

SUPREME COURT OF SEYCHELLES

Reportable

[2020] SCSC 753

MC 28/2020

In the matter between

THE GOVERNMENT OF SEYCHELLES

(rep. by Nissa Thompson)

Applicant

and

1. STEVE MONTHY

2. LIZA MONTHY

(rep. by Clifford Andre)

Respondents

Neutral Citation: *Government of Seychelles v Monthy and Anor* (MC 28/2020) [2020] SCSC (13 October 2020).

Before: Twomey CJ

Summary: interlocutory application under s. 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 Respondents

Heard: 1 September 2020

Delivered: 13 October 2020

ORDER

Pursuant to section 4 of POCA, the Respondents or any other person are prohibited from disposing or otherwise dealing with whole or any part of the following property: SR 92,750, Euro 230, Vehicles S14379 and S20251 and sums recovered by the Court from the unauthorised sale of vehicle S25698. Superintendent Hein Prinsloo is appointed as Receiver over all 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.

JUDGMENT

TWOMEY CJ

Background to the Application

1. The Applicant has applied for orders pursuant to sections 4 and 8 of the Proceeds of Crime (Civil Confiscation) Act (hereinafter POCA) prohibiting the Respondents or any other person specified in the orders from disposing of or otherwise dealing with the whole or any part of the property or diminishing the value of property, namely cash being SR 384,050, Euro 50, and US 20 seized from the Respondent's home on 17 April 2020 at Roche Caiman. The First and Second Respondents are husband and wife respectively.
2. The present application was filed on 21 May 2020 and the Respondents represented by Learned Counsel, Mr. Clifford Andre entered appearance in the matter on 16 June 2020. Counsel also filed a reply objecting to the Application for an interlocutory order and the appointment of a receiver.

The Applicant's Affidavit and belief evidence of Superintendent Hein Prinsloo

3. With respect to the Applicant, the averments of Superintendent Hein Prinsloo are to the effect that it is his belief evidence pursuant to section 9(2) of POCA that on 17 April 2020 in the vicinity of Roche Caiman, officers of the Anti-Narcotics Bureau (ANB) stopped and searched a hired car bearing registration number S28264 being a Silver Honda Fit driven by one Kevin Quatre. There was a passenger in the car, namely Steve Monthy, the First Respondent. Both persons were known to the ANB and both had previous convictions for drug trafficking.
4. The car was searched and under the passenger seat, a piece of gold and white cigarette paper containing a beige substance was found which the ANB suspected to be heroin. The First Respondent stated that the substance was his. Subsequently, the Forensic Science Laboratory confirmed that the substance was indeed heroin.
5. The ANB then proceeded to 329 Bois Rouge, Roche Caiman where the Respondents live to carry out a search. During the search in the bedroom occupied by the Respondents a total sum of SR 384,050, Euro 50 and USD 20 in various denominations were found behind the headboard of the bed. The foreign exchange when converted and added to the rupees amounted to SR385,338,20.

6. When questioned the First Respondent stated that he was spray painter and the Second Respondent that she was unemployed. The First Respondent claimed that the cash belonged to him.
7. Superintendent Prinsloo avers that the First Respondent was convicted on 29 September 2016 of drug trafficking. A bank search subsequently carried out on the First Respondent confirmed that he did not have any bank accounts but it was discovered that the Second Respondent had a Savings Account at Nouvobanq with account number 0121019671001 and an account at ABSA which was closed in October 2019.
8. He also avers that it was established that the Second Respondent had a business registered in her name, namely Lammis Import (Lammis) registered in 2012 with a wholesaler licence. The licence expired in 2017. Lammis has an MCB account with account number 11606 in the name of Liza Joubert trading as Lammis. The account had a negative balance until July 2019 with the last transaction captured on the account on 30 September 2019 and a closing balance of SCR181.24. No significant deposits were made in 2019.
9. In 2020, the MCB 11606 account received seven cash deposits from January 2020 to 14 May 2020 totalling SCR69, 800. The account had a balance of SR 13,165.45 when the money was seized by the ANB in the Respondents' home. It is Superintendent Prinsloo's averment that money seized by the ANB could not have come from the operation of any business by Lammis as its licence expired in November 2017.
10. The Second Respondent had a further bank account at Nouvobanq Savings Account number 01201019671001 and had no transactions in January or February 2019. From April 2019 to December 2019 the account received small payments labelled as home carer's salaries and pensions, which in December 2019 totalled SR 81,237.98. This account received a cash deposit of SR7, 500 on 11 October 2019 while SR 6,025.47 was withdrawn in UAE Dirhams on the same day.
11. On 9 October 2019, the First Respondent exchanged SR25, 740.00 for USD 1,800 at a bureau de change stating that the purpose of the exchange was for local expenses. On 13 October 2019, the First Respondent sent UAE Dirhams 2,397.21(SR 9,350) via bureau de change to

the First Respondent. Two card purchases for SR 713.66 and SCR521, 15 were made in UAE from the same account on 14 October 2019. It is Superintendent Prinsloo's belief that these were for the purchase of controlled substances and that the deposit of large amounts subsequently broken into small amounts to avoid detection is a well-known money laundering tactic known as smurfing.

12. On 5 April 2019, the First Respondent exchanged SR35, 000 for USD 2,448 with the purpose of the transaction recorded as "travel expenses" yet neither of the Respondents travelled at that time. On 27 December 2019, the First Respondent again exchanged SR37, 180 for USD2, 600 with the purpose of the transaction recorded as trade. He had no licence and nor did Lammi at the time either. On 7 January 2020, the Second Respondent exchanged SCR49, 930 for U 3, 480 with the purpose of the transaction recorded as personal expenses. The First Respondent exchanged a further SR 11,336.50 for USD790 with the purpose of the transaction recorded as "family maintenance". It is Superintendent Prinsloo's belief that all these are examples of money laundering to disguise the origin of the money.
13. It is also his averment that the Second Respondent has a history of drug trafficking and the person with whom he was travelling on the day he was arrested, Quatre, was also convicted of drug trafficking on 13 July 2018 for importation of controlled drugs, trafficking in controlled drugs and conspiracy to commit an offence and was sentenced to four years imprisonment on each of these counts.
14. It is his belief evidence therefore, that neither Respondent nor Lammi had the financial means to have such a large amount of cash or to earn the money seized by the ANB at their home.

The First Respondent's Counter Affidavit

15. With respect to the application for the interlocutory orders by the Applicant, the Respondents have deposed in a joint affidavit that the money found in their apartment was legitimately obtained and that it had no connection with drug trafficking as the First Respondent is not currently charged with drug trafficking nor has his past conviction any relation to the money seized. They aver that Lammi is still operating and importing goods. They support this averment with release orders of goods from the Ministry of Finance imported by Lammi with the latest dated 16 October 2019 and a tax invoice in the name of the Second Respondent

dated 7 March 2020. They aver that their increase in revenue was from sales made from the goods. They have also attached a credit not dated 22 February 2013 from H. Savy Insurance in respect of SR 200,000 for an injury claim and aver that the Second Respondent had been given that money as financial help from the First Respondent from this source of money.

Supplementary Affidavit of the Applicant

16. In answer to the Respondent's cross affidavit, the Applicant through its officer, Superintendent Prinsloo has sworn a further affidavit in which he depones that the money from H. Savy Insurance was paid on 19 November 2015 and a cash deposit of only SR100,000 was made in the MCB Account 11601 held by the Second Respondent trading as Lammis and not the full SR 200,000 as claimed. He also avers that R 275,000 arising from another cheque from H. Savy Insurance for SCR 300,0000 was deposited in the same account in January 2015 by which time the balance in the account was only SCR4, 976.63 which indicates that the money already deposited from the First Respondent had been spent and could not therefore form part of the money seized during the search at the Respondents' home.
17. Further, after several transactions, the balance in Lammis' account on 16 June 2015 was SR791.84 and it is impossible that the SR 385,346 found in the Respondents' could have originated from the insurance claim paid by H. Savy Insurance.
18. Superintendent Prinsloo also avers that the batch of documents including those in the release orders from the Ministry of Finance amount to SR41, 122 in 2015 for imported goods, SR57, 479 in 2016, SR 46,981 in 2017 and SR 29,890 in 2018 and SR 3,379 in 2019 and SR1, 209 in 2020. After June 2015, the highest balance in Lammis account was SR14, 539.09, in 2016 the highest balance was SR21, 906.06, SR 24,773.31 in 2017, SR 9368.80 in 2018, SR 4,983.35 in 2019 and SR 45,634.45 in 2020. On 17 April 2020, when the money was seized from the Respondent's house, Lammis' account had a balance of only SR 13,999.45. Therefore, if Lammis imported goods for the value of SCR 3,379 in 2019 and SCR1, 209 in 2020 it was impossible that it could have made a profit of SCR385,346.30 as seized by the ANB on 17 April 2020.

19. It is Superintendent Prinsloo's belief that the money seized was therefore money from drug trafficking that could not be deposited in the bank.

Cross examination of the Applicant

20. Counsel for the Respondent cross-examined Superintendent Prinsloo on the manner in which he had extracted information from the Second Respondent's bank account to form his belief evidence. Superintendent Prinsloo explained that that was how he had carried out the analysis of the relevant accounts, as was his mandate.

Cross examination of the First Respondent

21. The First Respondent testified that the heroin found in the car on the day of his arrest in April 2020 was his and that he had previously been convicted of drug trafficking in September 2016. He stated that the money found in their home was insurance money from a claim he had made and received in 2014 and 2015. He explained that the money he had exchanged in 2019 and 2020 was for his wife for when she travelled although he had labelled the transaction as travel expenses and had not actually travelled and another time as local expenses.
22. He then stated that he had lent his wife the money from insurance and then she had returned it. He denied obtaining money from drug transactions. The deposits in 2019 were from the same insurance money. He cashed the cheque and kept the money with him. She sent money to his wife when she had travelled for business. He admitted he had again exchanged money in Seychelles in December 2017 after travelling home from Dubai. He was using the money to support his wife's business together with money he was obtaining from Social Security. Similarly, when he exchanged money for dollars in January 2020 and labelled it "family maintenance" it was for the purpose of his wife's business. He denied that he had labelled the transactions as they appear on the bank records but rather that he had told the bank it was for his wife's business. He reiterated that the money seized from his home was not from drugs.

Cross examination of the Second Respondent

23. It was put to the Second Respondent that the averments in the affidavit she had submitted in respect of their explanation of where the money seized from them had come from differed from the explanation the First Respondent and herself were stating in court, namely that they

had first intimated that the money was from Lammis' business and then that it was from the First Respondent's insurance claim.

24. She admitted that she had stated that the money was hers; she had been saving it to return it to the First Respondent. She kept it in the house although she had two bank accounts. She had been keeping money in the house since 2011 but had been saving to pay her husband back since 2017. He had first given her a lump sum of SR250, 000 for her business.
25. When it was put to her that the bank statements showed that on 19 November 2014 only a cash deposit of SR 100,000 was paid into Lammis' MCB 11606 account, she stated that that was the amount her husband had lent her. She had saved SR 384,050 and was going to give him his money when it was seized. She disagreed that she could not have made the savings from trading as Lammis. She also stated that the First Respondent had also sold his car and had made some money from the transaction although they had not made that averment in their affidavit.
26. She sought to explain that although she had made purchases of SR 3379 in 2019 and SR1109, she had sold the goods to her friends and made large profits. She admitted that this was not in Lammis' name as its licence had long expired. She also explained that she could not provide the documents as her friend had imported the goods for her.

The Applicant's closing submissions

27. In its closing submissions, the Applicant has referred the Court to the law relating to section 4 POCA applications as laid out in *Financial Intelligence Unit v Contact Lenses Ltd* (MC 95/2016) [2019] SCSC 564 (19 June 2018), that is, that unless the Court doubts the belief evidence of the Applicant which is reasonably made, it cannot refuse the order unless the Respondents are able to show on a balance or probabilities that the specified property retained were not from illegitimate sources. It is the Applicant's submissions that the evidence of the Respondents in court and their affidavit evidence are far from compelling to explain the legitimacy of the source of the money seized from them. Their accounts kept changing and were not credible.
28. No closing submissions have been forthcoming from the Respondents.

My observations and findings

29. I agree with the Applicant that the law relating to section 4 POCA applications is as stated by the Applicant. Section 9 of the POCA provides in relevant part:

“(1) Where the Director or Deputy Director states in proceedings under section 3 or 4 on affidavit ..., that he believes, that —

(a) the respondent is in possession or control of specified property and that the property constitutes, directly or indirectly, benefit from criminal conduct; or...

(b) the respondent is in possession or control of specified property and that the property was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes benefit from criminal conduct; and

(c) the value of the property or as the case may be the total value of the property referred to in both paragraphs (a) and (b) is not less than R50, 000,

(d) then, if the Court is satisfied that there are reasonable grounds for the belief aforesaid, the statement shall be evidence of the matters referred to in paragraph (a) or in paragraph (b) or in both paragraphs (a) and (b), as may be appropriate, and of the value of the property.” (Emphasis added)

30. With regard to the law and without having to rehearse the whole of the evidence adduced, the circumstances in which the money was found, the fact that the First Respondent has been convicted of drug offences, the fact that drugs were found in the car in which he was a passenger and admitted that they were his, the concealment of the large sums of money in the headboard of the Respondents' bed when the Second Respondent had numerous bank accounts in which legitimate money could have been banked lead me to conclusion that there are reasonable grounds for the Applicant's belief. That is prima facie evidence against the Respondents.

31. With respect to the Respondents' evidence, I have to be convinced on a balance of probabilities that the specified property is from legitimate sources. The averments of the Respondents and their supporting documentation are not compelling. They changed their accounts on so many occasions that it became impossible to fathom what they were stating the legitimate source of the money seized was from.

32. It is further insulting to the court's intelligence to hazard a response that an insurance claim paid in 2014 would still be generating profits for a business in 2020 when clearly this is not supported by the trading accounts or even an existing licence of the Second Respondent's business.
33. Both Respondents were not credible witnesses in Court and were evasive in the answers they provided. They have not been able to show the Court how the money seized from their home was from a legitimate source. Lammis was no longer functioning as a business, the First Respondent stated that he was not working and was even receiving money Social Security and even if the Second Respondent was trading illegally, the money used to purchase goods could not by any stretch of the imagination generate the profit she claims she had made.
34. In the circumstances, the application is granted. I make the following orders:
1. Pursuant to section 4 of POCA I prohibit the Respondents or any other person from disposing or otherwise dealing with whole or any part of the following properties: SR 384,050.00, Euro 50, USD 20 recovered by the ANB from the Respondents' home on 17 April 2020.
 2. Superintendent Hein Prinsloo is appointed as Receiver over all of the said properties 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.

Signed, dated and delivered at Ile du Port on 13 October 2020.



M. Twomey
Chief Justice

