

SUPREME COURT OF SEYCHELLES

Reportable

[2020] SCSC 660

MA 356/2019

Arising in MC 62/2016

In the matter between

THE GOVERNMENT OF SEYCHELLES

(rep. by Steven Powles and Nissa Thompson)

Applicant

and

1. RADOMIR PRUS

2. SANDRA PRUS (NÉE WILCZOK)

3. EXELSIOR DREAMS

4. FREE SUN LIMITED

(rep. by Anthony Derjacques)

Respondents

Neutral Citation: *Government of Seychelles Prus and Ors* (MA 356/2019) [2020] SCSC 660
(14 September 2020)

Before: Twomey CJ

Summary: application under s. 5 of POCA for a disposal order-opposition to application- meaning of criminal conduct- constitutional point raised in closing submissions

Heard: 7 July 2020

Delivered: 14 September 2020

ORDER ON MOTION

Pursuant to section 5 of POCA an order for the disposal of the specified property by the Applicant, namely the four bedroom ‘Maison 72’ situate on Eden Island and the 28.8m long motor yacht, ‘Dream Angel’ moored at Eden Island Marina is issued.

RULING

TWOMEY CJ

Background to the present application

[1]. This is an application by the Government of Seychelles for a disposal order pursuant to section 5 of the Proceeds of Crime (Civil Confiscation) Act 2008 (hereinafter POCA) that

specified property, namely Maison 72 at Eden Island, Mahé, Seychelles and motor yacht, Dream Angel moored at Eden Island Marina be transferred to the Republic of Seychelles. The notice of this motion was duly served on the Respondents, who entered appearance and filed an opposition to the application.

- [2]. By way of background, it must be noted that this matter in some form or another has haunted the corridors of this court for over four years. On the 15 November 2017, this Court granted orders pursuant to sections 4 and 8 of the POCA prohibiting the Applicants or any person having notice of the order from disposing or otherwise dealing with the specified property. It also appointed Jan Celliers, Assistant Commissioner of Police and Head of the Financial Investigation Unit to receive the said property.
- [3]. It did so on the belief evidence of Jan Celliers contained in an affidavit sworn on 28 June 2017, that the specified property constituted 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 constituted benefit from criminal conduct.
- [4]. The criminal conduct in this matter was subsidy fraud by the Respondents resulting in the detriment to the financial interests of the European Union of the equivalent of Euros 10,202, 449 and a further sum of the equivalent of Euros 1,800,432 to the detriment of the Czech Republic, which conduct also amounted to money laundering.
- [5]. On 14 November 2018, the Respondents applied to this Court for an order to discharge or set aside its interlocutory order and to prohibit the disposal of the specified property on the grounds, inter alia, that the First Respondent was a respected and upstanding Czech citizen who was engaged in successful business enterprises and who had been acquitted of fraud charges laid against him by the Czech courts.
- [6]. In a ruling delivered on 8 July 2019, this Court dismissed the application finding a number of irregularities with the documentary evidence produced by the Respondents to ground their application and because the Respondents had failed to show that the specified properties had not been obtained from criminal conduct.

The grounds for the present application

- [7]. The present application for a final disposal order of the specified property is sought on the grounds of the 12-month expiry period after the grant of the interlocutory order and the dismissal of the set aside application has passed, that there was no application pending under section 4 (3) of the POCA before this Court or any other court in respect of the specified property, and that there was no appeal pending before any court.
- [8]. In his affidavit supporting the application, Assistant Commissioner, Jan Celliers, again summarised the criminal conduct in this case. He averred that the fraud believed to have been committed by the Respondents consisted of the diversion of part of a subsidy paid by the European Union for new technology and machinery associated with waste management in the Czech Republic, Hungary and Poland for the benefit of a Czech group of companies (Exelsior Group Ltd, hereinafter Exelsior) to be supplied by a UK company, FPR Engineering Limited (a shell company, hereinafter FPR) to the Respondents in Seychelles and that this conduct further amounted to money laundering.
- [9]. He further averred that an international warrant had been issued by the Czech authorities for the arrest of the First Respondent and that this was subsequently cancelled to allow him to travel back to face trial for the fraud offences and that he is still facing trial for the same amongst other charges in the Czech Republic.

The Respondent's opposition to the application

- [10]. In his affidavit in reply, the First Respondent averred that the Orders made by this Court were based on an incorrect conclusion and that the specified property was not acquired from criminal conduct.
- [11]. He also averred that he is a respected and upstanding citizen of the Czech Republic and that he earns sufficiently to pay for all his acquisitions. He further avers that he has a clean criminal record and has not been found guilty of subsidy fraud anywhere in the world.
- [12]. He also avers that the Fourth Respondent obtained a loan in the sum of USD1, 100,000 from FPR on the 1 March 2011 signed by himself for the purchase of Maison 72 at Eden Island. With regard to the yacht, Dream Angel, he had received dividends from first Excelsior, of which he is shareholder, secondly, from Capital Invest Corp Ltd (hereinafter

Capital) of which he was both a shareholder and a partner and thirdly, apart from the dividends paid to him, he also was paid the equivalent of US 1,909,334 as a “commitment” owed to him by Capital. He avers that his shareholding in Excelsior amounts to the equivalent of USD 9,539,305.60.

[13]. He has also attached for the court’s consideration a sale agreement between Fast Trade Limited, a member of Excelsior, with Lactalis Polska dated 15 May 2008 for the sale of shares amounting to over Euro 6,000,000.

Affidavit of Superintendent Hein Prinsloo of the Seychelles Police Force

[14]. Upon receiving the First Respondent’s affidavit and annexed documents, Superintendent Hein Prinsloo made further investigations, which he explains in the affidavit he swore on behalf of the Applicant.

[15]. He avers that the agreement between the Fourth Respondent and FPR states that the loan would be effected by “bank transfer from the Lender’s account to the Borrower’s account” but there is no proof of such a bank transfer. In fact, the payment by the First Respondent to Webber Wentzel for the purchase of the house at Eden Island was made from account number 77 1030 1508 0000 0008 0392 3043 which appears to be the account of FPR in Novy Bohumin, Czech Republic, seemingly opened specifically to facilitate the transfer of the funds for the house. No such company is listed on the database of Czech companies.

[16]. Superintendent Prinsloo further avers that the loan agreement also specifies that the repayment of the loan would be from March 2011 to April 2020 with an interest rate of 1.5% per annum but that a search of the Company Registry in the UK revealed that FPR was dissolved on 2 April 2013.

[17]. He also avers that the First Respondent’s averment that the money lent by FPR to the Fourth Respondent assigned by an ‘agreement on the assignment of receivables’ (a scheme whereby businesses borrow money against amounts due from customers) dated April 2011 between FPR and Rexel Trading Ltd (hereinafter Rexel) was in respect of the same house at Eden Island.

- [18]. In this regard, Superintendent Prinsloo avers, a receivable is a debt owed to a company by a customer for goods or services that have been delivered or used but yet unpaid and is considered as a liquid asset. A loan from FPR for a period of nine years is not a liquid asset as it cannot be quickly and easily converted into cash and does not therefore qualify as a receivable. In any case, the agreement on the assignment of receivables does not specify the details of the USD 1,170,000.00 loan repayment although a pledge has been placed on the property in the amount of USD 1,170,000.00. The scheme therefore appears to be a handover of the property from FPR to Rexel without any mode of securing the repayment. He avers that it is implausible that a credible institution would conduct business in such a manner.
- [19]. Superintendent Prinsloo further avers that the scheme appears to be devised to give the impression that Rexel was in a position to repay the loan but a search at the Companies' Register in the UK reveals that Rexel's director is the First Respondent's wife and that the company has filed dormant accounts for the years 2010 and 2011 and did not carry out any significant business and could not therefore have accounts receivable to secure a loan of the magnitude of USD 1,170,000.00 as indicated by the First Respondent in his affidavit and attached documents.
- [20]. He further avers that in any case, the transfer of USD 1,100,000.00 was made on 2 March 2011 with a further transfer of USD 77,088.80 from the account of FPR to Webber Wentzel for the purchase of the house by The Fourth Respondent. As The Fourth Respondent had already secured this loan there seems to be little reason and no commercial credibility to sign the agreement on the assignment of receivables between FPR and Rexel especially as the agreement with Rexel was made only one month after the loan was secured with FPR. Further, he notes that the agreement specifies no details of the repayment, due date, interest or service fee and no proof of payment is attached.
- [21]. Bizarrely, it is further averred, that in an undated letter from Rexel to the Fourth Respondent (see Annexure 4 of the First Respondent's affidavit), the Second Respondent who is also the First Respondent's wife, and director of Rexel, notifies the Fourth

Respondent that FPR's claim on the house has been transferred to Rexel and the Fourth Respondent has to fulfil its obligation (that, is repaying USD 1,170,000.00 to Rexel).

[22]. Superintendent Prinsloo avers that based on his analysis, this appears to be an exercise in creating a paper trail to imply that FPR granted a loan to the Fourth Respondent to buy the property. However, no proof of such payment was given. With the transfer of the loan to Rexel a month later, again with no payment details and no proof of any payment on the loan, the "assignment of the claim" therefore appears to be false, baseless and constitutes money laundering and forgery.

[23]. Superintendent Prinsloo avers that the stages of money laundering are all evident in the transactions: 'the placement stage' was in the transfer of USD 1,170,000.00 to FPR's account 77 1030 1508 0000 0008 0382 in the Czech Republic, 'the integration stage' was the transfer of the USD1,170,000.000 from FPR's account in the Czech Republic to Webber Wentzel at Eden Island for the house and the 'layering stage" was the attempt to conceal the origin of the funds with non-commercial credible loans and agreements.

[24]. With regards to the First Respondent's averment that he is a prominent businessman with sufficient funds to purchase the yacht, Dream Angel, Superintendent Prinsloo's averment is that it would have been sufficient for the First Respondent to produce his share certificates in the various companies he claims to be a shareholder of, the transfers into his bank account and the transfer of the purchase price from his bank to the owner of the boat. No source of the funding for the purchase of the boat has ever been provided leading to the conclusion that the boat was purchased from the proceeds of crime.

Evidence of the First Respondent

[25]. The Applicant further sought the permission of the court to cross-examine the First Respondent on his affidavit as is permitted by the POCA Rules. The application was granted and the evidence of the First Respondent was taken in a virtual hearing on 7 July 2020.

[26]. In his line of questioning, Counsel for the Applicant sought to obtain answers from the First Respondent on the source of funds for the purchase of the house at Eden Island and

the yacht, Dream Angel. With regard to the agreement between FPR and the Fourth Respondent for the purchase of the villa, the First Respondent accepted that he had signed the same on behalf of the Fourth Respondent and a Mr. Forsman for FPR. He stated that he signed hundreds of contracts and as this one was just one of them and signed a decade ago, he could not remember the details.

[27]. He accepted that FPR had sent USD 1, 170, 000 to Webber Wentzel, the lawyers for Eden Island, for the purchase of the villa from its account in Novy Bohumin in the Czech Republic. He also accepted that Mr. Forsman on behalf of FPR had also signed the assignment of receivables to Rexel whose director, Ms Wilczok (the Second Respondent) had signed on their behalf. When it was put to him that Ms. Wilczok was his wife, he stated that she was not at the time the agreement was signed. He could not however remember when his relationship with her had started but said that he married her in 2016. He agreed that the agreement effectively meant that FPR ceded its interest in Maison 72 on Eden Island to Rexel so that if the Fourth respondent defaulted on its loan to FPR, the property would no longer be forfeited to FPR but it would go to Rexel instead.

[28]. When asked whether Rexel had paid the consideration to FPR for the assignment, he retorted that that was not something that was dealt with in the agreement and that he did not know where it was dealt with, as he was not a representative of either Rexel or FPR at the time or ever. He was not aware how much Rexel had paid FPR as he was not party to the transaction. He also accepted that he had not asked the question of his wife knowing the present proceedings were ongoing in the court.

[29]. He also agreed that the notification of the assignment of the claim which he signed as the Director of the Fourth Respondent and Ms. Wilczok (his wife) on behalf of Rexel, is undated but ultimately the company, the Fourth Respondent, which bought the house was in debt to Rexel in the amount of USD 1, 170, 000 plus related charges although there is a discrepancy of USD77,000 between what FPR lent the Fourth Respondent for the purchase of the house and the debt assigned by FPR to Rexel. He was of the view that the discrepancy was due to fluctuations in exchange rates although it was pointed out to him that there was only a month's difference between FPR lending the money to the Fourth

Respondent and the assignment of receivables to Rexel. Alternatively, he hazarded, maybe there was a typo in the document or maybe they had agreed to round off the figures.

[30]. When asked where the USD1, 177,000 dollars that FPR paid Eden Island Development Limited and Webber Wentzel came from, he stated that FPR, formerly called Fast Trade, had made money from the sale of a dairy in Poland to Lactalis Polska. When asked about documentation to show that FPR and Fast Trade were the same company, he replied that this could be confirmed by open sources such as googling it on the internet. He also said that the director of FPR, formerly Fast Trade was Mr. Topiarz and that Mr. Topiarz was the director of the Fourth Respondent until recently when his wife had taken over the position.

[31]. It was put to him that he could still not show the flow of money for the purchase of the villa in 2011 as the document relating to Lactalis Polska was dated 1 September 2008 and that no evidence had been provided by him to show that the money paid by Lactalis Polska to Fast Trade was in fact the money used by FPR to pay Eden Island and Webber Wentzel. He answered that it showed the origins of the funds.

[32]. He was also asked where Rexel obtained the USD 1, 170, 000 to pay FPR, and answered that from what he knew Rexel had shares in many companies and that in any case this was a transaction between third parties and that he was not their representative and did not have access to their records.

[33]. He admitted that both he and his wife were directors of the Fourth Respondent, which owed money to Rexel of which his wife was the director and that so far no money had been repaid to Rexel.

[34]. With regard to the yacht, Dream Angel, the First Respondent stated that the documentation he had provided showed that he had enough money to buy the vessel. The dividends paid to him together with the “commitment” payable to him by Capital were well above the purchase price for the yacht. He stated that documentation to show the transfer of the dividends from the companies to him and then into his account in

Seychelles which had subsequently been frozen and then unfrozen was available. It was put to him that this documentation had been requested but had not been provided to date, to which he replied that he had not understood that he had to provide such evidence.

[35]. In re-examination by his lawyer, he stated that the registration number and address of FPR and Fast Trade were the same. With regard to the USD 77,000, discrepancy between what FPR lent the Fourth Respondent for the purchase of the house and the debt assigned by FPR to Rexel, apart from the fluctuation in exchange rates it could also be explained by the extra sum paid for the bank charges.

Closing Submissions

Submissions of the Respondents

[36]. The Respondents have, in closing, referred to what they term the new definition of criminal conduct in POCA and submit that it is *not* required (sic?) that a person be convicted in order for property derived from such conduct to be forfeited and disposed of by the state. They state that, as they have not been found guilty of committing the offences as laid down in section 2 of POCA in either Seychelles or elsewhere the confiscation and disposal orders cannot stand or issue.

[37]. The Respondents also challenged the findings of this court in granting the section 4 interlocutory order and in dismissing the set aside application and submit that the confiscation order was only made on belief evidence and mere speculation and not conclusive evidence that the specified property was acquired from the proceeds of crime upon a conviction. In this respect, the Respondents aver that the operation of the interlocutory order is unlawful and a breach of the Respondents' constitutional rights under Article 19 (right to a fair trial) and 26(1) (right to property) of the Constitution.

[38]. With respect to the merits of the case, the Respondents submit that they are bona fide purchasers of the specified property. With regard to the villa, the Respondents aver that the money used to purchase it was from a loan given by FPR. FPR obtained these funds from the sale of a dairy farm to Lactalis Polska. FPR's "equitable interest" in the villa was then assigned to Rexel. The Respondents submit that the villa is co-owned by the First Respondent and the Second Respondent.

[39]. With regard to the vessel, Dream Angel it is submitted that the First Respondent purchased the vessel from money he received from dividends paid to him as a shareholder in the Exelsior in the Czech Republic, from dividends paid by Capital and from money owed to him by Capital.

[40]. He submits, in conclusion, that the money used to purchase the specified property did not come from proceeds of crime.

Submissions of the Applicant

[41]. With regard to the legal point raised by the Respondents that the new definition of criminal conduct contained in POCA requires an actual conviction in order for a property derived from such conduct to be forfeited and disposed of by the state, and that the instant proceedings are therefore a breach of the Respondents' constitutional rights, the Applicant submits that they have raised preliminary objections in the Constitutional Court where a petition on this point has been brought under article 48(7) of the Constitution. It has submitted in that court that the matter should have first been raised before this Court.

[42]. The Applicant further submits that a petition to the Constitutional Court does not constitute an appeal for the purposes of section 5 (1) and (2) of POCA and that therefore the disposal order sought in the present application can be properly made. Further, it submits, section 22 of POCA makes it clear that an appeal for the purposes of POCA is one to the Court of Appeal.

[43]. With respect to the definition of criminal conduct in section 2 of POCA, the Applicant submits that the new definition did not add any new requirement that an offence be committed before forfeiture of disposal orders could be made. The previous definition of criminal conduct also referred to the commission of offences and behavior consisting of offences and there is therefore no new element to criminal conduct as averred by the Respondents. In any case, it submits, the alleged breaches of the rights of the Respondents with regard to a fair trial and to property now raised before the Constitutional Court have already been settled in the case of *Hackl v Financial Intelligence Unit* (2010) SLR 98 (Constitutional Court) and (2012) SLR 225 (Court of Appeal).

- [44]. In regard to the Respondents' submission that the specified property does not constitute the proceeds of criminal conduct, the Applicant submits that the contrived scheme set up for the purchase of the villa indicates that the only company out of pocket is Rexel whose director is the Second Respondent, the wife of the First Respondent, and it ensures that the Fourth Respondent gets what its name suggests "free sun".
- [45]. The Applicant further submits that the Respondents have failed to present any evidence to demonstrate where and how Rexel obtained the USD1, 170,000 purportedly given to FPR. The Second Respondent, the director of Rexel, was a party to the proceedings and failed to provide this information.
- [46]. With regard to the yacht, it is submitted that all the First Respondent had to do was attach his share certificates and provide proof that the dividends were indeed paid into his bank account and then provide proof of the transfers from his bank account to the company he purchased the boat from. No such evidence has been adduced.
- [47]. In conclusion, the Applicant submits that the Respondents have collectively failed to demonstrate that the specified property does not constitute directly or indirectly proceeds of criminal and conduct and that the disposal order should therefore issue.
- [48]. The Appellant also invites the court to rule that the complaints made pursuant to Articles 19 and 26 are both frivolous and vexatious and are matters that have previously been decided by both the Constitutional Court and the Court of Appeal.

Consideration by the Court of the issues raised

A new definition of criminal conduct?

- [49]. It is not the intention of this Court to give a potted history of the legislative history of the POCA, save to say that an amendment to the Act in 2017 while inserting a definition of criminal conduct in the POCA and repealing the reference to the definition of criminal conduct in the Anti Money Laundering Act (AMLA) did not, in its view, create a new requirement that there be an actual conviction in order for a property derived from such conduct to be forfeited and disposed of by the state.

[50]. This Court endorses the submissions of learned Counsel for the Applicant on this issue: ‘criminal conduct’ is defined in section 2 of POCA (2017 Amendment Act) as follows:

“Criminal conduct” means the offence committed by a person who-

(i) Converts or transfers property knowing or having reason to believe that the property is the proceed of a crime with the aim of concealing or disguising the illicit origin of that property, or aiding any person involved in the commission of the offence to evade the legal consequences thereof;

(ii) Conceals or disguises the true nature, origin, location, disposition, movement or ownership of the property knowing or having reason to believe that the property is the proceeds of a crime; and

(iii) Acquires, possesses or uses property knowing or having reason to believe that the property is the proceeds of crime.

[51]. The previous definition of criminal conduct in POCA was as follows:

“Criminal conduct” shall have the meaning set out in the Anti-Money Laundering Act, 2006 “(AMLA)

[52]. Section 2 of AMLA provides:

“Criminal conduct” shall have the meaning set out in section 3 and includes the financing of terrorism”

[53]. Section 3(9) of AMLA provides:

In this Act, “criminal conduct” means conduct which –

(a) constitutes any act or omission against any law of the Republic punishable by imprisonment for life or for a term of imprisonment exceeding three years, and/or by a fine exceeding R50,000 and, without prejudice to the generality of the above includes the offence of money laundering established by sections 3(1) and 3(3) of the Act and whether committed in the Republic or elsewhere and whether before or after the commencement of the relevant part of this Act;

(b) where the conduct occurs outside the Republic, would constitute such an offence if it occurred within the Republic and also constitutes an offence under the law of the country or territorial unit in which it occurs;

(c) *Includes participation in such conduct, including by not limited to, aiding, abetting, assisting, attempting, counselling, conspiring, concealing or procuring the commission of such conduct (emphasis added).*

[54]. A reading of the above provisions makes it clear that the previous definition of criminal conduct for the purposes of POCA included the requirement that an offence be committed as is the case in the present definition. The words ‘commission’ and ‘offence’ are used extensively in both definitions but not the word conviction.

[55]. Perhaps the confusion has arisen from a persistent lack of understanding of what a predicate crime is in the scheme of proceeds of crime legislation. The word predicate is from Latin *praedicare* meaning to proclaim or make known. Predicate crime is an American concept in which the underlying criminal offence gives rise to criminal proceedings, which are the subject of a money laundering charge. The concept is important in the USA because prosecution for money laundering requires proof that the property involved was proceeds of “specified unlawful activity” (Bell, R.E. (2002), "Abolishing the concept of ‘predicate offence’", *Journal of Money Laundering Control*, Vol. 6 No. 2, pp. 137-140). In that context, a predicate crime is one committed in preparation for the bigger crime of money laundering.

[56]. The thrust of modern day proceeds of crime legislation is to target the unexplained wealth of the criminal and not the criminal himself. The POCA regime in Seychelles adopts much of the model proposed in the United Nations Convention Against Corruption, in which legislation provides for non-conviction based confiscation/forfeiture proceedings that do not require a predicate offence to be established. This is what distinguishes proceeds of crime proceedings from criminal proceedings. As was explained in both *Hackl* (supra) and *FIU v Mares* (2011) SLR 405, proceedings under POCA are civil in nature although the Act deals with the proceeds of criminal conduct. As was also clearly explained in *Hackl*, the objective of POCA is not to indict, prosecute and convict criminals for money laundering but rather to forfeit the proceeds of their crime. It is the AMLA that deals with criminal offences associated with money laundering.

[57]. This approach is explained by the Constitutional Court of South Africa (Nkabinde J) in *Prophet v National Director of Public Prosecutions* [2006 (2) SACR 525 (CC)]

“[58] *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.*”

[58]. It is worth pointing out that in *Prophet* the Court upheld the finding that the forfeiture of the Appellant’s property was valid despite his acquittal on drug-dealing charges in the Magistrates Court because there was a reasonable probability that the house was an instrument of the crime.

[59]. The regime of civil forfeiture adopted in POCA remains in place in this jurisdiction, despite changes to POCA in 2017. In the circumstances, the Respondent’s objection to the disposal order on this point has no validity.

Constitutional issue to be referred

[60]. In their closing submissions, the Respondents have not only challenged the reasons for this Court granting and maintaining the interlocutory order for confiscation of the Respondents’ property but aver that the basis for granting the order is in breach of the Respondents’ constitutional rights.

[61]. The Respondents have also submitted that the section 4 and 8 orders were unlawful, because they were only made on belief evidence and mere speculation and not conclusive evidence that the specified property were acquired from the proceeds of crime upon a conviction. It cannot be gainsaid that a court cannot sit on appeal of its own decision. All the Respondents had to do was appeal this Court’s decision. To date they have done so. In the circumstances, this submission cannot be entertained.

[62]. The Court points out however, that the submission relating to the grant of section 4 orders on belief evidence is an old and tired argument that only needs to be stated to be dismissed. Belief evidence grounding interlocutory orders is a statutory concept defined by section 9 of POCA and explained ad infinitum by the courts in the past decade (See for example *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 *DJS Capital Ltd & Ors v FIU* (SCA 01/2014) [2016] SCCA 3 (22 April 2016).

- [63]. With regard to the specific point relating to the fact that the Respondents have lodged a Petition with the Constitutional Court in relation to the constitutionality of the present proceedings, it must be pointed out that no application was made before this Court for a determination of whether there has been or is likely to be a contravention of the Respondents' charter rights so as to refer the matter to the Constitutional Court.
- [64]. Further, the fact that this Court is or was informed tardily of the Respondents' petition to the Constitutional Court is immaterial, as the Respondents were required to raise the matter before this Court for determination on whether the alleged complaint was frivolous or vexatious or that the issue raised had not previously been decided by the Constitutional Court or the Court of Appeal. Since the procedure was not complied with, the purported self-referral to the Constitutional Court has no bearing on the present proceedings before this Court and is therefore disregarded.
- [65]. I add however, that even if the matter had been referred to this Court for determination, I would have dismissed it and would have found that the complaint was frivolous and vexatious for the reasons given above.

Evidence that the specified property is not from proceeds of criminal conduct

- [66]. In respect of the present proceedings, a disposal order is sought by the Applicant pursuant to section 5 of POCA. The Court will issue such an order:

“unless it is shown to its satisfaction by the respondent or any person claiming any interest in the property, that the property does not constitute, directly or indirectly, proceeds of criminal conduct and was not acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of criminal conduct.”

- [67]. There are other qualifications to the issuance of the order, inter alia, that the court shall give any person with an interest in the property the opportunity to be heard as to why the order

should not be made, and that the order should not be made if there is a serious risk of injustice to any person. The onus of establishing the injustice is on the person alleging it.

[68]. It is with this legal backdrop that I have scrutinised the evidence before me. This ultimately is a simple case. A house and yacht were bought. It is the reasonable belief of the Government of Seychelles that the funds used to purchase the two properties are from proceeds of crime. An order to confiscate the property is granted on this statutory evidence. All the Respondents have to do is show the legitimate source of their funds to acquire the property seized.

[69]. The First Respondent first said that he has purchased the properties from legitimate funds because he is:

-A respected and upstanding citizen of the Czech Republic, engaged in successful investments in technology, industry and science with a focus on innovation in the whole of Europe including a very successful PET recycling factory with the highest capacity in the European Union.

-A member of the International Humans Rights Commission and serves on its supervisory board as an ambassador at large

-The Honorary Consul of the Republic of Congo

-A member of the subcommittee on science research and innovation of the “House of Commons” (sic) of the Czech Republic

-Absolved of the charge of subsidy fraud as per judgment of the court dated 18 June 2015

-Charged only because of corruption in the Czech government of Vaclav Klaus which conspired to extort him into making a settlement

-Of clean criminal record

-The inventor of a nano battery

[70]. The Court was not persuaded by his evidence and refused to set aside its order. He now comes with a whole new set of facts of where he got the money from:

With regard to the villa, he, the First Respondent as the director of the Fourth Respondent obtained on its behalf a loan in March 2011 of USD 1,100,000 from a company in the UK named FPR (and formerly known as Fast Trade Ltd) to buy the villa. FPR had these funds available because in 2008 it had sold a dairy farm to a company called Lactalis Polska. For some unknown reason, FPR's loan to the Fourth Respondent was a month later, in April 2011, assigned to Rexel, another company, whose director was the Second Respondent (now the First Respondent's wife).

With regard to the yacht, the First Respondent purchased it from dividends he had received from a group of companies named Exelsior in the total equivalent sum of USD 221,105.84. He also received dividends equivalent to USD 138,204.36 from another company Capital. He also received instalments of money from the latter company, as they owed him USD1, 909,334.00

[71]. All this would have been alright had it not been for the simple fact that there is no evidence of any bank transfers of the money as such – only documents from the named companies of confirmation of the payments. The evidence set out *in extenso* above also raises alarm bells with regard to the standing of the relevant companies. Their directors are eerily the same individuals (Topiarz, Forsman, Wilzcok). FPR was dissolved in 2013. It had no subsidiary in the Czech Republic yet money was sent from its bank account in Novy Bohumin to Webber Wentzel for the purchase of the villa. It is alleged that FPR had money to make the transfer as it had sold a dairy farm in 2008 yet no bank statement or account of its commercial activities was ever produced, especially of the relevant date of transfer.

[72]. No reason is given as to how and why Rexel paid FPR USD1, 170,000.00 in return for the villa at Eden Island.

[73]. With regard to the purchase of the vessel, Dream Angel, the source of the funds is also purportedly proven by confirmation from companies of payments of dividends and of loan repayments. Where are the corresponding share certificates, where are the transfers

of the funds in the First Respondent's bank account and where is the First Respondent's bank statements attesting to these transfers?

The Court's decision

[74]. Many questions remain unanswered but of utmost importance is the fact that the Court is not satisfied that the Respondents have been able to show the legitimate source of their funds to acquire the specified property in this application. The different explanations by the Respondents at different times during these proceedings indicate their lack of credibility and I have no hesitation in disregarding their evidence.

[75]. I am satisfied on the pleadings and the evidence before me, namely the affidavits of Assistant Commissioner Jan Celliers and Superintendent Hein Prinsloo and the exhibits appended to their affidavits that a disposal order in favour of the Applicant should issue in respect of the specified property.

The Court's Orders

[76]. Accordingly, I make Order pursuant to section 5 of POCA for the disposal of the specified property by the Applicant, namely the four bedroom 'Maison 72' situate on Eden Island and the 28.8 meter long motor yacht, 'Dream Angel' moored at Eden Island Marina.

Signed, dated and delivered at Ile du Port on 14 September 2020.

M. Twomey
Chief Justice