THE REPUBLIC OF SEYCHELLES

IN THE SUPREME COURT OF SEYCHELLES HELD AT VICTORIA

Miscellaneous Application No 62 of 2012

Arising from Civil Side No. 63 of 2011

Mares Corp==========Applicant

Versus

Financial Intelligence Unit==========Respondent

Frank Elizabeth for the Applicant

Barry Galvin for the Respondent

RULING

Egonda-Ntende, CJ

1. The applicant is seeking an order of this court to order the respondent to release the applicant's funds in an account that was frozen by the respondent on or around October 2010 without a court order. This application is brought by notice of motion with a supporting affidavit. The main ground of the application is that there has been a change in the law. The Anti Money Laundering Act, 2006 as amended in 2008 has been further amended by Act 24 of 2011 which came into force on or about 22nd December 2011. In the new law a limit of 180 days is put on the time that such an order of the respondent can stay in force.

2. The respondent opposes this application and has filed an affidavit in opposition. At the hearing of the application Mr Barry Galvin, learned counsel for the respondent, argued that new law was not in force in relation to investigations started prior to its enactment as it did not have retrospective effect. He referred to Section 31 of the Interpretation and General Provisions Act to argue that the old law still applied in respect of the matter now in question.

3. I shall start with a brief history of this matter. The main proceeding is somewhat in legal limbo. This was initially a proceeding under the Proceeds of Crime (Civil Confiscation) Act commenced on the 21st March 2011. An application for an interlocutory order to freeze the assets in question was dismissed by the Supreme Court. There was an appeal by the respondent to the Court of Appeal. The Court of Appeal, on 9th December 2011, reversed the decision of the Supreme Court, set aside the orders made, and directed parties to undertake further proceedings in the manner provided by the Seychelles Code of Civil Procedure starting with the filing of a plaint. Those directions have not been followed or implemented as yet, at least as at the hearing of this application, or writing of this ruling. The Court of Appeal did not provide a time limit within which its order was to be implemented by the parties, starting with the respondent.

4. For the moment there appears to be no head proceeding before this court. It is yet to be commenced in accordance with the Seychelles Code of Civil Procedure. Other than citing the new law in relation to the powers of the respondent, learned counsel for the applicant, Mr Frank Elizabeth, did not point to any law that authorises the procedure he has adopted in this matter in seeking the relief that he is seeking. There is no claim against the applicant on this file as the case stands until the Court of Appeal decision is implemented. The applicant has no counter claim so far in this matter.

5. The affidavit in opposition sets out the main grounds of opposition to this application in paragraphs 3 and 4 which I shall set out.

> '3.In response to the affidavit filed in support of this application, I say that the matters relating to the properties of Mares Corp, namely the bank account 300000003944 held at BMI Offshore Bank with a balance of USD 1,117,724.96 are still pending before this court and before the Judge Burhan in a separate plaint, namely plaint no. Cs 354 of 2010. I say that this case before Judge Burhan has been adjourned at the request of the attorney for the Applicant until the 11th and 12th November for hearing. I say that the grant of an order to release funds in the said account will not be just and proper in the circumstances as it will have the effect of deciding the merits of both cases prematurely, rendering this Respondent without any causes of action in both cases. I also say that undue prejudice will

> arise as the funds can be easily transferred out of the jurisdiction of these Courts.
> 4. Further, I say that the Acts of 2006/2011 were amended in December 2011 with a new Section 10 under the 2011 Amendment ("the 2011 amendment"). I say that the 2011 amendment has no retrospective effect on cases being investigated prior to the 27th December 2011, which is the date of the which the amendment to the Acts of 2006/2011 was published into the Gazette. I say that the repeal of any Act does not affect any investigations, legal proceedings, or remedy in respect of any right, privilege, obligation, or liability or any penalty, forfeiture or punishment and the investigation, legal proceedings or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the Act, had not been repealed.'

6. I am surprised that Mr Hogan is referring to a proceeding before this court in paragraph 3 of this affidavit. There is no proceeding before this court. The respondent has failed to comply with the order of the Court of Appeal and has not instituted as directed a proceeding by way of a plaint, more than six months since the decision of the Court of Appeal was announced. Much as no time limit was set by the Court of Appeal within which to comply with the order it must be assumed that it had to be complied with within a reasonable time. A month perhaps would be sufficient or perhaps even two months. The delay of six months is both inordinate and egregious. It cannot be condoned in my view.

7. With regard to proceeding before Judge Burhan, in my view, it is up to that court to make any orders for interim relief, on application of the parties as the law allows, rather than for this court to anticipate or second guess what is going in that proceeding. I am concerned only with the proceeding before me.

8. Turning to whether or not it is the old section 10 or the new section 10 that should apply, it may be helpful to set out the relevant portion of the old section 10. Section 10 (4) of the AML, Act 5 of 2006, states,

> 'If the FIU, after consulting a reporting entity required to make a report under subsection (1), has reasonable grounds to suspect that a transaction or a proposed transaction may involve an offence of money laundering or of financing of terrorism, it may direct the reporting entity in writing or by

> telephone, to be followed up in writing, not to proceed with the carrying out of that transaction or proposed transaction or many other transaction in respect of the funds affected by that transaction or proposed transaction for such period as may be determined by the FIU, which may not be more than five days, in order to allow the FIU—
> (a) to make the necessary inquiries concerning the transaction; and
> (b) if the FIU deems it appropriate, to inform and advise the Attorney General.
> For the Purpose of calculating the period of five days referred to in this subsection, Saturday, Sundays, and public holidays shall not be taken into account.'

9. The new section 10 (4) of the AML as amended by Act 24 of 2011, enlarges the initial period from 5 days to 180 days. New provisions are provided as subsections (5), (6), (7), (8), (9), (10), (11) and (12). For the first time provision is made in 10 (9) for any person aggrieved by an order under section 10(4) to apply to court for such an order to be set aside.

10. It appears to me that if one applied the repealed provisions as the respondents pressed me to do an order under the repealed provisions could not exceed 5 days. The operative words of the law are, '….. **for such period as may be determined by the FIU, which may not be more than five days, in order to allow**….' I am not aware that this provision was ever amended to make this period indefinite prior to Act 24 of 2011 which appears to have enlarged the period that the FIU order could last. In my view, FIU did not have power to make an order that would last indefinitely, as Mr Frank Elizabeth submitted. That power is circumscribed and limited to five working days.

11. I will assume though that my reading of this provision is wrong and that the position is as both counsel in this matter appeared to regard to be the old law. I shall assume that the law states that the FIU could make an order that would last indefinitely. That order is not final nevertheless. FIU had to take proceedings at some point before a court of law. In the instant case FIU commenced proceedings before this court vide CS 63 of 2011. Those proceedings as noted above are in legal limbo. FIU and the respondent, on this application, has failed to comply with the order of the Court of Appeal to commence proceedings or raise proceedings in the manner and form ordered by the Court of Appeal. The delay to comply is both inordinate and egregious.

No explanation is available as to why it has failed to comply with the Court of Appeal order. The affidavit of Mr Hogan is quiet on this aspect of the case.

12. It cannot be expected that the applicant in this matter has to wait for the respondent to wake up from the deep slumber that the FIU is enjoying in this matter. Or that the law can protect an indolent litigant who at the same time is restraining a party from its property. In my view the actions of FIU in this matter are oppressive, unjust, and an abuse of the process of this court. FIU cannot at this stage talk of the existence of a legal proceeding as the justification for the order to BMI not to allow transactions on the applicant's aforesaid account as clearly there is no legal proceeding before this court. Having failed to comply with the order of the Court of Appeal, the FIU cannot have the protection of this court. Neither can I say there is any on going investigation by FIU. None is alleged on the affidavit of Mr Hogan. Even if there had been one alleged the investigation having resulted into the proceedings of CS 63 of 2011 before this court, it would be irrelevant to refer to any on going investigation. In my view there is no limb under which FIU can avail themselves protection under the repealed section 10(4) of the AML, 2006 as amended by Act 5 of 2008.

13. Mrs Svetlana Vasileva, on behalf of the applicant, has sworn to the effect that their bank account was 'frozen' in October 2010 and that since then the FIU has not obtained a court order from any court to extend its directive. She believes that the FIU directive has expired and the money is being frozen illegally both by the Bank and FIU. I agree.

14. It is the duty of any court to ensure that not only is the law applied but the court must not allow itself to be a conduit for unjust, oppressive and abusive conduct by one litigant against the other. That is the situation that now obtains here. The Supreme Court of Seychelles will use its inherent jurisdiction to protect its process from being abused. I find the conduct of FIU in relation to this proceeding to be unjust, oppressive and an abuse of the process this court. The FIU, the respondent on this application, has no authority in law as of now to order BMI not to allow transactions on the respondent's aforesaid account. Such order or direction has clearly not been sanctioned by any court. It has no force of law. I direct the FIU to release the applicant's funds forthwith.

15. In the result this application is allowed with costs.

Signed, dated and delivered at Victoria this 4th day of June 2012.

FMS Egonda-Ntende
Chief Justice