SUPREMECOURT OF SEYCHELLES

Reportable
[2021] SCSC
MA 236//20 Arising in MC 78/19

In the matter between

PMC AUTO (PTY) LTD **Applicant**
(rep .by Mr Pardiwalla)

and

THE GOVERNMENT OF SEYCHELLES **1st Respondent**

SUPERINTENDENT HEIN PRINSLOO **2nd Respondent**
(*rep. by Mr Powles and Mrs Thompson*)

STEVE CHANG TAVE **3rd Respondent**

NATASHA CHANG TAVE **4th Respondent**
(rep. by Mr Camille)
NORTHERN STAR PTY LTD **5th Respondent**
(rep. by Mrs Amesbury)

Neutral Citation: *PMC AUTO (PTY) LTD v Government of Seychelles & Ors* (MA 236/2020 (arising in MC 78/2019) [2021] SCSC 458 (26 July 2021).
Before: Govinden CJ
Summary: Application for variation of an Interlocutory and Freezing Order; Section 4 (3) of POCA; Applicant negligence as to whether the property constitute benefits from criminal conduct; application dismissed.
Heard: 16 April 2021
Delivered: 26 July 2021

JUDGMENT

Govinden CJ

BACKGROUND

[1] An application for freezing orders was 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 2nd Respondent in this case, against the 3rd to 5th Respondents in case MC 78/19. They are self-employed business persons and a proprietary company respectively.

[2] Upon being satisfied that there was no risk of injustice to the Respondents or any other person if she made the orders, sought as they could 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, the court granted the application and issue an interlocutory order prohibiting the disposal of, dealing with or diminishing in value of the specified property. It further appointed 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.

[3] The specified property that was seized in accordance with the provisions of Section 4 of POCA were found in the Annexure to the judgment and they consisted, amongst a number of other moveable, the following motor vehicles, Hyundai Grand i10S with licence plate numbers S7396 (previouslyS321850, s34634 (previously S32186), S32187, S32307 and S 32416. Herein after also referred to *as "the motor vehicles"*.

THE APPLICATION

[4] This application is the direct result of that Order. The Applicant is a company incorporated under the Companies Act and is a licensed motor dealer. It is praying for a variation of the decision in MC 78/19 as it claims that he has an interest in the motor vehicles as they were purchased from the Applicant by the 5th Respondent on accredit basis for which deposits were made and that it was a term of the credit agreement that the balance owed would be paid in instalments. The said balance being left unpaid.

[5] According to the Applicant, it was alerted to an investigation being conducted on the 3rd to 5th Respondents for alleged money laundering and drug trafficking by the FCIU on the 20th of May 2019 and it cooperated with the investigation and engaged with the FCIU to note the Applicant's interest in the motor vehicles. However, soon after this the payments from the 5th respondent stopped and its account went into arrears in the sum of SR 353,244.

[6] That by virtue of the said Order, the 1st Respondent took possession and control of the Motor Vehicles with the authority to maintain or dispose of the motor vehicles, and thereafter with any realized funds stemming from the motor vehicles not reverting to the Applicant.

[7] According to the Applicant, the motor vehicles were seized and sold by auction in December 2019. The Applicant therefore avers that it holds a pecuniary interest in the Motor Vehicles. It further avers that it was its understanding from the time of the FCIU's request for information of 20th May 2019 up to well after their seizure and sale that they would be indemnified for their loss on their initial credit agreement with the 5th Respondent.

[8] However, the FCIU then reneged on their position to indemnify the Applicant and even after a request made by the legal representative of the Applicant, the 2nd Respondent still refused to indemnify the Applicant.

[9] Therefore, it avers that as the nature of the said Order obtained by the 1st Respondent precludes the Applicant from obtaining any material redress for the debt owed by the 5th Respondent this has caused an injustice to the Applicant.

[10] It is the Applicant's case that it conducted its due diligence on the 5th Respondent and had no reason to believe and indeed had no knowledge that their alleged activities could be criminal in nature.

[11] The Applicant therefore prays to this Court for a variation of the Order made on the 18th November 2019. In particular, that a sum of Seychelles Rupees 353,244, out of the funds derived from an auction of the motor vehicles is released from the said Order and paid

out to the Applicant in respect of an outstanding balance due to the Applicant from its credit agreement with the 5th Respondent.

THE REPLY

[12] The 1st and 2nd Respondents strenuously resist the application in their Consolidated Reply as supported by the affidavit of Superintendent Hein Prinsloo of the FCIU.

[13] In their replies to the application, the 1st and 2nd Respondents argue that the onus is in law on the Applicant to prove that injustice has been caused to it by the Order dated the 18th of November 2019 and in this regard it has failed to produce any documentation that shows that it has any interests in the motor vehicles and that evidence shows that it had failed to place a charge or registered any interest in the vehicles following their sales. It is further averred by them that all documents submitted by the Applicant only shows that the 5th Respondent owes it money, which is not being disputed. However, according to these Respondents owing a debt is not enough to prove an injustice as the government or the Receiver's obligation is not one of collecting debt on its behalf from the 3rd to 5th Respondents. It is also argued that the Applicant has not taken any steps to recover the money owed to them by the 5th Respondent even if the latter had fallen into arrears since November 2018 and has not attempted to recover same until the application was made in this case.

[14] The 1st and 2nd Respondents further averred on what they considered as examples of bad account management on the part of the Applicant, such as irreconcilable invoices purporting to relate to same transaction. Which to them also prove that the Applicant as a Reporting Entity under the law has failed to carry out due diligence, which shows negligence on its part. The failure to carry due diligence being also the failure to report at least two suspicious transactions in cash amounting to more than RS 50,000.

[15] Finally, the 1st and 2nd Respondents deny any allegations of undertaking given on their parts to indemnify the Applicant by referring to the several correspondence between the parties exhibited in this case.

[16] The 3rd to 5th Respondents support the Application.

THE LAW

[17] The relevant law applicable to this application are found in Section 4 (1) and Section 4 (3) of the POCA which provides;

Section 4 (1) ;

Interlocutory order

4. (1) Where, on an inter partes application to Court, in that behalf by the applicant, it appears to the Court, on evidence, including evidence admissible by virtue of section 9, tendered by the applicant, that —

(a) a person is in possession or control of —

(i) specified property and that the property constitutes, directly or indirectly, benefit from criminal conduct; or

(ii) specified property that was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes benefit from criminal conduct; and

(b) the value of the property or the total value of the property referred to in sub-paragraphs (i) and (ii) of paragraph (a) is not less than R50,000,

Section 4 (3);

(3) Where an interlocutory order is in force, the Court, on application to it in that behalf at any time by the respondent or any other person claiming an interest in any of the property concerned, may —

(a) if it is shown to the satisfaction of the Court, that the property or any part of the property is property to which paragraph (a) of subsection (1) does not apply; or

(b) that the order causes any other injustice to any person (the onus of establishing which shall be on that person), discharge or, as may be appropriate, vary the order, and the Court shall not make the order in whole or in part to the extent the Court shall not decline to make the order in whole or in part to the extent that there appears to be knowledge or negligence of the person seeking to establish injustice, as to whether the property was as described in subsection (1)(a) when becoming involved with the property.

ANALYSIS AND DETERMINATION

[18] I have thoroughly considered the Application and the response thereto and their supporting affidavits in the light of the applicable law. Having done so, I find that parties have admitted the following relevant facts. First, that there is an Interlocutory Order that is in force between the parties, being the Order dated the 18th of November 2019. Secondly, that there is an application by a person claiming an interest in properties concerned in that order (as compared to having an actual interest, something which is being disputed by the 1st and 2nd Respondent).

[19] Therefore, the issues left for determination would be whether the Order causes any injustice to the Applicant (the onus of establishing which shall be on the Applicant) in which case this court will either discharge or, as may be appropriate, vary the order provided that there appears to be no knowledge or negligence of the Applicant, as to whether the motor vehicles were acquired, in whole or in part, directly or indirectly, from the benefits from criminal conduct.

[20] The way I read the two above provisions together leads me to conclude that this court cannot make an Order to vary or discharge an Interlocutory Order made under the provisions of Section 4 (1) of the POCA even where injustices are proven by the Applicant if the court is satisfied that there appears to be evidence that there is knowledge or negligence on the part of the Applicant as to whether the motor vehicles were acquired, in whole or in part, directly or indirectly, from the benefits from criminal

conduct. It would only in the absence of such a knowledge or negligence that this court would be able to make a discharge or variation Order. The burden of proving injustice being on the Applicant and the burden of proving the presence or absence of knowledge or negligence being decided on a balance of probabilities. I will therefore proceed to make my determination on this basis.

[21] As to the issue of injustice, the motor vehicles were sold to the 5th Respondent by the Applicant after which they were seized by the orders of this court and sold by the Receiver prior to their purchased price being fully paid to the Applicant. It appears that the Applicant indeed allowed itself to incur considerable debt over a long period of time without making any attempts to recoup its outstanding debt from the 5th Respondent. In fact, it appears that the Applicant's attempt to recover the outstanding debt was only prompted by the sales of the motor vehicles by the Receiver, following the orders made by the court. The 1st and 2nd Respondents argued that as a result of these latches, the Applicant should not benefit on the basis of injustice. Especially given that its debt is one of breach of contract of sale by the purchaser, the 5th Respondent and not one relating to a pecuniary interest in the motor vehicles. My views, however, differ from that of the said Respondents in this respect. I am of the opinion that the injustice would prevail irrespective of the latches on the part of the Applicant.

[22] The undisputed facts show that the motor vehicles were sold to the 5th Respondent and by the time that they were sold by the Receiver they were not fully paid up. This debt subsists in law irrespective of whether it was secured by way of registered charges or other securities. The debt subsists in law whether the Applicant's book keeping was not properly effected and managed or that it waited up to the last moment to seek the recovery of its debt in the hand of a third party. The Applicant has clearly proven an interest in the motor vehicles, being a pecuniary interest in the form of unpaid price. The motor vehicles were seized by a third party in the hands of their purchaser and sold, which would have effectively restricted the Applicant's capacity to sue the 5th Respondent and recover the unpaid debt from the proceeds of the sale of the motor vehicles, within the prescriptive period afford of 5 years given to it by law. The only

remedy would therefore be that of compensation from the proceeds of their sale in the hand of the Receiver, this would prevent an injustice.

[23] I find therefore that the Applicant has managed to prove that the prohibition by the 3rd to 5th Respondents to deal with the motor vehicles and their eventual sale by the Receiver had caused an injustice to the Applicant. However, the Court will not make such an Order to the extent that there appears to be knowledge or negligence of the Applicant, as to whether the motor vehicles were acquired, in whole or in part, directly or indirectly, from the benefits from criminal conduct.

[24] On the facts of this case, knowledge of such facts has not been proven. I will therefore proceed to make an analysis on whether there exist negligence to the existence of this fact. In order to establish negligence of the Applicant as to whether the motor vehicles were acquired from benefits of criminal conduct, the 1st and 2nd Respondents need to establish that the Applicant owed a statutory duty to the Republic under Section 4(3) of the Act when he sold the motor vehicles to the 5th Respondent and that the Applicant breached this duty of care.

[25] I am of the view that in this case the existence of the duty is created by the provisions of the statute itself. According to Section 4 (3) the Applicant had a statutory duty to ensure that the specified property did not constitute, directly or indirectly, benefit from criminal conduct; or that the specified property was not acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes benefit from criminal conduct.

[26] A person who owes a duty to take care at common law will breach that duty if they fail to exercise reasonablecare. The standard of care is that of the hypothetical "reasonable man":

> "*The person concerned is sometimes described as 'the man in the street,'* or '*the man in the Clapham omnibus,' … Such a man taking a ticket to see a cricket match at Lord's would know quite well that he was not going to be encased in a*

steel frame which would protect him from the one in a million chance of a cricket ball dropping on his head." ***Hall v Brooklands Racing club 1933***

[27] The standard of care is purely objective and is not adjusted to take account of the personal characteristics of the defendant. There are no degrees of negligence. Either reasonable care has been taken or it has not. All a claimant has to prove on the balance of probabilities is that the defendant has not taken reasonable care.

[28] I will therefore have to examine the evidence to see whether the acts of the Applicant shows that it failed to exercise the care of a reasonable auto dealer in the circumstances and in so doing breached its statutory duty under Section 4 (3).

[29] The motor vehicles were purchased directly or indirectly in whole or in part with the proceeds of crimes held to have been committed by the 3rd and 4th Respondents, this was the reason for the interlocutory and Receivership orders made by the former Chief Justice. Accordingly, I find that this fact is firmly established and beyond contest at this stage of the proceedings.

[30] Was the Applicant dealings with the 5th Respondent so negligent that it prevented it from coming to the same conclusion as the court. If the Applicant had been diligent enough and had taken reasonable care would it have suspected that the purchased were being effected by the proceeds of their criminal conduct? Having scrutinized the facts of this case I answer this question in the positive. I am firmly of the view that the Applicant failed to exercise reasonable care in its sale transactions of the motor vehicles with the 5th Respondent and in so doing caused it to breach its statutory duty of case under the aforementioned provisions.

[31] The following established facts proven on a balance of probabilities convinces me that this is so. The Applicant has failed to adduce in these proceedings or at any time before hand to the FCIU, any legal documents or credit agreement between itself and the 3rd, 4th and 5th Respondents. An Auto dealer selling motor vehicles, through instalment payments system would have exercised reasonable care and draft the sale agreements, which would have contained the terms, and conditions that those sales would take place and set out the

limits of the obligations of each parties. The resulting effect has been under payments of the price and a resultant inability to recover them.

[32] The Applicant has also failed to put and registered any charges on any of the motor vehicles that would have given to it a lien and prevent their sales to third parties as is commonly done by auto dealers selling vehicles on part payment basis. As a result, the 5th Respondent appears to have been capable of transferring one of those vehicles to a third party, even if it had not been fully paid up, with total inaction on the part of the Applicant.

[33] The Applicant is a Reporting Entity under the Act. It is duty bound to as such, carry out a due diligence process in its dealing with the 3rd, 4th and 5th Respondents. The Applicant has failed to produce, in these proceedings and any time before to the FCIU, any "know your customer" documents or any other "due diligence" documents relating to how much credit to which they were entitled. The court will take it that the Applicant did not carry out those procedures.

[34] Moreover, it is abundantly clear that the Applicant had practically abandoned the debt owed to him by the 5th Respondent well ahead of these proceedings and no letter of demands or proceedings had been instituted against it in order to secure those debts.

[35] All these leads me to one inevitable conclusion, that is that even if the Applicant did not know that specified property that was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes benefit from criminal conduct. He failed to exercise reasonable care in his dealing with the 5th Respondent. This failure amounts to him being negligent to a statutory duty. Namely, he failed to exercise reasonable care in his duty to find out as to whether the vehicles were acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes benefit from criminal conduct. Accordingly, the court will not vary the Interlocutory Order dated the 18th of November 2019 and release funds recovered from the sale of the motor vehicles to the Applicant.

FINAL DTERMINATION

[36] For these reasons, I accordingly dismiss this application with costs in favour of the 1st and 2nd Respondents.

Signed, dated and delivered at Ile du Port on 26th July 2021.

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R. Govinden

Chief Justice