IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2023] (18 December 2023)

SCA CR 11/2023

(Appeal from MC 11/2022)

In the matter between

Mica Solange Faure **Appellant**

(rep. by Mr. Joshua Revera)

and

The Republic **Respondent**

(rep. by Mrs. Nissa Thompson)

Neutral Citation: *Faure v R* (SCA CR 11/2023) [2023] (Arising in MC 11/2022) (18 December 2023)

Before: Fernando President, Robinson JA, Tibatemwa-Ekirikubinza JA

Summary: An appeal against an order of forfeiture of USD 6,000.00 and Euro 10,000.00 in pursuance of section 76(1) of the Anti-Money Laundering and Countering the Financing of Terrorism Act 2020 (AMLCFT) seized from the Appellant.

Heard: 4 December 2023

Delivered: 18 December 2023

ORDER

Appeal allowed. Judgment of the Trial Court is quashed and order made for the return of the funds seized from the Appellant. No order as to interest and costs.

JUDGMENT

FERNANDO, PRESIDENT

1. This is an appeal against an order made in pursuance of section 76(1) of the Anti-Money Laundering and Countering the Financing of Terrorism Act 2020 (AMLCFT) for forfeiture of USD 6,000.00 and Euro 10,000.00, seized from the Appellant at the Seychelles International Airport on 27 June 2022 and detained under the provisions of section 74(4) of AMLCFT.

2. The Appellant has raised the following grounds of appeal:

    1) The Learned Trial Judge erred in law and on the fact by failing to properly apply the burden and standard of proof.
    2) The Learned Trial Judge erred in law and on the fact in finding that the Appellant's evidence was inadequate in that it failed to give due weight to the evidence of the Appellant and was predisposed to the Respondent's application.
    3) The Learned Trial Judge erred in law and on the fact in finding that the Appellant's affidavit was defective when this was raised in the Respondent's submissions only with no opportunity given to the Appellant to address and be heard such that the Appellant's right to a fair hearing before the Supreme Court was infringed.
    4) The Learned Trial Judge erred in law and on the facts in refusing to allow and consider evidence available from public source at the hearing in that it denied the Appellant a fair hearing and was prejudicial to the Appellant
    5) The Learned Trial Judge erred in law allowing the continued detention of cash seized after the time had lapsed including after the Respondent had withdrawn its application in that it denied the Appellant her right to property without legal basis;

By way of relief the Appellant had sought an order that the judgment be quashed, that the funds be returned to the Appellant with interest and cost and for such further and other orders, as may be just and necessary in the circumstances.

Facts in Brief:

3. On the evening of 27 June 2022, the Appellant was scheduled to leave Seychelles bound for Nigeria via Dubai on an Emirates flight. The Appellant before her departure had approached the Customs Officer on duty at the Seychelles International Airport as was legally expected of her, to declare the forex in her possession, namely USD 6,000.00 and Euro 10,000.00, equivalent to Seychelles Rupees 234,580.00 which was above the prescribed sum of SCR 50,000.00 that she was permitted under the law to carry. After having been questioned by the Customs Officers on duty at the airport, namely Andrew Onezia and Aline Charles and on the instructions of their supervisor Ms. Bonnelame, the forex was seized as they were not satisfied as to the source of the forex.

Background to the appeal Case Miscellaneous Cause 11 of 2022:

4. An application was made **(Miscellaneous Cause 7 of 2022)** on 7 July 2022 to the Supreme Court, pursuant to section 74(3) of AMLCFT within the 14-day period, seeking authorization for the continued detention of forex seized from the Appellant, namely Euro 10,000 and USD 6,000, for a period exceeding 60 days, after its seizure on 27 June 2022 at the Seychelles International Airport. The application was supported by an affidavit of Jude Bistoquet of the Financial Crime Investigation Unit (FCIU). In his affidavit Mr. Bistoquet had stated that the detention of forex seized beyond 14 days "is justified while its origin or derivation is further investigated…". He goes on to say that "the owner of Marlu Seychelles (Pty) Limited needs to be interviewed to ascertain the terms and conditions that the

said loan was given." It is also stated in Mr. Bistoquet's affidavit "That **I** require more time to establish the real source of funds seized". The Supreme Court granted a detention of the forex for 30 days under section 74(4) on 22 July 2022, that is up to 22 August 2022.

5. An application pursuant to section 76(1) for the forfeiture was filed **(Miscellaneous Cause 10 of 2022)** with a supporting affidavit from Ms. Angelique Legaie of FCIU, on 19 August 2022 and was mentioned on 22 August 2022. On 22 August the Appellant who was the Respondent to the application then, moved for time to file counter affidavit. In the meantime, Court ordered the detention of cash seized until the final determination of application. Case was then fixed for mention on 8 September 2022. On 8 September Counsel for the Respondent (present Appellant) wanted to cross examine Ms. Angelique Legaie of FCIU on the affidavit she filed in support of the Application. Case was adjourned for 12 September 2022. On 12 September the case was adjourned again to 19 September 2022 to cross examine Ms. Angelique Legaie of FCIU.

6. On 19 September Miscellaneous Cause 10 of 2022 was withdrawn and **Miscellaneous Cause 11 of 2022** was filed, namely a fresh application pursuant to section 76(1) for forfeiture, and this time with an affidavit from Superintendent Neville Thaver of the FCIU. It is not clear why Miscellaneous Cause 10 of 2022 was withdrawn.

7. In his affidavit dated 19 September 2022, Superintendent Neville Thaver of the FCIU has stated that he took over the case file from Ms. Angelique Legaie of FCIU. He had also stated: "That I make this affidavit from facts within my own knowledge save where otherwise appears and where so appearing I believe the same to be true". I find that the affidavit of Neville Thaver is identical, namely word to word, to the supporting affidavit sworn by Ms. Angelique Legaie of FCIU dated 19 August 2022

in Miscellaneous Cause 10 of 2022. In his affidavit he sets out details pertaining to the seizure of the forex from the Appellant on 27 June 2022, what the Appellant told the customs officers when questioned as to the source of the forex in her possession, and that the customs officers had reasonable grounds to suspect that the forex were proceeds of crime, namely money laundering. Both affidavits of Thaver and Legaie have in their respective affidavits the following averments at the same paragraphs: At paragraph 12 - "That as part of my investigation, Muditha Gunatilake was interviewed……"; At paragraph 13 - "Furthermore, I found that subsequent to the credit on to the Respondent's account…."; At paragraph 15 - "That warrant was executed at Double Click exchange to ascertain transactions conducted by the Respondent……"; At paragraph 17 - "That as part of my investigation, I interviewed one Mr. Chandeepa from Double Click…" At paragraph 19 - "That at the time of my interview, I asked to speak to the cashier who issued the receipt"; At paragraph 23 – "Based on the analysis I conducted…." There is nothing to indicate in the respective affidavits of Thaver and Legaie, that both Thaver and Legaie had been conducting their investigations together and or assisting each other. Further in view of the averments in the affidavit of Mr. Bistoquet referred to at paragraph 4 above, it is not clear who really investigated the origin and derivation of the forex seized and who interviewed the owner of Marlu Seychelles (Pty) Limited, namely, was it Mr. Jude Bistoqet? Ms. Angelique Legaie? or Mr. Neville Thaver? These matters put in doubt the averment in Thaver's affidavit on which the learned Trial Judge based reliance to forfeit the forex, namely: "That I make this affidavit from facts within my own knowledge save where otherwise appears and where so appearing I believe the same to be true". It is clear that Thaver was not present at the airport when the Appellant's forex was seized and thus not privy to what happened that day.

8. Thaver had attached to his affidavit, copies of the statements of custom officers Andrew Onezia and Aline Charles. They are not in the form of affidavits and thus

hearsay. The statements of Andrew Onezia and Aline Charles have been relied upon by Thaver to establish the truth of what is contained in the statements and not merely the fact that it was made. In the case of **Subramaniam V Public Prosecutor (1956) 1 WLR 965** it was held **"***Evidence of a statement made to a witness by a person who is not himself called as a witness is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement*.**"** In the statement of Aline Charles it is stated that she had asked her supervisor Ms. Bonnelame if an amount equivalent to SR 50,000/- could be given to the Appellant, which indicates that she entertained doubts as to whether in fact, the said amount is liable to seizure under the AMLCFT Act.

9. **Section 170 of the Seychelles Code of Civil Procedure** states: "Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory applications, on which statements as to his belief, with the grounds thereof, may be admitted." Affidavits are treated as sworn evidence in view of the fact that they need to be sworn "(a) before a Judge, a Magistrate, a Justice of the Peace, a Notary or the Registrar; and (b) in any cause or matter, in addition to those mentioned in paragraph (a) before any person specially appointed for the purpose by the court." It is to be noted that an application made in pursuance of section 76(1) of the Anti-Money Laundering and Countering the Financing of Terrorism Act 2020 (AMLCFT) for forfeiture, is not an interlocutory application, unlike an application for continued detention of moneys seized pursuant to section 74(3) of AMLCFT Act. It is stated at the outset of the judgment that it is a 'Final Order'.

10. In the Malaysian case of **Lim Yew Sing v Hummel International Sports & amp; Leisure, [1996] 3 MLJ 7** the Court of Appeal emphasized that hearsay evidence would only be admissible in affidavits for interlocutory applications. Further, in **Mohd Nazir Bin Badar Shair v Timbalan Menteri Dalam Negeri [2000] 2 MLJ 559** it was held: "Information which is not within the personal knowledge of a

deponent is allowed only when an affidavit is affirmed for an interlocutory proceeding and not when a final order is sought." In **Union Estate Management (Proprietary) Limited v Herbert Mittermeyer, 1979 SLR,** Sauzier J in explaining what constituted a proper affidavit stated: "...an affidavit which is based on information and belief must disclose the source of the information and the grounds of belief. It is therefore necessary for the validity of an affidavit that the affidavit should distinguish what part of the statement is based on information and belief and that the source of the information and grounds of belief should be disclosed."

11. Upon an evaluation of Superintendent Neville Thaver's affidavit in light of the procedural standards and the precedent set by Union Estate, it becomes evident that the affidavit does not meet the requisite criteria for validity. Firstly, the affidavit appears to be an exact duplicate of the previously withdrawn affidavit of Angelique Legaie. Additionally, while Superintendent Thaver asserts that the affidavit is based on his personal knowledge, it enumerates several events that evidently fall beyond his direct experience. Considering his recent involvement with the case file, the affidavit fails to clearly differentiate between statements derived from Superintendent Thaver's direct observations and those informed by communications from the original investigator Jude Bistoquet or the customs officials Andrew Onezia and Aline Charles. It has been stated earlier that the statements of customs officials Andrew Onezia and Aline Charles are not in the form of affidavits. I find however that Thaver in testifying before the Court had confirmed everything he had said in his affidavit. He does not clarify even while testifying before the Court as to who really investigated the origin and derivation of the forex seized and who interviewed the owner of Marlu Seychelles (Pty) Limited, namely, was it Mr. Jude Bistoqet? Ms. Angelique Legaie? or himself? However, when a Court is called upon to make a pronouncement whether the belief of an applicant under section 76(4) of the AMLCFT can be relied upon to make an order

of confiscation of money, it cannot do so when in doubt whether Thaver formed his belief from facts within his own knowledge or hearsay.

12. Section 76 (1), (2) and (3) of the AMLCFT Act deals with Court proceedings for forfeiture of cash seized states thus:

"*(1) A judge may order the forfeiture of any cash which has been seized under subsection (2) of section 74* ***if satisfied, o****n an application submitted by the Attorney General a prosecutor on behalf of Anti-Corruption Commission of Seychelles, that the cash seized is not less than the prescribed sum or the* ***judge has reasonable grounds for suspecting*** *that it directly or indirectly represents any person's benefit from, or is intended by any person for use in connection with, any offence.*

(2) An order may be made under this section whether or not proceedings are brought against any person for an offence with which the cash in question is connected.

(3) ***Where it appears to the court on evidence produced*** *by or on behalf of the Attorney General or a prosecutor on behalf of Anti-Corruption Commission of Seychelles consisting of, or including evidence adduced under subsection (4) that the cash constitutes directly or indirectly the proceeds of crime or was intended by any person to be used in connection with criminal conduct, the Court shall make an order of forfeiture in respect of the whole or, a specified part of the cash:*

Provided that the court shall not make an order if it is proved by the respondent or any other person that the cash does not constitute directly or indirectly the benefit from criminal conduct or was not intended by any person to be used in connection with criminal conduct."

13. The above provisions make it clear that it is the Judge who has to satisfy himself that there are reasonable grounds for suspecting that the cash seized directly or indirectly represents any person's benefit from, or is intended by any person for use in connection with, any offence, based on the application and the supporting affidavit of the Applicant before him. At paragraph 70 of the Judgment the learned Trial Judge has correctly stated: **"***As regards to this application for a court order for the forfeiture of the cash seized by virtue of section 76 (1) of the AMLCFT Act, I have to be satisfied, that I have reasonable grounds for suspecting that it directly or indirectly represents any person's benefit from, or is intended by any person for use in connection with any offence*…" It is not a mere adoption of the evidence of the Applicant without a critical analysis of the evidence. The judgment shows the learned Trial Judge has continuously referred to the belief or suspicion of Mr. Thaver, rather than of himself. In this case adoption of the Applicant's evidence, leave aside the critical analysis of the evidence, has been put into serious doubt in view of what has been stated above. No court can place reliance on the evidence of Neville Thaver when one does not know whether Mr. Neville Thaver's evidence was based on facts within his own knowledge.

14. It is clear from section 76(3) of the AMLCFT Act that is only after a prima facie case has been established by the Applicant that the cash constitutes directly or indirectly the proceeds of crime or was intended by any person to be used in connection with criminal conduct, that the burden shifts to the Respondent or any other person to prove on a balance of probability that the cash does not constitute directly or indirectly the benefit from criminal conduct or was not intended by any person to be used in connection with criminal conduct.

15. What is stated above which goes to the very crux of this case have not been considered by the Trial Judge and this suffices in my view to allow this appeal, without considering the grounds of appeal.

16. I therefore allow the appeal, quash the order of forfeiture made by the Supreme Court and order the release of the forex seized to the Appellant. I make no order as to interest and costs.

Fernando President

I concur:

F. Robinson JA

I concur:

Dr. L. Tibatemwa-Ekirikubinza JA

Signed, dated and delivered at Ile du Port on 18 December 2023.