

SUPREME COURT OF SEYCHELLES

Reportable
[2020] SCSC 205
MC 18/2019

In the matter between

THE GOVERNMENT OF SEYCHELLES
(rep. by David Esparon)

Applicant

and

GIANNI BORDINO
(rep. by Frank Elizabeth)

Respondent

Neutral Citation: *Government of Seychelles v Bordino* (MC 18/2019) [2019] SCSC 205 (27 March 2020)

Before: Twomey CJ

Summary: Interlocutory application under section 4 of POCA - personal knowledge, information and belief evidence in affidavit - prima facie case by Applicant - shift of onus of proof on balance of probability on Respondent - lack of evidence of legitimate funds used to purchase property

Heard: 30 July 2019 to 12 February 2020

Delivered: 27 March 2020

ORDER

Pursuant to section 4 of POCA, the Respondent or any other person is prohibited from disposing or otherwise dealing with whole or any part of the property namely Parcel V17532 at Eden Island. Superintendent Hein Prinsloo 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 pursuant to section 8 of POCA. These orders are to be served on the Registrar General who is not to effect any transfer of the property

JUDGMENT

TWOMEY CJ

- [1] This application for a freezing order is brought by the Government of Seychelles by way of a notice of motion and supported by affidavits sworn by Hein Prinsloo, Superintendent of Police attached to the Financial Crime Investigative Unit (hereinafter the FCIU). The Respondent is an Italian national and a self-employed business person and objects to the application.
- [2] In particular, the Applicant is seeking two interlocutory orders pursuant to section 4 of the Proceeds of Crime (Civil Confiscation) Act (hereinafter POCA) as amended, prohibiting the Respondent or any person who has notice of the orders from disposing of or otherwise dealing with whole or any part of a property, namely Parcel V17532 comprising of a condominium unit in Zannalak, Eden Island, Mahe, Seychelles,
- [3] The Applicant seeks a further order under section 8 of POCA, that is, the appointment of Superintendent Hein Prinsloo as a Receiver of the specified property and to hold the same until further orders of this court.
- [4] The court is satisfied that notice was given to the Respondent and that he was legally represented. The proceedings in this matter were then delayed in view of a constitutional challenge taken by the Respondent to the application, which matter was dismissed by the Constitutional Court on 10 December 2019.
- [5] The applications by the Applicant are based on the belief evidence of Superintendent Prinsloo. The main ground for these applications is that the Respondent is 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] In essence, Superintendent Prinsloo's averments are to the effect that the Respondent defrauded an Italian company, namely Nord Marine S.N.C., of which he was a partner and manager, and that he destroyed company records, transferred and/or converted 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.

- [7] In particular, Superintendent Prinsloo avers that a letter from the Italian Ministry of Justice (the Ministry) dated 15 October 2018 requested the assistance of Interpol for the provisional arrest of the Respondent in respect of fraudulent bankruptcy charges in Italy. In this respect, an order (the Order) declaring the fugitive status of the Respondent by Judge Alessandro Chionna of the Court of Busto Arsizio is attached to the letter. These documents were exhibited (Exhibits HP01, HP02, HP18).
- [8] The Order states that twenty-three yachts were entrusted to the Respondent and one Debora Malcuori, both partners and managers of the company, for sale to third parties but after the declaration of bankruptcy, these were concealed so that their location could not be ascertained at the date of the letter from the Ministry.
- [9] Further, another thirteen yachts entrusted to the Respondent and Malcuori were sold through intermediaries to companies following lease contracts 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 seven yachts were diverted after the declaration of bankruptcy in spite of preventative seizure orders by the Italian court.
- [10] It is also averred that the Respondent and Malcuori diverted Euro 200,00 from the company to a third party account and concealed the transfer by buying gold bullion or ingots.
- [11] Superintendent Prinsloo further avers that the above actions amount to the offence of possession of property with intent to defraud as criminalised by section 314 of the Penal Code of Seychelles.
- [12] He also states that the Respondent and Malcuori entered Seychelles on 6 November 2011, departed and re-entered on 12 November 2011.

- [13] On 17 November 2011, Four Stars Ltd with Company Number 099509 was incorporated in Seychelles as an International Business Company with the Respondent as the sole shareholder allotted 100 shares of US\$1 each. Further, on 30 November 2011, the Respondent opened a bank account, number 300000011097, in the name of Four Stars Ltd at BMI Offshore Bank Limited, Mahe, Seychelles, with the Respondent and Malcuori as signatories to the account, following which the sum of US\$ 460,000 was deposited therein on 26 December 2011. A further sum of US\$ 319,000.000 was deposited therein on 9 January 2012 with both sums having been transferred from account 2908465000 held with the BSI Private Bank in Lugano, Switzerland in the name of the Respondent and Malcuori
- [14] Subsequently, the Respondent applied for and was granted a gainful occupation permit in Seychelles to work for a company, Naval Services (1995) Ltd (Naval Services) together with Malcuori as his PA at the recommendation of the director of Naval Services Ltd, one Giorgio Mameli (Mameli). In view of misleading information provided by Naval Services with respect to the purchase of shares in the company by the Respondent in the application for the GOP, the same was revoked and both the Respondent and Malcuori informed by the Minister for Immigration that they had no valid permit to remain in Seychelles and to make arrangements to leave by 6 March 2012.
- [15] Documents tendered by the Applicant (HP10 and HP 11) reveal that the Respondent had signed an agreement to purchase shares in AMIS, a company which had a controlling shareholding in Naval Services. However, no shares had ever been purchased in the same and no payment for the shares made from the Respondent's bank account. Yet, on 23 January 2012 a payment of Euro 14,500 was made to Mameli in his account 0200018635 at Volsbank, Modau, Germany with details of the transaction entered as "purchase of shares".
- [16] 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".

- [17] It is the Applicant's belief that these payments were made to use the name of the company Naval Services and the assistance of Mameli to obtain a legal basis to apply for a GOP and conceal the origin of the illicit funds.
- [18] Parcel V17532 was then transferred to the Respondent 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 Respondent, Malcuori and their two sons Alessandro and Gabriele on 25 October 2012. Neither the Respondent nor Malcuori had GOPs in Seychelles capable of producing a legal income which would have permitted the purchase of the property in July 2012.
- [19] It is Superintendent Prinsloo's belief therefore, that the Respondent and Malcuori are in possession of property acquired in whole or in part with or in connection with property that directly or indirectly constitutes benefit from criminal conduct, and that they used that property to acquire the condominium at Eden Island.
- [20] In response to the averments by Superintendent Prinsloo, the Respondent filed an affidavit on 24 April 2019 in which he avers that the criminal charge in respect of tax evasion in Italy was dismissed on 20 April 2015 and that the case for fraudulent bankruptcy was still ongoing. In this regard he produced a copy of the judgment. He added that the case for fraudulent bankruptcy was based on allegations only at this stage and that the present application was therefore premature. He states in his affidavit that Malcuori is his wife.
- [21] With respect to the concealment of the yachts, the Respondent denies the same and states that all the yachts were subsequently located and handed over to the Liquidator upon bankruptcy. With regard to the accusation relating to the diversion of yachts by intermediaries to third parties he avers that as the direct user or owners of the yacht he was at liberty to do with them as he pleased and that unless the identities of the intermediaries or financial companies alluded to were given to him he was not in a position to fully answer the allegation.

- [22] Similarly, the Respondent avers that unless he is given the identity of the employee who he gave instructions to transfer the sum of Euro 200,000 from the company account to a third party account he cannot fully answer the allegation. He also avers that he does not see the relevance of the travel dates referred to by the Applicant.
- [23] He accepts that the two sums of money were transferred into his account in Seychelles but disputes that they came from his and his wife's bank account in Lugano, Switzerland.
- [24] With regard to the purchase of shares in Naval Services he avers that negotiations in this respect did indeed take place and that the transfers of money to Mameli and Luini were not for the purpose of obtaining a legal basis for the application of a GOP.
- [25] He avers that the money used to purchase the condominium was not from money obtained from criminal conduct but rather from some money he had saved 'for a rainy day' together with money given by his father-in-law.
- [26] In a further affidavit in support of the Section 4 application, Superintendent Prinsloo avers that the dismissal of charges for tax evasion as produced by the Respondent in his Counter Affidavit is irrelevant as it does not relate to the prevailing order made by the Court in Busto Arsizio dated 6 March 2019 but to an earlier matter. He further avers that the Respondent and his wife have been declared fugitives from justice and the Italian Ministry of Justice has requested their arrest and extradition and this continues to be the case.
- [27] He reiterates that the origin of the two bank transfers to Four Stars Ltd originated from the Respondent's account in Lugano Switzerland and was conducted by SWIFT payment although the IBAN number of the account did not reflect fully due to a typing error.
- [28] He avers that the Respondent does not indicate the provenance of the money allegedly saved for a "rainy day" or that from his father in law.
- [29] In response, the Respondent has averred that the two court cases and orders mentioned are interrelated and originate from 2009 when he was ordered to pay Euro 5 million in taxes which was later reduced to Euro 3.5 million which he was paying in instalments

amounting to Euro 1.5 million. He later won his appeal and stands to have this amount refunded. He paid his taxes but also made profits which he saved and used to buy the house at Eden Island.

[30] With regard to ongoing proceedings in Italy relating to him and his wife, the appeal process has not been exhausted and there has been no extradition request from Italy in relation to him and his wife.

[31] He admits that the money transferred to the Four Stars account in Seychelles was from his account in Switzerland. With regard to the money received from his father-in-law, he did not ask him for the provenance of the money which was given as gift but knows that he sold a house in Tuscany.

[32] In his cross examination on his affidavits, Superintendent Prinsloo, confirmed that the order for the Respondent's provisional arrest and extradition to Italy is still pending. The Respondent is not only sought in Italy but there is also an operating order declaring him a fugitive. Superintendent Prinsloo referred the court to Exhibit HP02 which is the order made by Judge Alessandro Chionna where the offences committed by the Respondent, particularly the offence of fraudulent bankruptcy is stated. In contradiction to the Respondent's averments, the documentation from the court states that the company's yachts have not been recovered, the diverted sums of money were used to purchase gold ingots and that a number of other company assets were sold to third parties listed in the court order. In summary, the Respondent diverted all the company's assets and then filed for bankruptcy. The property at Eden Island was purchased before the request for arrest and extradition was made by the Italian authorities.

[33] Superintendent Prinsloo also stated that in the present case the offence of fraudulent bankruptcy is the predicate offence grounding the section 4 application. 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.

- [34] In his cross-examination on his affidavits, the Respondent stated that all the boats 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.
- [35] He did not agree that there was a discrepancy in his affidavits as to the provenance of the funds transferred to his account in Seychelles used to purchase the property at Eden Island. He stated that he had always said that the money came from his Swiss bank account. He had only denied that the account number as stated in Superintendent Prinsloo's affidavit was incorrect.
- [36] With regard to his declaration that he was a shareholder in Naval Services, 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 and the Italian police knew this. The Mafia had made demands on him regarding the boats and money derived from them and this is why he couldn't pay his taxes, declared bankruptcy and had to get out of Italy. He was not fleeing justice in Italy but the Mafia rather.
- [37] Superintendent Prinsloo was allowed to clarify the issue of the Swiss Bank account and explained that the account number had always been correctly stated. It was only the IBAN number that had not been inserted.
- [38] 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 and the irrelevant court order as opposed to the current operating order stand to be considered by this Court.

[39] The Respondent has also submitted proceedings from the court of Busto Arsizio. These are unauthenticated and cannot therefore be admitted as evidence by the court. In any case even if they were admitted, they do nothing to help the Respondent's case as the conclusion and order of the court dated 23 October 2018 is to the effect that the Respondent and his wife be imprisoned for four years and eight months for a number of crimes on the indictment including fraud. This has not been denied by the Respondent, rather he states that the appeal procedure in relation to it has not been exhausted.

[40] In his closing submissions, Counsel for the Applicant has again reiterated the belief evidence of Superintendent Prinsloo and has submitted that the Applicant's prima facie evidence has not been rebutted by the Respondent. He has also directed the attention of the court to the fact that the Respondent's evidence relating to his fear of the Mafia was not alluded to in any of the affidavits he filed in opposition to the application. This evidence compounded with the false statements in the Respondent's application for the GOP and his unsubstantiated statements relating to the provenance of the funds used to purchase the property at Eden Island are indicative of his lack of credibility.

[41] In his closing submissions, Counsel for the Respondent has stated that the Applicant has filed a defective application in that the supporting affidavit to the motion for the interlocutory order does not specify the Applicant's belief evidence and grounds for it but rather that that this is contained in the motion itself. Again, these are matters being raised for the first time at the eleventh hour and should not be entertained by the court without an opportunity being given to the Applicant to respond to. I do not however wish to further adjourn to invite further submissions on this point and deal with this issue conclusively as having examined the affidavit of Superintendent Prinsloo filed on 6 March 2018, I find that Paragraphs 3, 32 and 33 contain the following averments:

“3. That I have made reasonable investigations in the matter for the application for interlocutory order as per section 4 of the Proceeds of Crime (Civil

Confiscation) Act 2008 as amended. As such, I am required under section 9 of the said Act to submit evidence of my belief having regard to section 9(2) of the said Act.

...

32. That it is my belief under section 9 of the Proceeds of Crime (Civil Confiscation) Act;

That...

33 That the grounds for my belief are the averments mentioned in the affidavit including: ..." (Emphasis added)

[42] Clearly both the belief evidence and the grounds for it are stated in the affidavit. The submissions on this point have therefore no basis and are disregarded.

[43] It is trite that section 4 applications are decided on the belief evidence of the Applicant as explained in Section 9 of POCA. In *Financial Intelligence Unit v Contact Lenses Ltd & Ors* (MC 95/2016) [2018] SCSC 564 (19 June 2018) the Court summarised the approach to the law in this respect. It stated:

"15. The courts in Seychelles have established in previous cases, namely 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 that the provisions above should be interpreted to mean:

"1. ...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 POCCCA, 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)

2...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, it cannot refuse the order (Sentry supra).”

- [44] On this basis 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 in 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.
- [45] 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.
- [46] 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 the obtention of his GOP in Seychelles.
- [47] 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.

[48] 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.

[49] 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.

[50] I therefore find that the interlocutory order sought should issue on the belief evidence of Superintendent Prinsloo as I am satisfied that there are reasonable grounds for his belief.

[51] 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 or was acquired or constitutes benefit from criminal conduct.

[52] I therefore grant the application and issue an interlocutory order prohibiting the disposal of, dealing with or diminishing in value of the specified property. I further appoint Superintendent Prinsloo to be the Receiver of the said specified property to manage, keep possession or dispose of the same or otherwise deal with any property in respect of which he is appointed.

[53] In the circumstances, I make the following orders:

1. Pursuant to section 4 of POCA I prohibit the Respondent or any other person from disposing or otherwise dealing with whole or any part of the property namely Parcel V17532 a comprising of a condominium unit in Zanmalak, Eden Island, Mahe, Seychelles.
2. Superintendent Hein Prinsloo 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. These orders are to be served on t the Registrar General.
4. Costs of these proceedings will abide the final outcome of the case in relation to the specified property in this matter.

Signed, dated and delivered at Ile du Port on 27 March 2020.

M. Twomey

Chief Justice