IN THE SUPREME COURT OF SEYCHELLES

Civil Side: MA 335/2016

(arising in MC 99/2016)

[2017] SCSC188

The Financial Intelligence Unit (FIU) Applicant

versus

1. Andy Onezime
2. Nasim Onezime Respondents

Heard: 20 January 2017

Counsel: Mr. Barry Galvin for petitioner

Mr. Clifford Andre for respondents

Delivered: 2 March 2017

ORDER ON MOTION

M. TWOMEY, CJ

[1] The Applicant is a statutory body. The Respondents are husband and wife. The First Respondent is a Seychellois citizen born on 15 March 1979 who travelled to Kenya in 2008 where he remained until 2013. While in Kenya, he married the Second Respondent with whom he had one daughter, namely Melissa Nelly Onezime.

[2] The Applicant is seeking an interlocutory order pursuant to section 4 of the Proceeds of Crime (Civil Confiscation) Act 2006 (hereinafter POCA) prohibiting the Respondents or any person who has notice of the order from disposing of or dealing with or diminishing in value the sums of money, hereinafter referred to as specified property, held in various accounts in Seychelles and eleven vehicles; which accounts and vehicles are more fully described in the Schedule attached to this decision.

[3] The application is brought by way of notice of motion and supported by an affidavit sworn by Mr Finbarr O'Leary, then Deputy Director of the Applicant.

[4] The Applicant seeks a further order under section 8 of POCA, and that is the appointment of a Receiver of the specified property to hold the same until further orders of this court.

[5] The main ground for this application is that the Respondents are in possession or control of specified property that 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, constitutes benefit from criminal conduct. And that such property is in excess of R50, 000.00.

[6] Pursuant to section 9 of POCA, Mr. O'Leary swore an affidavit on 26 October 2016 of his belief evidence pertaining to the Respondents in respect to the application for the confiscation of their property. He has therein averred that for a number of years prior to leaving Seychelles, the First Respondent operated an auto parts company, A&P Auto part. In 2002, the First Respondent opened an account in the name of the said company and on his departure from Seychelles in 2008 the remaining balance in that account was SR1, 778. In April 2013, the balance remained the same and as the account was dormant for many years it was classified as abandoned property and the sum standing to credit transferred to the Central Bank on 31 July 2016.

[7] Further, the First Respondent had a loan account with the Development Bank of Seychelles with an overdue balance of SR11, 911. This account also remained dormant during the First Respondent's absence from Seychelles.

[8] It is the Applicant's belief that whilst in Kenya the Applicant was involved in trafficking heroin to Seychelles. On their entry into Seychelles in 2013, the Respondents were searched and interviewed by NDEA agents. They were found to be in possession of the following currency: 600 Thai Bhat, 535 Euros, 105 Dirhams, 2 US dollars and SR60 which amounts to SR8, 241 in total. This was the only known funds brought into Seychelles by the Respondents.

[9] On 18 May 2013 a phone conversation was recorded by the NDEA between Andy Onezime and an NDEA agent. As a result of this conversation and the NDEA investigation into it and other related matters, the first Respondent was charged with communicating with NDEA agents, corruptly giving money to NDEA agents to procure information and conspiracy to commit a felony contrary to section 381 of the Penal Code.

[10] As part of the investigation into the two Respondents' activities, a financial profile was prepared which revealed that since their return to Seychelles in 2013, the Respondents had amassed significant wealth and engaged in frequent large money transactions which are unexplainable by reference to legitimate income and believed to be the proceeds of drug trafficking.

[11] During the period October 2013 to December 2015 the Respondents had a combined gross income of SR719,6683 with their total known use of funds in the same period (estimated on the most conservative basis excluding normal household and living expenses while on overseas trips) amounting to SR2,530,405.32.

[12] The First Respondent purchased a car hire business, namely Tyomito Car Hire for SR 550,000 in cash in May 2013. The source of the cash used to purchase this business is unknown. A tax declaration by the First Respondent for 2013 and 2014 declared a gross total income of SR473, 148 for the car hire and a gross income (as per the business bank account) for 2015 is estimated at SR 246,520 by the Applicant. This is the only declared source of income for the two Respondents.

[13] Other unexplained sources of wealth may be evidenced by reference to account number xxxxxxx in the name of the Second Respondent at MCB bank in which between September 2013 and September 2016, SCR 579,234 in mostly cash deposits were remitted and then transferred out mostly by ATM transactions. Similarly, account xxxxxxx held in the name of the Second Respondent at Barclays bank (Seychelles) Limited shows that from October 2013 and March 2016, the sum of SR 869, 813. 33 was deposited followed by withdrawals totalling SR 829, 467. 40. The Second Respondent is not registered with the Seychelles Revenue Commission and has no known source of income. On 6 June 2013 while opening an account with MCB in her daughter's name the Second Respondent declared that she was unemployed, yet while opening another account with Barclays Bank on 6 September 2013 she declared that she had been employed with Tyomito Car Hire Business for nine months.

[14] In a letter to the bank when account xxxxxxx was opened in June 2013,the Second Respondent stated that the beneficiary of the account was to be the Respondents' six year old daughter, Melissa Nelly Onezime. Yet there were continuous withdrawals from the account for goods in Katiolo Night Club, PMC Auto Parts and STC duty free. From the total funds paid into the account as of 16 September 2016 amounting to SR 174,150 there remains a balance of SR 1567.58.

[15] A further source of unexplained income is the involvement of the First Respondent with Reef Car Hire. It was registered in the name of Giovinella Brown and Gaetan Furneau who had obtained loans in respect of the company from the Development Bank of Seychelles in the sums of SR 337,000 and SR 263,393. This business was transferred to James Onezime, the First Respondent's uncle on 21 November 2013. Prior to this transfer, the First Respondent made a first deposit of SR 53,000 into the account of Gaetan Furneau, and later the same day a further deposit in cash of another SR117, 000. Additional payments for the reimbursement of these loans were made to Gaetan Furneau by one Francois Onezime also known as James Onezime.

[16] Between October 2013 and July 2016 the loan balance with the Development Back of Seychelles of SR544, 839 had been reduced to SR94, 813 with some of these

repayments being made in cash by Andy Onezime in sums totalling SR185, 000. These payments do not correspond to withdrawals from other accounts held by the Respondents, James Onezime or Tyomito Car Hire. It is the Deponent's averment that the source of the funds for the repayment is unexplained and is believed to be the proceeds of drug trafficking.

[17] Further, between October 2014 and July 2015 the Second Respondent spent SR635, 000 for the purchases of vehicles with the source of the funds also unknown and believed to be the proceeds of drug-trafficking.

[18] On 28 September 2016, this Court made a section 3 interim order in respect of specified property belonging to the Respondent. Subsequent to the making of this Order, there followed contempt of court proceedings relating to the fact that vehicle registration number S13188 (item 2 of Table 2 in the Schedule of specified property attached) and vehicle registration number S20189 (item 10 of Table 2 of the Schedule) were not surrendered to the Applicant as directed by the order of this Court. A further subject of the said contempt of court proceedings was the withdrawal of SR40, 000 from bank account number xxxxxxx at Bank of Baroda which bank account had also been frozen by order of the Court.

[19] The contempt was subsequently purged by the return of the money to the account and the explanation of the First Respondent as to the whereabouts and status of the two named vehicles, namely, that one vehicle had encountered an accident and was written off and another destroyed in a fire. The First Respondent also stated that vehicle S13188 had also met with an accident and was being repaired. The cheque from the insurers in respect of S13188 was handed to the Applicant.

[20] The Applicant then applied for an order that the proceeds of any insurance claim or payment regarding vehicles S20189 and S22201 be paid to the Receiver.

[21] On 11 January 2017, the Respondents swore a reply affidavit in which they made several averments which in relevant part is to the effect that:

1. They have not been charged with any offences or engaged in any illegal activities, the Applicant's application is frivolous and vexatious and an abuse of the court process.

2. On his return to Seychelles in 2013, the First Respondent had in his possession 5 million Kenyan shillings (approximately SR 650,000) being the proceeds of sale of his vehicle in Kenya but the money was not found on him at the airport as he was not searched. The Second Respondent was searched and the equivalent of SR 8241 was found in her purse.

3. He had other sources of funds in Seychelles on his return in 2013. He had relatives in Seychelles, he had USD11, 000 and Euro 36,000 which he received from Mrs. Alexia Amesbury returned to her by NDEA after being seized from his aunt at the airport. He was also renting his house for a sum of SR4, 000 while he was not in Seychelles which sum of money was received from his grandmother Miona Onezime who has since passed away.

4. They had not been requested to explain their wealth. Had they committed any offence they would have been charged and that it is an abuse of process for the Applicant to seize and sell their assets which should not be condoned by the court.

5. They Respondents aver that they are entitled to withdraw sums of money from their daughter's account as and when they please and no law has been broken.

6. Had they been given a chance to prove to the Applicant "the manner in which they obtained business" (sic) they would have done so. They further aver that the Applicant is abusing its power to intimidate and victimise the Respondents "who have worked hard and tirelessly to obtain what the Applicant is saying is from criminal conduct."

[22] In accordance with section 8(9) of POCA, the deponents of the affidavits were directed to attend court for cross examination.

[23] Mr. Finbarr O'Leary testified and submitted updated financial profiles of the Respondents from the period of April 2013 to 20 January 2017. The only declared source of income of the Respondents is that from Tyomito Car Hire as evidenced on the bank statement from Bank of Baroda and amounts to SR 1,086,388.68 while their total expenditure was SR 4,103,244.89 leaving a total of SR 3,016,856.21 from unknown sources (See Page 13 of Exhibit FOL 8).

[24] The First Respondent stated in cross examination that when he entered the country in 2013 he had Euro 50,000 in his pocket in 500 bills. He also stated that he obtained the money from the sale of his car in Kenya.

[25] It is clear from the Respondent's affidavit, documentary evidence and the proceedings at trial that Counsel for the Respondents and the Respondents fail to understand the provisions of the law relating to the POCA. Counsel seems also unaware of the Proceeds of Crime (Civil Confiscation) (Procedure) Rules, 2016 (The POCA Rules). In that regard he has done a great disservice to his clients. The Court is unable to discern any evidence that may have helped the Respondents discharge the burden of proof imposed on them by the provisions of the law.

[26] The Respondents' affidavit is also not proper. It is a joint affidavit and it is questionable what is and is not within the knowledge or both or any of the deponents. Paragraph 4 of the affidavit contains averments pertaining to the "Defendant" when there is clearly no Defendant in the proceedings. The averments are set out as a statement of defence and not as an affidavit proper. Paragraph 25 of the Affidavit states that all the averments of the affidavit are true "to the best of my information, knowledge and belief" and then signed by the two deponents. The affidavit is riddled with statements pertaining to the fact that the Applicant has abused its power by bringing the application and that the Respondents have not had the opportunity to rebut the belief evidence of the Applicant and yet there is scant rebuttal of that belief evidence.

[27] As I have stated the tack chosen by the Respondents in defending the section 4 application shows a distinct lack of appreciation of the provisions of POCA. The following statement in the affidavit is an example of averments contained in the whole affidavit which are not only meaningless but concerning and mortifying to say the least:

> *"The Applicant is put to strict proof and that the Applicant is required to prove that all his working place is the necessity to condemn the Respondents to double punishments (sic). It is also averred that the 1st Respondents (sic) is undergoing a hearing in respect of the criminal conduct that the Applicant alleges the 1st Respondents (sic) has committed. The 1st Respondents (sic) avers that since the trial in respect of the allegation is ongoing, punishments should not be tolerated and that the Applicant is abusing the court system fully (sic) and such acts should not be condone (sic).The Respondents avers (sic) that such action/application by the applicant is frivolous and vexation (sic) and abuse of process" (sic)* (Paragraph 9 of the Respondents' affidavit).

> *"The respondents avers (sic) that if they had committed an offence they should have been charged and the seizure of the businesses (sic) would have been part of the punishments (sic). Since this is not the case, the Respondents avers (sic) that the FIU is taking the course of law in their own hands (sic) and requesting the court to allow them to sell the assets of the Respondent without having been charged (sic) with a criminal offence and been sentenced accordingly. This is an abuse of process, which the FIU is taking advantage of and should not be condoned by this Hounorable (sic) Court."*

[28] Apart from the fact that the averments are unintelligible, incomprehensible, and/or grammatically disastrous, I have struggled on many occasions in these proceedings to understand what is stated in the Affidavit and what amounts to a rebuttal of the Applicant's belief evidence. I have also struggled to see how the Affidavit is admissible given the provisions of the law.

[29] Only recently in the case *Erne v Brain and ors* (2016) (unreported) MA290/2015 and 230/2016 arising out of CS 127 /2011, this Court reiterated the provisions of section 170 of the Seychelles Code of Civil Procedure and cited the case of *Union Estate Management (Proprietary) Limited v Herbert Mittermeyer*(1979) SLR 140, namely the following statement to find an Affidavit invalid:

> *"...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"*

[30] In *Erne* the Court pointed out that it has :

> *"…on countless occasions laboured the point that affidavits are evidence and are therefore subject to the same rules of admissibility as other evidence"*

[31] Rule 6 of the POCA Rules provides in relevant part:

> *"(1) The deponent of an affidavit shall only aver as to facts within his or her personal knowledge.*
>
> *(2) An affidavit shall contain sufficiently specific averments verifying the grounds on which an application is made or opposed to enable the court to effectively adjudicate the matter in accordance with the Act."*

[32] In the present joint affidavit it is clear that some of the averments are not within the personal knowledge or belief of either or both the Deponents. Moreover the averments as deponed are not specific enough to allow this Court to adjudicate on the matter in favour of the Respondents. For all the reasons I have outlined above I find that the affidavit is invalid and I strike it out.

[33] The Respondents attached to their affidavit an unsigned and undated photocopy of an agreement of sale of the First's Respondent's car in Kenya. There was no attempt to

produce the original or a signed copy of this agreement at the trial. Rules 6(3) and 6(4) of the POCA Rules provide:

> *"All documents relied on in an affidavit shall be exhibited to the affidavit. (4) The original of any document sought to be relied on in an affidavit shall be exhibited unless the Court accepts any explanation averred as to its non-production, in which case a notarised or otherwise duly authorised or certified copy shall be exhibited."*

[34] The document therefore is inadmissible. It is also self-serving as it cannot be verified by this Court whether it was drafted only to meet the needs of the Respondents in relation to the belief evidence of the Applicant. I do not therefore accept that the First Respondent sold a car in Kenya and entered Seychelles with Euro 50,000 in his back pocket. It is simply not credible. Further every person entering Seychelles has to declare funds of this magnitude. A form is given to every disembarking passenger to fill out.

[35] Insofar as the law relating to proceeds of crime is concerned I can do no better than to refer to the settled law as established in *FIU v Mares* (2011) SLR 405, *Financial Intelligence Unit v Sentry Global Securities Ltd & Ors* (2012) SLR 331, *Financial Intelligence Unit v Cyber Space Ltd* (2013) SLR 97 to again reiterate and summarise the law:

> *"…that 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 POCA, the evidential burden shifts to the respondent to show on a balance of probability that the property is not the proceeds of crime…" (Mares* supra*)*

> *"…All that is necessary is "a reasonable belief" that the property has been obtained or derived from criminal conduct by the designated officer of the FIU. That belief pertains to the designated officer and hence involves a subjective element. It is therefore only prima facie evidence or belief evidence. No criminal*

offence need be proved, nor mens rea be shown. If the FIU relies on belief evidence under section 9 the court has to examine the grounds for the belief and if it satisfied that there are reasonable grounds for the belief it should grant the order. There are appropriate and serious protections for the respondents as at different stages they are permitted to adduce evidence to show the Court that the property does not constitute benefit from criminal conduct. Their burden in this endeavour is that "on a balance of probabilities." In other words, once the applicant establishes his belief that the property is the proceeds of crime, the burden of proof shifts to the respondent to show that it is not. Hence, unless the court doubts the belief of the officer of the FIU which is reasonably made he cannot refuse the order. (Sentry supra)

[36] The Respondents labour under a belief that there must be some formal call on them to show that the property subject to a section 3 order is not from proceeds of crime. They fail to understand that once the belief evidence is made, the burden of proof shifts onto them to show that the property is not from proceeds of crime. They also fail to understand the connection between POCA and the Anti-Money Laundering Act. (AMLA). In *Hackl v FIU* (2012) SLR 225, the Court of Appeal outlined the history of proceeds of crime legislation. It also explained that in POCA it is not the criminal offence which is being targeted by POCA or AMLA and that:

"[although] there is an undeniable connection between the ―criminal conduct' as defined, … it is the asset derived from any such conduct that is being aimed at. The distinction is important… All that is necessary to trigger the provisions of POCA is a predicate crime and not a criminal offence per se." (p. 230)

[37] The Court of Appeal in *Hackl* also explained that a case under POCA is essentially a civil matter. The double jeopardy argument which it would appear is again being made in the present case is not supported. The Court in *Hackl* reviewed authorities on the issue in different jurisdictions and dismissed the double jeopardy claim stating:

"The double penalisation argument has been deliberated on in jurisdictions all over the world in countries whose laws have similar provisions to that of

Seychelles. In United States v Ursery (95-345) 518 US 267 (1996) the Supreme Court of the United States of America after reviewing a long list of similar precedents found that in contrast to the in personam nature of criminal actions, in rem forfeitures are neither "punishment" nor criminal for purposes of the double jeopardy clause of the American Constitution. In the case of Bennis v Michigan (94-8729) 517 U.S. 1163 (1996) the forfeiture was found constitutionally permissible even in the case of a joint owner of property as the court found that:

> *historically, consideration was not given to the innocence of an owner because the property subject to forfeiture was the evil sought to be remedied.*

Similarly in the South African case of Simon Prophet v National Director of Public Prosecutions CCT 56/05, the Constitutional Court in effect traces the origins of modern forfeiture laws to the common law of the deodand (the guilt of inanimate objects) of the Middle Ages [and states]:

> *Civil forfeiture provides a unique remedy used as a measure to combat organised crime. It rests on the legal fiction that the property and not the owner has contravened the law. It does not require a conviction or even a criminal charge against the owner.*

In Gilligan v Criminal Assets Bureau and Others and Murphy v GM, PB and Ors [2001] IESC 82 the Supreme Court of Ireland found:

> *The court is satisfied that the United States authorities lend considerable weight to the view that in rem proceedings for the forfeiture of property, even when accompanied by parallel procedures for the prosecution of criminal offences arising out of the same events are civil in nature and that this principle is deeply rooted in the Anglo-American legal system.*
>
> *…*

The forfeiture of several properties both immoveable and moveable in Seychelles belonging to the appellant is a civil matter. (Pages 232-233)

[38] The submissions of Learned Counsel for the Respondents that there are ongoing criminal proceedings against the First Respondent has no bearing on the instant matter. He has also missed the point that a section 4 application is an interlocutory order and that there are protections in POCA for the Respondents until the final disposal of the frozen assets. They can apply to have a section 3 or a section 4 order granted by the court set aside at any time if they can show that the property is not benefit from criminal conduct. This continues to be the case until a final disposal order is made. Such a disposal order has not yet been made in this matter.

[39] What is before this court is a section 4 application supported by the belief evidence of the Applicant's Deputy Director. He has outlined to the court with supporting documentation the fact that between 2013 and 2017, SR 3,016.865 has gone through the Respondents' account from unknown and unexplained funds. The Applicant states that it believes that these funds are from drug trafficking. That belief evidence is reasonable in the circumstances in which it is made.

[40] The burden of proof shifts onto the Respondents to show on a balance of probability that the funds are not proceeds of crime. They have failed in any way meaningful or otherwise to discharge this burden. They have on numerous occasions reiterated that they have not been given the opportunity to discharge this burden. Yet that opportunity was afforded to them on the service of this application on them since 8 November 2016, in the preparation of their affidavit in answer to the Applicant's in January 2016 and at this trial.

[41] I am satisfied therefore that the information in this application, of course, together with the unchallenged evidence of Mr. O'Leary in respect of the Respondents that there are reasonable grounds to suspect that the property in the Respondents' accounts 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, constitutes benefit from criminal conduct.

[42] In view of my findings against the First and Second Respondents I make the following orders:

1. I make an interlocutory order pursuant to section 4 of the Proceeds of Crime (Civil Confiscation) Act 2008, prohibiting the Respondents or any other person having notice of the making of the order from disposing of or otherwise dealing with the whole or any part of the property or dealing with or diminishing in value sums of money standing to credit accounts held by the Respondents in the various banks as detailed in the Schedule attached to this Order.

2. I make an order pursuant to section 8 of the Proceeds of Crime (Civil Confiscation) Act 2008, appointing Phillip Moustache, the Director of the FIU as the Receiver of the specified property, to take possession of the said property as set out in the Schedule hereto, to forthwith transfer the funds standing to credit in the accounts as set out in the Schedule hereto to a bank account in the name of the Receiver and to be held by him until further Order of this Court.

3. To keep any lodged net sale proceeds of items of the specified property in a bank account in the name of the Receiver pending further order.

4. Liberty to the Receiver to apply to the Court for directions from time to time as the case may require.

5. Costs of these proceedings will abide the final outcome of the proceedings in relation to the property specified in this matter.

Signed, dated and delivered at Ile du Port on 2 March 2017.

M. TWOMEY
Chief Justice

Specified Property Table 1 (REDACTED)

Specified Property Table 2 (REDACTED)