstances of the case constituted criminal conduct? This is done in order to establish a prima facie case under Section 4 of the POCCCA.
 - (iii) If the court rules that a prima facie case has been made out, the onus shifts to the Respondent.

⁵(SCA 39/2019) [2022] SCCA 1.

- (iv) Once the Respondent adduces evidence to counter the averments of the Applicant, the court then determines whether it is satisfied that the onus by the Respondent – of proving that the property was NOT the proceeds of crime – has been fulfilled.
- (v) If the court is satisfied that the Respondent has satisfied his onus of proof then the application should be dismissed
- (vi) If the court is not satisfied, court should then consider whether there would be a serious risk of injustice and if not, then proceed to grant the application.

57. The Seychelles courts of law have summarized the above approach in various cases⁶ as follows:

"... once the applicant provides the Court with prima facie evidence that is, reasonable grounds for his belief in compliance with section 9(1) in terms of his application under section 4(1) of POCCCA, the evidential burden shifts to the respondent to show on a balance of probability that the property is not the proceeds of crime..."

58. I note that the Trial Judge at paragraphs 44-49 of her judgment held as follows:

"I have examined the documentary evidence annexed to Superintendent's Prinsloo's affidavit. I have also taken into consideration the evidence in court. There seems to be ample evidence as outlined above to support his belief that the money used to purchase the property in Seychelles was from illicit funds. I am satisfied on this information, together with his belief evidence that there are reasonable grounds at this stage to suspect that the specified property constitutes directly or indirectly, benefit from criminal conduct, or was acquired in whole or in part with or in connection with property that is directly or indirectly benefit from criminal conduct. The Applicant therefore has established a prima facie case against the Respondent.

The burden of proof then shifted to the Respondent to show on a balance of probabilities that the properties retained were not from illegitimate sources. In other words, he had to show the legitimate source of the funds used to purchase the properties sought to be seized by the present applications.

⁶ Financial Intelligence Unit v Contact Lenses Ltd & Ors (MC 95/2016) [2018] SCSC 564 (19 June 2018); FIU v Mares (2011) SLR 405, Financial Intelligence Unit v Sentry Global Securities Ltd & Ors (2012) SLR 331, and Financial Intelligence Unit v Cyber Space Ltd (2013) SLR 97.

The Respondent's affidavits are vague and although contain denials of Superintendent Prinsloo's averments in no way validly explain the provenance of the money used to buy the property in Seychelles. In particular, the explanation of money squirrelled away for a rainy day is very unconvincing without any documentation of even a savings account statement or other bank documentation. Similarly, the alleged gift from the father-in-law is also not supported by any documentation. I also do not believe the Respondent's explanation regarding the false statements made regarding his shareholding in Naval Services for obtaining of his GOP in Seychelles.

He has also stated that unless the identities of the third parties referred to in the Applicant's affidavit to whom the Italian company's assets has been diverted are disclosed to him he cannot properly comment. The court is bewildered by this approach as the identities of all these persons are contained in the Applicant's affidavits which were duly served on the Respondent. The only inference the court can draw is that the Respondent is being evasive in his answer. His evidence about being pursued about the Mafia is although fascinating and convenient is not in the least convincing.

On the whole, I find the averments of the Respondent and his supporting documentation not to be compelling. He averred that the yachts were not concealed but all recovered by the Italian police but has no produced any evidence of this alleged fact. Similarly, he claims that all the assets of the company were recovered but does not produce any supporting documentation sting that he has no means to translate the Italian documents he has in his possession to that effect. In contradiction to this averment he then states that the yachts were his to do as he wished.

The Respondent has failed to satisfactorily explain the legitimate source of wealth used for the purchase of the property at Eden Island. If indeed he had made profits from his company -in Italy and had savings for the transaction, all he had to do was to produce bank statements of these accounts. (Emphasis of Court)

59. The Trial Judge in essence found that the Respondent discharged its burden of establishing reasonable grounds showing that the property was obtained through illicit means. On the other hand, the Judge found that the Appellants failed to discharge the evidential burden by showing the legitimate source of wealth used for the purchase of the property.

60. A careful reading of Prinsloo's affidavit from paragraphs 4 to 33 reveals a detailed account of events and grounds that made him to believe that the property acquired by the Appellants was derived from proceeds of crime. For example, at paragraphs 13-17 and 28-30, Prinsloo stated as follows:

“13. That according to the travel records of BORDINO and MALCUORI they entered the Seychelles from Italy on 6th November 2011. They departed from Seychelles to Italy on 10th November 2011 and arrived again in Seychelles from Italy on 12th November 2011.

14. That on 17th November 2011 FOUR STARS LTD (FOUR STARS), Company number 099508, was incorporated in the Republic of Seychelles as an International Business Company (IBC). La Rosiere (Registered Agents & Trustees) LTD (La Rosiere) was appointed on 17th November 2011 as the registered agent of FOUR STARS. According to documentation obtained from La Rosiere, a meeting was held at Maison La Rosiere, Mahe, on 17th November 2011. During this meeting, MALCUORI was appointed sole Director of FOUR STARS and BORDINO was appointed Shareholder of an allotted 1,000 shares of US\$ 1 each. According to a note in the file of La Rosiere, BORDINO and MALCUORI was introduced to La Rosiere by Giorgio MAMELI of Naval Services, marked as ("HP3") of which I have signed my name prior to the swearing hereof.

15. That on 30th November 2011, BORDINO and MALCUORI opened bank account number 300000011097 in the name of FOUR STARS held at BMI Offshore Bank Limited in Mahe Seychelles. BORDINO and MALCUORI were both authorized signatories on the account.

16. That an amount of USD 460,000.00 was deposited into BMI account 300000011097 in the name of FOUR STARS on 26th December 2011. The funds originated from account 2908465000 with BSI SA Private Bank in Lugano Switzerland in the name of BORDINO and MALCUORI. On 19th January 2012 an amount of USD 319,000.00 was deposited into BMI account 300000011097 in the name of FOUR STARS. The funds originated from account 2908465000 with BSI SA Private Bank in Lugano Switzerland in the name of BORDINO and MALCUORI.

28. That Parcel V17532, Condominium Unit A4, comprised in Zanmalak Eden Island, was transferred to Gianni BORDINO in accordance with The Land Registration Act (CAP 107) and The Condominium Property Act (CAP 41A) on 6th July 2012. Marked as

("HP14") of which I have signed my name prior to the swearing hereof. The purchase price was USD 620,000.00 and this amount was transferred on 21st March 2012 from account number 300000011097 held at BMI Offshore Bank in the name of FOUR STARS to the account of Eden Island Development Company for the purchase of this property marked as ("HP15") of which I have signed my name prior to the swearing hereof.

29. That in the letter dated 28th February 2012 from Principal Secretary Immigration & Civil Status Department (HP9) it was stated that BORDINO and MALCUORI should make arrangements to leave the Seychelles on 6th March 2012. No evidence of any GOP's for BORDINO and MALCUORI on the date of the purchase of Parcel V17532, Condominium Unit A4, comprised in Zanzmalak Eden Island, could be found. BORDINO did not have a GOP to work in the Seychelles and only applied for a GOP as a Technician Specialist at Waypoint Marine on 7th August 2013. Marked as ("HP16") of which I have signed my name prior to the swearing hereof. MALCUORI did not have a GOP to work in the Seychelles and only applied for a GOP as an Italian Buyer Representative at Mamma Mia on 5th September 2014. Marked as ("HP17") of which I have signed my name prior to the swearing hereof. BORDINO could not have earned a legal income in Seychelles during 6th July 2012 when the property in Paragraph 28 supra was purchased.

30. That it is believed that BORDINO and MALCUORI are in possession of property and that the property was acquired in whole or in part with or in connection with property that directly or indirectly constitutes the benefit from criminal conduct and that they used that property to acquire the property mentioned in paragraph 28 supra in whole or in part. The source of the funds to purchase the property described in par. 28 supra are from account number 2908465000 in the name of BORDINO and MALCUORI held at BSI SA Lugano Switzerland that is believed to have been used for the specific purpose of concealing the proceeds of crime of the assets mentioned in the certified copy of the Court of Busto Arsizio's order (HP2) in which the court declared BORDINO and MALCUORI fugitives from justice.”

61. Prinsloo's averments in the above paragraphs explain how the Appellant's criminal conduct (fraudulent bankruptcy) which commenced in Italy was linked to the purchase of the property in Seychelles. In summary, Prinsloo explained that the Appellants first entered Seychelles on 6th November 2011 and left for Italy on 10th November 2011. Shortly thereafter, they returned to Seychelles on 12th November 2011. On 17th November 2011, the 1st and 2nd Appellants incorporated a company known as FOUR STARS LTD for which they were appointed as sole shareholder and sole director of the Company respectively. On 30th November 2011, the Appellants opened a Bank account number in the name of the Company. On 26th December 2011, money in the sum of USD 460,000 originating from a Switzerland Bank account belonging to the Appellants was deposited on the company account. On 9th January 2012, a further sum of USD 319,000 originating from the said Switzerland account was deposited on the company account. On 21st March 2012, USD 620,000 was transferred from the Company account to that of Eden Island Development Company for the purchase of the property in question. Prinsloo explained that although the 1st Appellant stated that he was working in Seychelles in 2013 as a Technician specialist and subsequently as an Italian Buyer Representative, the salary from those jobs could not make him so much money within a short period of time to enable him purchase such a pricy property. That the funds used to purchase the property could only have been accessed through illicit means.

62. It is on the basis of the above evidence that the Trial Court reached a finding that the Appellants purchased the property using illicit funds (from conduct which was criminal in nature i.e. the fraudulent bankruptcy).

63. Prinsloo also averred that the documents marked exhibit HP1 and HP2 obtained from the Italian Embassy in Mahe were certified. Exhibit HP1 was a letter from the Italian government requesting for the assistance of Interpol to arrest the Appellants. Exhibit HP2 was an order by a Court in Italy that declared the two Appellants fugitives from justice because they evaded the enforcement of an order of court (i.e. arrest) following fraudulent bankruptcy charges.

64. Before this Court, the Appellants' Counsel argued that since the Respondent relied on foreign documents to prove its case, the Court ought to have ruled on the admissibility of the said documents. Counsel further argued that the foreign documents were neither apostilled nor authenticated and this made them inadmissible in evidence. Counsel contended that it is only if the Trial Judge had ruled that the documents relied upon by the Respondent were admissible that the burden of proof would have shifted to the Appellants. In support of this argument, Counsel relied on the authorities of **Joy Kawira Kanga v Ministry of Employment, Immigration and Civil Status**⁷ and **Nasim Onezime v AG & Government of Seychelles**⁸ in which the Courts held that affidavits which were deponed outside of Seychelles and not authenticated are not admissible in evidence.

65. I note that Counsel's argument above does not support any of the 13 grounds of appeal presented in the Notice of Appeal and this contravenes **Rule 18 (8)** of the **Court of Appeal Rules** which provides that:

An appellant shall not without leave of the Court be permitted, on the hearing of that appeal, rely on any grounds of appeal other than those set forth in the Notice of Appeal.

66. Therefore, on the premise of the above provision, this Court will not entertain an argument or a ground which is outside the filed Notice of Appeal.

67. I must now address the Appellants' argument that the Italian court order relied upon by Prinsloo was being appealed against. The filing of an appeal in and of itself does not quash or nullify the conviction.⁹ The decision of that court stands until overruled by a higher court. An accused person remains a convict until an appeal is not only heard, but leads to quashing of the conviction.

⁷ (SC MC 29/2019).

⁸ SCA CL 03/2021.

⁹ Rule 20 (1) of the Seychelles Court of Appeal Rules provides that: "*An Appeal shall not operate as a stay of execution or proceedings under the decision appealed from.*"

68. Arising from the above analysis, I come to the same finding as the Trial Judge that the evidence contained in Prinsloo's affidavit established a prima facie case against the Appellants to put them to their defence.
69. I now examine whether the Appellants in their defence discharged the evidential burden which required them to adduce evidence to rebut the prima facie case established by the Respondent.
70. In paragraph 10 of the 1st Appellant's affidavit which is an answer to Prinsloo's averment regarding the disguise and concealment of assets, the 1st Appellant averred that, "*he would not be able to fully answer this allegation.*" Similarly, in paragraphs 14 and 15 of the 1st Appellant's affidavit, in addressing Prinsloo's averment regarding the travel records leading to the incorporation of FOUR STARTS LTD, the 1st Appellant casually stated that: "*he has no comments to make and that he does not see their relevance to the application being made before the court.*"
71. In paragraph 24 of the 1st Appellant's affidavit, he stated that, "*the origin of the money he used to buy the Eden Island property is money that he received as a "gift" from his father in law and money from his savings for a rainy day.*" As noted by the Trial Judge, no further evidence such as documents of a savings account were adduced to back the oral testimony.
72. Further still, in paragraph 24, the 1st Appellant averred that it was difficult to translate the document marked R4 attached to his affidavit, from Italian to English because it was too expensive for him.
73. It was the argument of the Appellants' Counsel that by making a finding that the 1st Appellant could have adduced documentary evidence to support his assertions regarding the source of funds, the Trial Judge had raised the standard of proof required of the Appellant.

74. The evidential burden of proof compels a party to produce evidence in support of their assertion. The evidence must satisfy court that what is said is probably true. In the matter before Court, the Appellants had a duty to satisfy Court that it is probably true that the property was purchased from funds saved for a 'rainy day' and funds given to him by his father in law. The Appellants carried the burden to disprove the evidence adduced against them.

75. The finding by the trial judge that the Appellant could have adduced documentary evidence to support his oral testimony cannot be interpreted as raising the standard of proof above a balance of probability. The evidence adduced by a Respondent to discharge the evidential burden they carry must be credible, must be believable, if it is to satisfy the court that it is more likely than not that the source of funds was legitimate. There are circumstances where documents together with the oral testimony is what will constitute sufficient evidence. It is in this light that the finding of the Trial Judge must be understood.

76. The Trial Judge was therefore correct when she concluded that the Appellants' affidavits are vague and although contained denials of Superintendent Prinsloo's averments, they in no way validly explained the provenance of the money used to buy the property in Seychelles. Further still, the Trial Judge was correct when she held that the explanation of money squirreled away for a 'rainy day' was not convincing since no documentation or even a savings account statement or other bank documentation was adduced to back that averment.

77. I find no reason to arrive at a different conclusion.

78. Therefore, grounds 5, 6, 7,8,9,10,11 and 12 also fail.

Grounds 3 and 4

79. The essence of these grounds is that the learned Trial Judge erred in granting the injunction without supporting evidence being adduced in Superintendent Prinsloo's affidavit. Furthermore, that the Judge made wrong inferences of fact and remarked that according to Prinsloo's averments, the Appellants had defrauded an Italian Company which amounted to criminal conduct under the POCCCA.

80. In reply, the Respondent's Counsel submitted that the Trial Judge made a correct remark and inferences of fact. That paragraphs 6 and 7 of Prinsloo's affidavit stipulate the facts upon which the Trial Judge relied on to make the remark. The said paragraphs of the affidavit are as follows:

"6. That in the order mentioned in paragraph 5 supra it is alleged that BORDINO and MALCUORI were both partners and managers of a company "NORD MARINE S.n.c. G. BORDINO S D.MALCUORI" which was declared bankrupt by the Court of Busto Arsizio, Italy, on 14th March 2012 for the purpose of deriving an unjust profit for themselves and others and causing creditors to suffer damage.

7. That it is further alleged that BORDINO and MALCUORI took and or destroyed the accounting records of the company, they transferred and or converted property knowing or having reason to believe that the property is the proceeds of a crime."

81. It is trite that in reaching a finding on a question(s) of fact, there must be supporting evidence. Such a finding can be made following a remark or comment by the trier of facts. In fact, in **Falcon Enterprise v Essack**¹⁰ it was held that the lack of opportunity to comment on evidence is a breach of the right to a fair trial.

82. Having appraised the inferences of fact drawn by the Trial Judge, I hold that following paragraphs 6 and 7 of Prinsloo's affidavit, the contested 'remark' made by the Trial Judge was correct.

83. I therefore hold that grounds 3 and 4 fail.

¹⁰ SCA 20/2001, LC 202.

Ground 13

84. For this ground, the Appellants' Counsel faulted the Trial Judge for failing to address the issue of hardship. Counsel cited Section 4 (1) of POCCCA which provides that: **“the court shall not make the order if it is satisfied that there would be a risk of injustice to any person.”**

85. Counsel submitted that he raised the issue of hardship in the closing submissions during the hearing at the lower court but the Judge did not address the said issue. He explained that the 1st Appellant's family would be deprived of their family house and have nowhere else to live once the injunction was granted. Furthermore, Counsel submitted that after the 1st Appellant purchased the property in 2012 and paid the necessary government taxes, it was an injustice 7 years thereafter for an injunction to be levied against the 1st Appellant.

86. In reply, the Respondent's Counsel argued that no where did the Trial Judge mention the issue of hardship. Furthermore, that Section 5(11) of POCCCA provides that for the purposes of orders made pursuant to section 4 and 5 of the said Act, 'injustice' shall not include hardship. Thus, Counsel argued that the law [Section 5 (11)] excludes hardship from the meaning of injustice.

87. I will deal with the first contention that the Trial Judge did not address the issue of injustice/ hardship as argued by the Appellants' Counsel.

88. A reading of the judgment of the Trial Judge shows the contrary. At paragraph 51, the Trial Judge stated that:

“I am also satisfied that there is no risk of injustice to the Respondent or any person if I make the orders sought as he may at any stage while the order is in operation cause it to

be discharged or varied by satisfying the court that the property does not constitute directly or indirectly benefit from criminal conduct.”

89. I note that the Judge took into consideration the need for justice to be done in granting the injunctive orders. Therefore, the Appellants’ argument that the Judge did not address the issue of injustice cannot stand.

90. I now move on to address the second limb of the Appellants’ argument to the effect that the orders granted by the Trial Judge caused hardship to him and his family as they were deprived of a family home.

91. **Section 5 (10) and (11) of the POCCCA** provide as follows:

“(10) The Court shall not make a disposal order if it is satisfied that there would be a serious risk of injustice to any person (the onus of establishing which shall be on that person) and the Court shall not decline to make the order in whole or in part to the extent that there appears to be knowledge or negligence of the person seeking to establish injustice, as to whether the property was as described in section 4(1)(a) when becoming involved with the property.

(11) For the purposes of this section and section 4, "injustice" shall not include hardship to the respondent or any other person claiming under him.” (Emphasis of Court)

92. The provisions of law reproduced above do not permit the Court to take into account hardship to be suffered as a result of dispossession when dealing with an application under the POCCCA.

93. Indeed, the Seychelles Constitutional Court in **Hackl v Financial Intelligence Unit (supra)** held that:

the right to property protected under the Constitution only extends to property lawfully acquired. It does not protect unlawfully acquired property ... Depriving people in ownership of property (representing the proceeds of crime) is not unconstitutional ... it is a legitimate restriction to the right to property.

94. Arising from the above discussion, I hold that the Appellants' ground lacks merit.

95. **Therefore, ground 13 fails.**

96. I now turn to the second appeal which was against Govinden CJ's Ruling wherein he declined to vary the orders issued by Twomey CJ. This is what was constituted in Miscellaneous Application No. 167/2020. In the same proceedings, Govinden CJ also handled a contempt application (viz Miscellaneous Application No.169/2020) brought by the Respondent - Government of Seychelles - as a result of the Appellants' failure to comply with Twomey CJ's orders. Govinden CJ held the Appellants to be in contempt of Court and

97. I will start with the grounds of appeal in respect of the application for variation of the orders. The Appellants argued under grounds 1 and 2 of the second appeal that Govinden CJ erred in holding that they failed to prove injustice to justify grant of the variation orders sought.

98. The Appellants argued that they had proved injustice in the following paragraphs of the 1st Appellant's affidavit in which he averred that:

"i. the parties were married on 18th September, 1993.

ii. they have two children born out of the marriage.

iii. the appellants arrived in Seychelles for the first time on the 6th November 2011 and left on the 10th November 2011.

iv. they came back to Seychelles on the 12th November 2011 and after the first appellant obtained sanction from the Government of Seychelles, he purchased parcel number

V17532 at Eden Island on the 6th July 2012 where the appellants have been living peacefully as husband and wife together with their two children ever.

v. on the 27th March 2020, the former Chief Justice made several orders in their case which effectively dispossessed them of their property.

vi. if the Receiver was allowed to take possession of their property as ordered by the court

they will be evicted from their home and their property leaving them homeless.

vii. if they were to become homeless a grave injustice would be caused to them as they had not exhausted all their legal remedies and they had a pending appeal before the Seychelles Court of Appeal yet to be heard and determined.

viii. they had requested the court to vary the court order only to enable them to continue to live in their family home pending the hearing and determination of their case before the Seychelles Court of Appeal.

99. The Appellants' Counsel submitted that all the above facts contained in the 1st Appellant's affidavit were not considered by Govinden, CJ. That the Judge only considered one fact (the pending appeal) out of the many facts that were presented before him and thereby came to a wrong conclusion of declining to grant the variation order sought.

100. Counsel submitted that the cumulative effect of the averments reproduced above show that there was injustice caused to the Appellants by placing their family home under receivership.

101. On the other hand, the Respondent Counsel in reply to the above submission supported the findings of Govinden, CJ. Counsel submitted that the 1st Appellant's averments provided no factual basis to substantiate his grievance of injustice.

102. In dealing with the issue, Govinden, CJ held as follows:

“Upon a careful analysis I find that the question of injustice could only have been answered in the positive if after the Receiver would have taken possession, he would have

had the right to transfer the property to third parties in good faith and for value. This scenario could have led to great legal complications, both for him and that third party, if he was to press for its return after a successful appeal. However, I am of the view that this cannot be done given the state of our law, even If, as it was in this case, the Receiver was appointed with power to dispose of the dwelling House. This is so because the Receivers right to dispose of the property is restricted by the provisions of Section 5 of the POCCCA. This Section prescribed that all properties under Receiverships can only be transferred to third parties through a court disposal order and that this order cannot be made if there is an appeal against the Interlocutory orders, such as in this case. Accordingly, I find that no injustice arises in this context.

The next issue to be decided is whether mere possession of Mr. Bordino's house by the Receiver and the reciprocal dispossession pending appeal can itself amount to injustice and that this has been proven by the Applicant.

Courts have generally held that the appointment of a Receiver does not alter the ownership rights; change the title to property, or affect the title of persons whose property is in receivership. The appointment of a Receiver does not deprive the owners/debtor of the ownership of the property of which the receiver is given authority, and the receiver does not actually take title to the property. Rather, the title to the property in receivership continues in the owner/defendant/debtor whose property is in the receivership until divested by court order, including a court sanctioned sale by the receiver. In this case divesting can only take place by a Disposal Order under Section 5. A Receiver can, pending a Divesting Order, only stand in the shoes of the person over whose assets she/he/it is appointed Receiver and holds property coming into its hands by the same right and title as the person for whose property she/he/it operates as a Receiver. Although title remains technically in the owner of the property, the appointment of a Receiver does divest the owner of possession, management and control of the property subject to the receivership, with the effect of denying the owner the power to transfer or otherwise act with regard to that property.

Upon the imposition of a receivership, the property of the receivership estate passes into the custody of the receivership court and becomes subject to the court's authority and control. As the court's officer or agent, the Receiver has the right to hold or possess, or has custody of, the property subject to the receivership for the benefit of all of those claiming an interest in it. Stated another way, upon appointment of a Receiver, the property of the entity in receivership is in custodia legis and the Receiver's possession, as an officer of the court, is considered to be that of the appointing court. As a result, even if the Seychelles Court of Appeal was to reverse the decision in the main suit no harm would be caused through a transfer of ownership interest as the Applicant would have been owner at all material time.

It is to be noted that mere averments that there is a right of appeal and that has been exercised is not enough to prove the injustice that would prompt this court to vary a court the court order. If that was to be the case, there would have been no need to insert the provision of Section 4 (3) (b) of the POCCA for the benefit of a Respondent Judgment Debtor. The law would have simply excluded him from that provision, which would have meant that he would have no right to seek a variation pending appeal. Now he can seek such variation but he or she needs to prove factual injustice.

The affidavit of Mr Bordino and his wife in support of their applications however only avers that the orders in the main suit, which calls for the Receiver to take possession of his house, amounts to injustice as it consist of dispossession pending the exhaustion of his legal remedies. To me that is not enough in law to amount to injustice given the law of receivership as referred to above and as a result, he has failed to discharge the burden of proof, which lies on him in law.”

103. In essence, Govinden, CJ held that no injustice was proved by the Appellants to warrant variation of the order because appointment of a Receiver under POCCCA proceedings does not amount to change of ownership. That it is only a Disposal Order granted under Section 5 of the POCCCA where an owner can be dispossessed/divested of the impugned property.

104. I note that the argument presented by the Appellants under grounds 1 and 2 is similar to that in ground 13 (supra). Although the Appellants sought the leave of this Court to

amend the word “hardship” in ground 1 and substituted it with the word “injustice”, the argument remains the same that the order appointing a Receiver amounted to dispossession of the Appellants from their family home which amounted to an injustice. For emphasis, I reiterate the holding of this Court in **Hackl v Financial Intelligence Unit (supra)** wherein it was held that:

the right to property protected under the Constitution only extends to property lawfully acquired. It does not protect unlawfully acquired property ... Depriving people in ownership of property (representing the proceeds of crime) is not unconstitutional ... it is a legitimate restriction to the right to property. (My emphasis)

105. I am therefore in agreement with the reasoning of Govinden, CJ regarding the interpretation of injustice arising under POCCCA and that the appointment of a Receiver does not in and of itself amount to an injustice.

106. As such grounds 1 and 2 fail.

107. Under ground 3, the Appellants faulted Govinden, CJ for holding them in contempt of court and committing them to imprisonment for 3 months in the event that they failed to handover the property to the Receiver.

108. The Appellants submitted that the default prison sentence issued by the Judge was harsh and manifestly excessive, in the circumstances, since there was no evidence before the Court that the Receiver had indeed requested the Appellants to handover possession of the property and refused to do so.

109. In reply, the Respondent’s Counsel submitted in her oral submissions that the 1st Appellant was personally served with a copy of the orders issued by Twomey, CJ immediately after the Ruling was delivered. That indeed, the foregoing action was

deponed in an affidavit by Prinsloo. Thus, Counsel submitted that it was not correct for the Appellants or their Counsel to state that the order was not served on them.

110. The Respondent's Counsel also argued that the Appellants' intentions are to defy the orders of Court by using delay tactics through filing of several interim applications. Counsel listed the following applications:

- i. On 23 April 2020: The 1st Appellant filed an appeal against the Interlocutory and Receivership orders to the Court of Appeal.
- ii. On 30 April 2020: The 1st Appellant filed an application to the Supreme Court for a Stay of Execution.
- iii. On 26 July 2020: Having failed to secure a stay from the Supreme Court, the 1st Appellant applied to the Court of Appeal for a Stay of Execution.
- iv. 21 September 2020: The Appellants filed an application for a variation order in the Supreme Court, followed by the Respondent's Contempt of Court application.
- v. 25 February 2021: The Court of Appeal dismissed the Application for a Stay of Execution on the basis that, inter alia, it was defective.
- vi. 20 October 2021: The Supreme Court dismissed the Application for a variation Order on the basis that, inter alia, the Appellants failed to prove injustice. The Court further held that the Appellants are in contempt of Court orders dated 27 March 2020.
- vii. 29 October 2021: The Appellants filed an appeal against the decision of the Chief Justice dated 20 October 2020.
- viii. 2 November 2021: The Appellants filed an application to the Court of Appeal for a Stay of Execution of the orders delivered on 20 October 2020, which remains pending before the Court of Appeal.

111. Following the above incidents, the Respondent's Counsel concluded that the learned Chief Justice was correct to hold the Appellants in contempt of the Court Order and to direct the Appellants to handover physical possession of their property to the Receiver failing which the 1st Appellant would undergo three months in prison.

112. In conclusion, the Respondent Counsel prayed that this Court dismisses the appeal.

113. I will address the latter argument first that the Judge was correct to hold the Appellants in contempt because they were using procedures of court to delay the execution of the freezing orders issued by Judge Twomey. I opine that when a litigant takes advantage of court processes, that in itself is not illegal. The said processes are available to any litigant and not just the Appellants in the present matter. Therefore, the Respondent Counsel's argument that the Appellants' actions of filing interim application was a tactic to delay execution of the court's orders lacks merit.

114. What the Respondent Counsel needed to prove to court is a record showing demand of vacation of the property and the Appellants' refusal to comply with that demand. At the hearing of this matter, Counsel for the Respondent stated that Prinsloo had sworn an affidavit in which he averred that the demand notice to vacate the property was served on the Appellants. Counsel promised to avail court with this affidavit since it was not part of the documents in the brief. However, until now, the said affidavit has not been filed in court.

115. Nevertheless, a careful reading of Govinden, CJ's ruling on the contempt application alludes to the fact that a demand for vacation of the property has ever been made by the Respondent. The Judge stated as follows:

“ ... so far, the Judgment Debtor has failed to surrender and give possession of the property despite that this has been demanded by the Applicant. To my mind, this clearly amounts to failure to abide to the orders of the Supreme Court in MC 18/19. The failure is ex facie contemptuous of the said orders, as he has not shown to this court that any injustice would be caused to him pending appeal if possession is taken over by the Receiver pending appeal.

I would accordingly grant the prayers of the Applicant in MA 169/20. Mr Gianni Bordino is ordered to give Mr. Hein Prinsloo the possession and physical custody of the property ... within 14 days of this Ruling failure of which he shall be committed to prison for three months.” (Emphasis of Court)

116. In **Ramkalawan & Anor v Nibourette & Anor**¹¹ this Court held that, *there are no statutory provisions with respect to contempt in the laws of Seychelles. Contempt procedures and remedies are received from England [by virtue of] Section 4 of the Court which provides that: The Supreme Court shall be a Superior Court of Record and, in addition to any other jurisdiction conferred by this Act or any other law, shall have and may exercise the Powers, authorities and jurisdiction possessed and exercised by the High Court of Justice in England*". Thus, it is the English authorities which will be referred to in addressing the issue of contempt.

117. **Halsbury's Laws of England, Contempt of Court (Volume 9 (1) Reissue) 1** defines contempt of court by classifying it into 2 categories as follows:

Contempt of Court may be classified as either (1) Criminal Contempt, consisting of words or acts which impede or interfere with the administration of justice, or which create a substantial risk that the course of justice will be seriously impeded or prejudiced;
[2] contempt in procedure, otherwise known as civil contempt, consisting of disobedience to the judgment, orders or other process of the Court and involving a private injury.

118. In order for a court to hold a party in contempt of court, the following factors must suffice:

- (i) existence of a lawful court order;
- (ii) knowledge of the order by the contemnor; and
- (iii) the contemnor's failure to comply with the order (disobedience of the court order).

119. It is clear from the facts on record that a lawful court order exists and that the Appellants are aware of it. The issue in contention is whether the Appellants have willfully or deliberately failed to comply with the said order. The Respondent argued that the Appellants have refused to surrender the property to the Receiver as ordered by Twomey,

¹¹ MA 178/2017 (arising in MC 86/2012) [2018] SCSC 618 (28 June 2018).

CJ. This is contrary to the court's order and it is on this premise that Govinden, CJ held the Appellants to be in contempt.

120. However, Govinden, CJ gave the Appellants a time frame of 14 days within which to comply with the Court's order of surrendering possession of the property, failure of which they would be committed to prison for 3 months.

121. I note that at the time Govinden, CJ delivered his Ruling and orders on 25 October 2020, the Appeal which is now before Court was not yet cause-listed for hearing. Given this fact, the Appellants had not yet exhausted all the legal remedies available to them including the Appeal. I also note that the Respondent has not yet moved Court for grant of a Disposal Order which is the final stage under the POCCCA proceedings. In such circumstances, now that this Court has heard the matter to its finality, the Appellants will be given a period of 14 days to comply with the orders issued by Twomey, CJ. The committal to civil prison for 3 months will commence in the event that the orders of this Court are not strictly complied with.

122. Arising from the above discourse, I hold that the Appellants' appeal against Govinden, CJ's Ruling partially succeeds on the issue of contempt. It however completely fails on grounds 1 and 2.

Conclusion and Orders

123. On the whole, I hold that the consolidated appeals fail and are hereby dismissed.

124. Consequently, the orders of the Supreme Court are upheld and modified in the following terms:

1. Pursuant to Section 4 of POCCCA, the Appellants or any other person are prohibited from disposing or otherwise dealing with the whole or any part of the property comprised in Parcel V17532 at Zanmalak, Eden Island, Mahe, Seychelles.

2. Superintendent Hein Prinsloo or any other authorized person is appointed as Receiver of the said property to manage, keep possession or dispose of, or otherwise deal with the property in respect of which he is appointed.

3. The Appellants must comply with these orders within 14 days from delivery of this judgment failure of which, they shall be committed to prison for three months.

4. The Orders of this Court are to be served on the Registrar General.

5. I make no order as to costs.

Dr. Lillian Tibatemwa-Ekirikubinza, JA

I concur

F. Robinson, JA

I concur

S. Andre, JA

Signed, dated and delivered at Ile du Port on 16 December 2022