

SUPREME COURT OF SEYCHELLES

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Reportable  
[2023] SCSC 191  
MC 11/2022

In the matter between:

**THE REPUBLIC**  
(Represented by Mrs Nissa Thompson)

**Applicant**

and

**MICA FAURE**  
(Represented by Mr Joshua Revera)

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**Neutral Citation:** *Rep vs Faure* (MC 11/2021) [2023] SCSC 191 (8<sup>th</sup> March 2023)  
**Before:** Adeline J  
**Summary:** Application under the Anti-Money Laundering and Countering the Financing of Terrorism Act, 2020 as amend (AMLCFTA) for forfeiture of cash seized and detained, in USD 6,000.00, euro 10,000.000 converted in SCR 234,580.00.  
**Heard:** 6 December 2022  
**Delivered:** 8 March 2023

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**FINAL ORDER**

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In exercise of the powers conferred upon this court by virtue of Section 76 (1) and Section 76 (3) of the AMLCFT Act, I order the forfeiture of the entire sum of foreign currency as described in the table annexed to the Notice of Motion dated 20<sup>th</sup> September 2022, equivalent to SCR 234,580.00

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**ORDER ON MOTION**

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**Adeline, J**

INTRODUCTION

[1] This is an application by way of notice of motion supported by an affidavit made pursuant to Section 76 (1) of the Anti-Money Laundering and Countering the Financing of Terrorism Act 2020, as amended, (“the AMICFT Act”) for forfeiture of cash seized and detained under the provision of Section 74(4) of the AMLCFT Act as amended, in USD 6,000.00, euro 10,000.00 converted in SCR 234,580.00. The affidavit in support of the application is sworn by police superintendent Neville Thaver (“Supt Thaver”), who is attached to the Financial Crime Investigation Unit (“The FCIU”) of the Seychelles Police Force.

[2] In his sworn affidavit, inter alia, at paragraph 4 of the same, Supt Thaver makes the following averments;

*“4. That I make this affidavit from facts within my knowledge save where otherwise appears and where so appearing I believe the same to be true.”*

[3] In seeking for an order of this court for the cash seized and detained to be forfeited, Supt Thaver avers, that he has reasonable grounds for suspecting that the cash seized from one Mica, Solange, Faure (“the Respondent”) of English River, Mahe, Seychelles at the Seychelles International Airport on the 27<sup>th</sup> June 2022, “represents proceeds of Crime or is intended to be used in connection with criminal conduct”.

[4] The facts and circumstances of the case that are the basis giving rise to Supt Thaver reasonable grounds for suspecting that the cash seized represents proceeds of crime, or is intended to be used in connection with criminal conduct, are borne out of his affidavit, and his oral testimony at the hearing of the application perse.

#### THE CASE FOR THE APPLICANT

[5] On account of the affidavit evidence of Supt Thaver, coupled with his oral evidence, the facts and circumstances of this case are summarised as follows;

(i) It was in the evening of the 27<sup>th</sup> June 2022, that the Respondent was meant to leave Seychelles on Emirates Flight EK 708 at 21.45 hrs bound to Dubai, her final destination, Nigeria. Prior to her departure, the Respondent approached custom officers to declare cash she had in her possession, the cash being more than the prescribed limit of SCR 50,000.

[6] Upon being questioned by custom officers and asked about the sources of the funds which the Respondent could not account for, they formed the opinion, that they have reasonable grounds for suspecting that the cash were not from legitimate sources and were therefore proceeds of crime, particularly, money laundering. The Respondent tried to account for the cash in her possession by saying that she is a business woman who was travelling to Nigeria via Dubai to purchase cigarettes and clothes, having previously purchased cigarette from Nigeria. When asked to provide proof of the sources of the funds, the Respondent made reference to a loan agreement in her possession, exhibit NTI, she had with a company registered and incorporated as Marlu Seychelles (Pty) Limited. She also did produce some receipts of her transactions, and said, that she had other related documents locked in her house.

[7] Custom officers found her explanation to be unsatisfactory and unconvincing. They seized the cash and the documents which the Respondent had given to them. As a consequence, the Respondent aborted her trip to Nigeria, and the matter was then referred to the FCIU for a financial investigation. Copies of statements made by custom officers Andrew Onezia and Aline Charles, as well as the loan agreement which the Respondent had referred to marked as NT2 were handed over to the FCIU. Whilst the FCIU's investigation as to the source of the funds continued and progressed, an application was made to the court for further detention of the cash seized, and on the 22<sup>nd</sup> July 2022, detention of the cash seized was authorised for a period of 30 days.

[8] Supt Thaver depones, that upon an examination of the loan agreement, he found that same was between the Respondent and a company known as Marlu Seychelles (Pty) Limited. Under the terms of the said agreements, the Respondent had apparently borrowed from the

company the sum of SCR 465,000 to be repaid over a period of 3 years, up to December 2005. The owner of the company, Marlu Seychelles (Pty) Limited is one Muditha Gunatilake, who in an interview did confirm that, his business partner is related to the Respondent.

- [9] Following an investigation into the Respondent's bank account and records, it transpired, that the loan of SCR 465,000 which the Respondent had apparently received from Marlu Seychelles (Pty) Limited, had been credited into her bank account by Double Click Exchange. It is averred by Supt Thaver, that notwithstanding Mr Muditha Gunatilake's explanation that he owns the two businesses, Marlu Seychelles (Pty) Limited and Double Click Exchange, he could not find any commercial sense for Marlu Seychelles (Pty) Limited to enter into a loan agreement with the Respondent to give the latter a loan, and yet, for the loan money to be disbursed from Double Click Exchange's account.
- [10] It is also averred by Supt Thaver, that the transaction became more suspicious because even if it was a business loan to be used for business purposes, the funds were never credited into the Respondent's business account, "Mica Wholesale", held at the Alsalam bank, but in Respondent's personal accounts. As per Supt Thaver's deposition, he also found that after the SCR 465,000 was credited into her account by Double Click Exchange, the sum of SCR 262,000.00 was transferred back into Double Click Exchange's account which the Respondent said was to purchase foreign currency.
- [11] It is an averments in Supt Thaver's affidavit, that on the same day, the 22<sup>nd</sup> April 2022 when the Respondent transferred SCR 262,000 back into Double Click Exchange's account, she also transfereed SCR 203,000.00 into her business account, "Micah Wholesale", held at the Alsalam Bank. As per Supt Thaver's deposition, the Respondent had only SCR 204.06 in her account prior to the SCR 465,000 that was credited therein, and that there were three different transactions that took place on the 22<sup>nd</sup> April 2022. The first transaction entailed a transfer of the sum SCR 465,000 by Double Click exchange from Absa Bank to the Respondent's personal account. On the same day, the Respondent transferred the sum of SCR 203,000 into her business account held at the Alsalam Bank,

and on the same day the Respondent made a transfer of SCR 262,000 to Double Click Exchange at Absa Bank. Supt Thaver avers, that on the 7<sup>th</sup> of June 2022, well before the actual seizure took place, the Respondent's account closing balance was SCR 704.06.

[12] Supt Thaver also avers, that a warrant was executed at Double Click Exchange to probe into the Respondent's financial transactions with Double Click Exchange, and it was discovered, that on the 21<sup>st</sup> April 2022, way back before the loan money was transferred into her account, the Respondent exchanged the sum SCR 237,000 at Double Click Exchange for the purchase of foreign currency, euro 15,000, exhibit NT4. It is averred by Supt Thaver, that the Respondent has not been truthful in her account of the source of the funds seized because as shown in her bank account's statement, the sum of SCR 262,000 was transferred to Double Click Exchange for the purchase of foreign currencies, when at the same time, the slip signed by a cashier shows that the purchase was by way of cash in hands. Supt Thaver depones, that this was a suspicious and confusing transaction because in his opinion, there was "no need to print a receipt to secure the cash".

[13] In her affidavit in reply to the Applicant's affidavit in support of its application sworn by Supt Thaver, the Respondent avers, that she verily believes and is advised by her attorney, that the "application, prima facie, has no foundation or substance, is an abuse of process and thus does not sustain in law". Nevertheless, in her affidavit, at paragraph 5-8, the Respondent's averments only describes the nature of her interviews with the FCIU officers referring to the 1<sup>st</sup> interview on the 27<sup>th</sup> June 2022, and what went on thereafter, without really answering the allegations against her and the averments made by the Supt Thaver.

[14] At paragraph 9 of her affidavit, she describes paragraph 7 of Supt Thaver's affidavit as "fabricated averments". She avers, amongst other things, that it was after she had in good faith informed custom officers that her final destination was to be Nigeria, and not Dubai, that they proceeded to seize and detain the foreign exchange. My comment about that, is that, this may have been the case, but could not have been the reason for the seizure of the cash seized. In fact, most significant, is that Supt Thaver has averred in his affidavit, that

the Respondent failed to provide custom officers with a satisfactory explanation as to the source of the cash.

- [15] At the paragraph 10 of her affidavit, the Respondent describes paragraph 8 of Supt Thaver's affidavit as "fabricated". However, she seeks to bring clarity over what she sees as discrepancies between what she said, and what is averred in the Applicant's affidavit. I observe, however, that she fails to concede or comment, and to bring more clarity over the source of the funds seized, over and above what is averred in paragraph 8 of Supt Thaver's affidavit.
- [16] At the paragraph 11 of her affidavit, the Respondent seeks to contradict the averment at the paragraph 12 of Supt Thaver's affidavit by saying that such averment is "invalid and incorrect" because it was she who informed customs officers of the loan agreement between her and Marlu Seychelles (Pty) Limited . Who informed customs officers about the loan agreement is immaterial. What matters most, is that the loan agreement was referred to by the Respondent to try to show that the cash seized came from a legitimate source when in actual fact she could not prove the same.
- [17] At paragraph 12 of her affidavit, the Respondent avers, that she had to go back to Mr Gunatilake and entered into a new and separate agreement for Double Click Exchange to sell her euro 15,000 which was to be paid as soon as the SCR 465,000, as per the loan agreement between her and Marlu Seychelles (Pty) Limited had been credited into her account.
- [18] At paragraph 13 of her affidavit, the Respondent confirms, that she did obtain the euro 15,000 from Double Click on the 21<sup>st</sup> April 2022, together with a receipt, NT4.
- [19] AT paragraph 14, the Respondent avers, that the loan (ie the SCR 465,000) was credited into her account on the 22<sup>nd</sup> April 2022, following which she transferred to Double Click Exchange SCR 262,000 for the purchase of the Euro 15,000. The Respondent avers, that she travelled to Nigeria with the cash, euro 15,000 on the 23<sup>rd</sup> April 2022 and returned to

Seychelles on the 15<sup>th</sup> May 2022, NT7. She also avers, that she finds it easier to travel with cash whenever she travels to Nigeria.

[20] At paragraph 16 of the affidavit, the Respondent avers, that she did inform the FCIU officers that the foreign exchange in cash she travels with to Nigeria is money for her to purchase goods to be later resold on the local market, and that the profits she made following the trip of the 23<sup>rd</sup> April 2022, was to fund the trip of the 27<sup>th</sup> June 2022 the day the cash was seized from her.

[21] At paragraph 18 of her affidavit, the Respondent avers, that paragraph 24 of the Applicant's affidavit are "fabricated and false". She also avers, that she did tell FCIU officers that she didn't bank the money she made from the sale of the goods from Nigeria following the 1<sup>st</sup> trip, but instead, used the same to purchase foreign exchange as her travelling date for her 2<sup>nd</sup> trip to Nigeria was fast approaching, NT6.

[22] It is an averment in the Respondent's affidavit at paragraph 19, that on the 18<sup>th</sup> June 2022, she did exchange SCR 137,561.00 at the JPL X-change, 45,126.00 on the 26<sup>th</sup> June 2022, and a further 45,000.000. The Respondent avers, that on the same day, she also changed SCR 15,200.00 at Double Click exchange and that all those transactions took place close to her travel date which was to be on the 27<sup>th</sup> June 2022, and that they were carried out without any intention of avoiding detection as averred by Supt Thaver.

[23] At paragraph 20 of her affidavit, the Respondent avers, that paragraph 26 iii, IV and XI of the Applicant's affidavit are fabricated and false because the only interview she had with the FCIU officers, was on the 27<sup>th</sup> July 2022, and that on other days, she was only contacted by phone without any interview.

[24] The Respondent also avers, that contrary to the Applicant's allegation, the FCIU did not give her any opportunity to provide them with any document whatsoever. In my considered opinion, if at all this had been the case, and those documents are available, the Applicant could have exhibited them with her affidavit, or even tender them at the hearing as exhibits.

- [25] The Respondent's averment at paragraph 21 of her affidavit in reply to paragraph 22 a-g of the Applicant's affidavit, is that, the financial transactions that are shown on her business account's statement represent how she operated her business. The Respondent fails, however, to answer Supt Thaver's averment at paragraph 23, that the loan money was used in April, and that the sum seized in June 2022 could not have originated from the said loan.
- [26] The Respondent avers, at paragraph 24 of her affidavit, that she sincerely believes, and is advised, that the detention of the funds seized from her on the 27<sup>th</sup> June 2022, is unlawful as the court made no order in MC 10 of 2022, for the cash seized to be detained until the determination of this matter.
- [27] It is averred by the Respondent, at paragraph 27 of her affidavit, that she believes and is advised, that the application to forfeit the funds seized is an abuse of process as the Applicant recognises the legitimacy of the loan agreement but nonetheless conducted its investigation on the bank to bank transfer at Double Click to prejudice the mind of the court and to make it appear that the loan agreement is deceitful.
- [28] At paragraph 29 of her affidavit, the Respondent avers, that she sincerely believes and is advised, that the funds seized under the Act must represent proceeds of crime, and that the Applicant has failed, neglected or omitted to show this court which crime she is suspected of having committed. This is contrary to the averments made in the affidavit sworn by Supt Thaver as well as his oral evidence which point to the crime of money laundering.
- [29] At paragraph 28 of her affidavit, the Respondent conceded that, the charge in return for the loan has not been registered, but avers, that that does not render the loan agreement suspicious or null and void. The Respondent also avers, that if the cash seized is forfeited, that would seriously prejudice her and her business, and that she is likely to lose her property, C6721, in default of repayment of her loan because she would be unable to undertake her commercial activities without having access to those funds to generate the funds she needs for the repayment of her loan.



## SALIENT ASPECTS OF THE APPLICANT'S CLOSING SUBMISSION

[30] In her written submission, at the beginning, the Applicant remarks, that the Respondent's affidavit in reply to the application is not supported by documents save an affidavit sworn by one Muditha Gunatilake. Learned counsel then proceeds to summarise the evidence pertaining to the case for the Applicant referring particularly, to the averments in the supporting affidavit to the Application sworn by Supt Neville Thaver which has been rehearsed in the preceding paragraphs of this judgment. Perhaps worthy of repetition, is learned counsel's submission at paragraph C, part of which reads as follows;

*"... The Respondent was interviewed wherein she stated, that she had further documents to provide to further support the source of the cash. That although she was given such opportunity when she was interviewed by the FCIU, she has failed to do so."*

[31] Further at paragraph d, learned counsel states the following;

*"... That as part of the said investigation, it was found that the loan agreement which the Respondent referred to had nothing to do with the cash which was seized from her prior to leaving Seychelles", which loan agreement, "was not registered at the Registrar General".*

[32] In her submission, learned counsel also points to the fact that, the Applicant's affidavit evidence in support of the application shows, that, although the loan agreement pertaining to the sum of SCR 465,000 was between the Respondent and a company registered and incorporated and Marlu Seychelles (Pty) limited, the Respondent received what was meant to be the loan money under the said contract from Double Click Exchange Bureau de change.

[33] Furthermore, it is the submission of learned counsel for the Applicant, that the investigation by the FCIU into the Respondent's financial affairs and transactions, reveals that, the cash that was in the possession of the Respondent and which was seized on the 27<sup>th</sup> June 2022 "did not originate from the funds that she had obtained as part of the loan agreement, which

loan money, the investigation shows, the Respondent spent in the months of April - May 2022.

- [34] Learned counsel also submits, that the affidavit evidence also reveals, that it was a dishonest attempt by the Respondent to make use of the loan agreement to mislead the authority into believing that the cash seized was from a legitimate source.
- [35] It is the submission of learned counsel, that the evidence as presented in Supt Thaver's affidavit shows, that Marlu Seychelles (Pty) Limited and Double Click Exchange are owned by the same person, and that the FCIU's attempt to interview the cashier was to no avail, and that although the Respondent was called several times for her to clarify several matters she did not turn up at the FCIU's offices.
- [36] Learned counsel submits, that the source of the cash seized is still unknown because the Respondent continues to conceal the source, and that such concealment of the source is an element of money laundering. It is the views of learned counsel for the Applicant, that the affidavit evidence of the Respondent as well as her oral testimony, was not supported by documents as exhibits, and that makes her evidence not compelling. Learned counsel submits, that the failure of the Respondent to provide documentary evidence to prove the legitimacy of the cash seized is the reason the Applicant has reasonable grounds for suspecting that the specified properties directly or indirectly represent benefits from or is intended by the Respondent for use in connection with an offence, namely, money laundering.
- [37] It is the submission of learned counsel, that the Applicant views the Respondent's affidavit in reply to be defective because it does not state the occupation of the Respondent, nor contains the Respondent's address. Learned counsel cites the case of Beau Vallon Properties limited v Phillippe Cointy as the authority to support the proposition that, the Respondent's affidavit is defective and should not be admitted as evidence, and added that, in Beau Vallon Properties limited (supra), the court considered the two omissions as blatant irregularities in the affidavit and refused to admit it in evidence.

[38] Learned counsel submits, that when relying on affidavit evidence, the case of Beau Vallon Propperties (Supra) instructs us that, documents must be exhibited to the affidavit because affidavit stands in lieu of the Applicant's oral testimony. Learned counsel emphasises this case law legal requirement by citing the case of D.L de Charmoy v P.L de Charmoy, SCA MA 08/2019, in which case, the court made reference to the case of RE Hinchliff, a person of unsound mind, deceased [1895] 1 ch 117, where the Court of Appeal held that any document to be used in combination with an affidavit must be exhibited. Therefore, learned counsel stands her ground in submitting that the Respondent's affidavit in reply should not be admitted in evidence.

[39] As regards to the Respondent's evidence, it is the Applicant's submission that "it was far from compelling". Learned counsel submits, that the court should take note that the Respondent first version of her story when she was interviewed by customs officers, was that the cash she had in her possession derived from a loan under the loan agreement which she presented to custom officers to prove the source of the cash, and that she later changed her story to say that, they are money generated from the sales of clothing. Learned counsel also submits that, the Respondent did admit, that all monies derived from the loan agreement had been used during her first travel. Learned counsel seeks for answers as to why the Respondent produced the loan agreement instead of her sales record if the cash seized is not from the loan agreement, contending, that the Respondent's intention was to conceal the source of the cash.

[40] As to the Respondent voluntary approach to the customs officers to make the declaration, learned counsel submits, that for the purpose of the declaration, the approach was not enough. The declaration should have been truthful and supported by proper documentation which was not the case.

[41] Learned counsel also submits, that the suspicion of the Respondent was enhanced by the discrepancies discovered surrounding the loan agreement, notably, the fact that the agreements was between the Applicant and Marlu Seychelles (Pty) Limited but the loan

was credited into the Respondent's account by Double Click Seychelles when an agreement could have been entered into between the Respondent and Double Click.

[42] Learned counsel further submits, that although the Respondent did receive the loan from Double Click Seychelles, the first line charge to secure the loan under the loan agreement was never registered, and has not been registered to date. Learned counsel seeks this transaction as one that does not make commercial sense.

[43] In her submission learned counsel states, that the Applicant does not agree with the Respondent's statement, that the loan was not purely a business loan in nature as is said in her submission, since the loan money was credited in the Respondent's business bank account, and the loan agreement provides for a charge to secure the loan.

[44] As regards to the financial transactions between the Respondent and Double Click, learned counsel points the court to the fact that the Respondent has failed to provide a satisfactory explanation for her transfer of excess fund to Double Click for the purchase of foreign currency. Learned counsel refers the court to the fact that, the Respondent did transfer SCR 262,000 to Double Click but bought foreign exchange to the value of SCR 237,000 only.

[45] Learned counsel mentions the fact, that in her oral testimony, the Respondent had testified that, she had gone back to Muditha and requested that he sells her Euro 15,000 and to advance her SCR 25,000 which funds were apparently used to purchase excess luggage for the trip to Nigeria on the 23<sup>rd</sup> April 2022. This, learned counsel submits, is not averred in the Respondent's affidavit in reply, and was a new story which the Applicant came up with in her oral testimony. Learned counsel states that, contrary to the Respondent's submission at paragraph 32, this is not supported by Mr Muditha's affidavit.

[46] Learned counsel brings to the attention of this court, that the affidavit of Mr Muditha exhibited to the affidavit of the Respondent, contains no averment of any satisfactory explanation as to why the receipt is marked as "cash in hand" when in fact, the Respondent transferred the money by way of bank transfer. Learned counsel takes issue over what she

perceives to be a case of the Respondent's counsel having missed the point, (reference to paragraph 30 of the Respondent's closing submission). Learned counsel explains, that by saying that there was no necessity for the Respondent to have a receipt, the Applicant averment that there was no necessity for Double Click to print the receipt before the bank transfer was made to secure the cash as the cash should have simply been put aside for the Respondent.

[47] Learned counsel specifically refers the court to the question that was put to the Respondent in cross examination, when she was asked why she had not produced any sales record thus far to satisfy the source of the cash seized, which did not come from her bank account, or the loan agreement and that she failed to provide any satisfactory explanation for such failure. Learned counsel submits, that the Respondent "appeared evasive and obstructive when she was asked to provide explanation for the source of the funds".

[48] It is the submission of the Applicant, therefore, that the Respondent has failed to provide proof of legitimate source of the specified properties and that she has only made unsupported claims.

[49] In answer to the Respondent's claim of unlawful detention of the cash seized, learned counsel submits that, the Applicant denies the claim, stating, that the Respondent has never filed any application for the release of the fund, which she ought to have done by virtue of Section 74(7) of the AMLCFT Act, after the withdrawal of MC 10/2022. In addition, learned counsel proceeds to add, that the provisions of Section 74 (8) of the AMLCFT Act states that cash seized under Section 74(2) shall not be released if any application for its forfeiture is made under 76 of the AMLCFT Act until the proceedings have been concluded.

#### SALIENT ASPECTS OF THE RESPONDENT'S SUBMISSION

[50] To set the tone, learned counsel submitting on behalf of the Respondent, began by stating, that the notion of forfeiture and its rule is consistent with the notion "that no one can derive

an advantage from his or her criminal wrong doing” which he said was inunciated in 1891 in the English Court of Appeal case of Cleaver v Mutual Reverse Fundlife Association, contending that, the Applicant’s application departs from such notion. Learned counsel then makes special mention of the Vienna Convention and the Palermo Convention provision on money laundering, which he says, may encompass thee distinct alternarive, namely;

- “(i) the conversion or transfer, knowing that such property is proceeds of crime
- (ii) The concealment or disguise of the true nature, source, location disposition, movement or ownership of or rights with respect to property knowing that such property is the proceeds of crime, and
- (iii) The acquisition, possession, or use of property knowing, at the time of the receipt that such property is the proceeds of crime”.

[51] Learned counsel for the Respondent then proceeds to recap the events of the evening of the 27<sup>th</sup> June 2022, which are almost the same as the Applicant’s version, containing facts which are not in dispute between the Applicant and the Respondent. For example;

- (i) That the Respondent is doing business as a sole trader under the business name of “Mica Whole Sale”, and that her business entails buying goods outside the country and selling them on the local market.
- (ii) That on the 27<sup>th</sup> June 2022, when she was travelling to Nigeria, she had in her possession euro 10,000.00 and USD 6,000.00
- (iii) That the Respondent did approach customs officers to declare the cash given that it was above the prescribed limit of SCR 50,000.00
- (iv) That as part of her explanation as to the source of the cash, the Respondent did produce a loan agreement dated 20<sup>th</sup> April 2022 between her and a company registered and incorporated as Marlu Seychelles (Pty) Limited, and that the terms of the agreement also includes, a charge against the Respondent’s property in favour of Marlu Seychelles (Pty) limited, and

- (v) That foreign exchange receipts euro 15,000, NT4, and euro 10,000 and usd 6,000.00 exhibit NT6 were produced.

[52] As per learned counsel's submission, custom officers were informed of the source of the cash when they were told that the money came from the loan agreement which the Respondent used to buy euro 15,000.00 from Double Click, and that money, the Respondent used to travel to Nigeria for business purposes on the 23<sup>rd</sup> April 2022. Learned counsel submits, that the proceeds of sale of the goods purchased from Nigeria when the Respondent did the first trip on the 23<sup>rd</sup> April 2022, were in cash, which cash was kept in hand to buy foreign exchange for the 2<sup>nd</sup> trip which was to be on the 27<sup>th</sup> June 2022.

[53] At paragraph 8 a)-h) learned counsel lays down the Applicant's case against the Respondent, by interalia, summarising the facts as follows;

"c) that the Respondent was not in possession of any bank statement

b) that the Respondent entered into a loan agreement with a private company which is suspicious in nature

e) that it doesn't make any commercial sense for a private company to give a loan to the Defendant

f) that the loan agreement was between the Respondent and Marlu Seychelles (Pty) limited which is a fishing company

g) the loan was disbursed by Double Click Exchange

h) that it does not make any commercial sense for Double Click Exchange to loan the agreed amount to the Respondent instead of Marlu Seychelles (Pty) limited.

i) that both Marlu Seychelles (Pty) limited and Double Click Exchange are owned by the same person, namely, Muditha Gunatilake

j) that the loan monies were not transferred in the Respondent's business account but in her personal account

k) that the charge over the property was not registered by Mr Gunatilake

l) that the receipt of the sale of euro 15,000.00 by Double Click Exchange is written "cash in hand" transaction

m) that the euro 15,000.00 was purchased in the amount of SCR 237,000.00, but the Respondent transferred back to Double Click Exchange an amount of SCR 262,000.00 which is SCR 25,000.00 in excess of the purchase amount, and that this does not make any commercial sense, and,

n) the Respondent is concealing the true origin of the funds”.

[54] Submitting briefly on the history of this case, learned counsel states, that the case first come to court in MC 7 of 2022 under Section 74(1) of the AMLCFTA in which case learned counsel submits, that “the court ruled that a private loan agreement and non-registration of the charge were suspicious in nature, and on that basis, authorised further detention of the cash seized for 30 days. Learned counsel also submits, that after the expiry of the 30 days, the Applicant filed MC 10 of 2022 for forfeiture of the cash under Section 76(1) of the AMLCFTA which was subsequently withdrawn and a new application filed as MC 11 of 2022 was filed.

[55] Commenting on the Applicant’s investigation, learned counsel submits, that the FCIU focussed its investigation on a legitimate bank to bank transfer from Gunatilake’s business to the Respondent’s bank account at Nouvobanq, and that the Applicant employed that investigative tactic solely to make it appear that the transactions were part of something bigger, the concealment of illegally obtained funds.

[56] As regards to the Respondent’s evidence regarding the loan agreement, learned counsel refers the court to the affidavit of Mr Gunatilake dated 5<sup>th</sup> September 2022, in which affidavit, he says, Mr Gunatilake explains, that the Respondent is his acquaintance given that there is a family relationship between her wife and the Respondent. Learned counsel proceeds to add, that based on Mr Gunatilake’s affidavit, “it was more of a family member assisting another in the pursuit of and establishing her business”.

[57] Learned counsel also submits, that in his affidavit, Mr Gunatilake does acknowledge, that his company, Marlu Seychelles (Pty) limited, did enter into a loan agreement in the amount of SCR 465,000.00 with the Respondent, and that it was because Marlu Seychelles (Pty)



limited had insufficient funds, that he decided to have the transfer made by Double Click exchange. This according to counsel, shows, that, the loan agreement was not fictitious because it was supported by documents, NT2, and NT3, the Respondent's bank account statement from Nouvobanq showing that the loan was credited in the Respondent's account on the 22<sup>nd</sup> April 2022.

[58] Learned counsel seeks to explain the delay during bank to bank transfer between the bank account of Double Click exchange and the Respondent's bank account as "procedural banking delays" that was by no means suspicious in nature as the Applicant has made it to appear. Furthermore, it is submitted by learned counsel, that there are no restrictions imposed by law as "who may provide a party with a loan", and therefore, a private individual or company, may equally provide the same loan agreement to another.

[59] As regards to the non-registration of the charge, learned counsel submits, that this should not be regarded as suspicious as the Applicant has sought to make the court believe because the only effect of having a charge registered is to give notice to the world and the priority of creditors over the mortgaged property. Learned counsel explains, that because the charge is not registered, the lender, Mr Gunatilake, is simply an unsecured creditor.

[60] In his submission about the purchase of foreign exchange, learned counsel submits, that the purchase of euro 15,000, and the receipt of purchase dated 21<sup>st</sup> April 2022 written "cash in hand" NT4, represent the practice and, or operations of all Bureau de change where transactions are made by cash. Learned counsel refutes the suggestion that a receipt to secure the euro 15,000.00 was not necessary, stating, that the Respondent would not have had the supporting documents for the euro 15,000.00 thus facing the possibility of seizure of the cash.

[61] In answer to the transaction Form attached to NT4 dated 22<sup>nd</sup> April 2022 indicating the transfer of SCR 262,000 by the Respondent to Double Click Exchange marked as transfer of forex purchased, which transaction shows, that the sum of SCR 262,000 was transferred, but the purchase of euro 15,000 was valued at SCR 237,000,00, Learned counsel submits,

that the Respondent did explain, under cross examination, that this was because the bank delayed in transferring the loan money that the Respondent had to go back to Mr Gunatilake to request him to sell her euro 15,000.00 and to advance her SCR 25,000.00 which she said she used to purchase excess luggage for the first trip to Nigeria.

[62] Referring to various aspects of the evidence, the Applicant maintains, as is submitted by learned counsel, that there are reasonable grounds in the application for suspecting that the specified properties directly or indirectly represent benefits from or is intended by the Respondent for use in connection with an offence, namely, money laundering. It relied on the affidavit evidence of police Supt Neville Thaver, as well as his oral testimony that was put to test in cross examination, which evidence is summarised in the early paragraphs of this judgment, and which in his submission, at paragraph 8 counsel for the Respondent acknowledges to be the Applicant's case against the Respondent in a nutshell.

[63] At paragraph 8 of his submission learned counsel for the Respondent states the following;

“The Applicant's case as follows;

- (a) That the Respondent had informed the custom officers that she was going to purchase commodities and cigarettes and has initially imported cigarettes into the country.
- (b) That the Respondent went to the import permit in Victoria to make modification on a cigarette box from Nigeria.
- (c) That the Respondent was not in possession of any bank statement.
- (d) That the Respondent entered into a loan agreement with a private company which is suspicious in nature
- (e) That it does not make any commercial sense for a private company to give the loan to the Respondent
- (f) The loan agreement was in the name of Marlu Seychelles (Pty) Limited which is a fishing company
- (g) The loan was disbursed by Double Click Exchange

- (h) That it does not make commercial sense for Double Click Exchange to loan the agreed amount to the Respondent instead Marlu Seychelles (Pty) Limited
- (i) That both Marlu Seychelles (Pty) Limited and Double Click Exchange are owned by the same person, namely, Muditha Gunatilake.
- (j) That the funds were not transferred in the Respondent's business account but her personal account
- (k) That the charge over the Respondent's property was not registered by Mr Gunatilake.
- (l) That the receipt of the sale of euro 15,000 by Double Click Exchange is written "cash in hand" transaction.
- (m) That the euro 15,000 was purchased in the amount of SCR 237,000 – however, the Respondent transferred to Double Click Exchange an amount of SCR 262,000 which is SCR 25,000 in excess of the purchase amount and does not make commercial sense and therefore
- (n) The Respondent is concealing the true origin of the funds".

#### DISCUSSION OF THE LAW AND FACTS

[64] The powers of this court to grant the order for the forfeiture of the cash seized equivalent to the sum of SCR 234,580.00 is conferred upon this court by virtue of Section 76(1) of the AMLCFT Act. Section 76(1) is couched in the following terms;

*"76(1) A judge may order the forfeiture of any cash which has been seized under subsection (2) of Section 74 if satisfied, on an application submitted by the Attorney General, a prosecutor on behalf of Anti-Corruption Commission of Seychelles, that the cash seized is not less than the prescribed sum or the judge has reasonable grounds for suspecting that it directly or indirectly represents any person's benefit from, or is intended by any person for use in connection with any offence".*

[65] It therefore follows, that as precondition to the making of the forfeiture order, the cash to be made the subject matter of the forfeiture order must have been seized under Section 74(2) of the AMLCFT ACT. To put Section 74 (2) in perspective, and to better understand

the effect of Section 74(2) it is worth mentioning the provisions of Section 74(1) of the AMLCFT Act that reads as follows;

*“74(1) An officer of the Seychelles Police Force or an officer of the Anti-Corruption of Seychelles, an officer of customs or an immigration officer or an officer of any other authority as may be specified by the notice, may search without warrant, a person within the jurisdiction, his or her luggage or other property in his or her possession or in the immediate vicinity and any vehicle belonging to him or her, or in which he or she was found or in the vicinity, which is suspected of being connected to him or her, if*

*(b) the cash found on the person represents the proceeds of crime or is intended by any person for use in connection with any criminal conduct or*

*(c) the cash is in excess of the prescribed sum and was not declared by the person when entering or leaving Seychelles”.*

Section 74(2) reads;

*“(2) The officers referred to in subsection (1) may seize, any cash found during a search under subsection (1) if;*

*(a) It is not less than the prescribed sum, and*

*(b) He has reasonable grounds for suspecting that it represents proceeds of crime, or is intended by any person to be used in connection with any criminal conduct and shall have the authority to seek further information from the carrier regarding the origin of the cash and their intended use and also notify the FIU regarding such cash seizure in such form and manner as may be prescribed”*

[66] Given that the words “prescribed sum” is mentioned few times in different provisions of the AMLCFT Act it is worth mentioning the statutory meaning of “prescribed sum”, which is found under Section 74(10) of the AMLCFT Act that reads as follows;

“74(10) For the purposes of this Section prescribed sum means, such sum as may be prescribed by the minister from time to time and until such time, it shall be SCR 50,000 or its equivalent in any currency”.

[67] On the facts of this case as transpired in evidence, prior to her departure to Nigeria via Dubai on the 27<sup>th</sup> June 2022 at the Seychelles international airport, the Respondent approached customs officers to declare that she had more than the prescribed sum of SCR 50,000 in her possession given that she was in possession of USD 6,000 and Euro 10,000 equivalent to SCR 234, 580.00.

[68] It also transpired in evidence, that, in seeking to show that the cash was from a legitimate source, the Respondent told custom officers that the cash is money obtained by way of a loan under a loan agreement with a company named, Marlu Seychelles (Pty) Limited. Such explanation was unconvincing to the custom officers who seized the cash in accordance with Section 74(2) (a) and (b) read with Section 74 (3) of the AMLCFT Act.

[69] Pursuant to Section 74(3) of AMLCFT Act, on an application for further detention of the cash seized beyond the 14 days, the court granted the application, and accordingly, ordered further detention of the cash for 30 days. The court was satisfied that the conditions under Section 74 (3) were met, in that;

*“(a) that there are reasonable grounds for the suspicion under subsection (1)*

*(c) That the detention of the cash beyond 14 days is justified while its origin or derivation is further investigated or consideration is given to the institution (whether in Seychelles or elsewhere) of criminal proceedings against any person for an offence in which cash is involved”.*

[70] As regards to this application for a court order for the forfeiture of the cash seized by virtue of Section 76 (1) of the AMLCFT Act, I have to be satisfied, that I have “reasonable grounds for suspecting that it directly or indirectly represents any person’s benefit from, or is intended by any person for use in connection with any offence. (Empahsis is mine).

[71] At this juncture, it needs to be mentioned, as correctly put by learned counsel for the Respondent in his written submission, that the provision of Section 76(3) of the AMLCFT Act moves away from the well established principle in civil trials, that a party who asserts an issue has the burden of proving his or her assertion. Under Section 76(3) of the AMLCFT Act the burden of proof shifts to the Respondent, in that, in defending this application the Respondent must prove an issue and bears the burden of proving that issue. In essence, by virtue of Section 76(3) the Respondent to this application must prove that the cash seized does not constitute directly or indirectly the benefit from criminal conduct or was not intended by any person to be used in connection with criminal conduct. (Emphasis is mine).

[72] The powers of the court to make the forfeiture order under Section 76(3) of the AMLCFT Act is mandatory where evidence is adduced before it proving that the cash constituted directly or indirectly the proceeds of crime or was intended by any person to be used in connection with criminal conduct. Section 76 (3) of the AMLCFT Act is couched in the following terms;

*“76(3). Where it appears to the court on evidence produced by or on behalf of the Attorney General or a prosecutor on behalf of the Anti-corruption commission of Seychelles consisting of, or including evidence adduced under subsection (4) that the cash constitute directly or indirectly the proceeds of crime or was intended by any person to be used in connection with criminal conduct, the court shall make an order of forfeiture in respect of the whole or, a specified part of the cash. (Emphasis is mine).*

[73] Section 76(3) contains a proviso that reads;

*“provided that the court shall not make an order if it is proved by the Respondent or any other person that the cash does not constitute directly or indirectly the benefit from criminal conduct or was intended by any person to be used in connection with criminal conduct”*

[74] In essence, therefore, where the Republic adduces evidence to prove that the cash seized constitutes directly or indirectly the proceeds of crime or is intended by any person to be used in connection with criminal conduct, the Respondent has to adduce evidence to rebut the proposition or proves the contrary.

[75] The question that falls to be determined, therefore, is whether on account of the evidence adduced before this court by the Republic, it has been sufficient to trigger the court's mandatory power to make the order of forfeiture, or it has not, or even if it has, this has been negated by proof by the Respondent, or any other person, that the cash does not constitute directly or indirectly the benefit of the criminal conduct or was not intended by any person to be used in connection with criminal conduct which, in effect, the court will decline from making the order of forfeiture being sought for by the Applicant.

[76] In the light of the totality of the evidence laid before this court by way of affidavit evidence, coupled with the parties oral testimony, I am satisfied, that the Applicant's case as summarised and submitted by learned counsel for the Respondent in the preceding paragraph from a-n are facts which the Applicant has sought to prove successfully before this court by way of evidence, and that it has done so to the satisfaction of this court. It is this court's finding, that it is around those facts, that the financial investigation by the FCIU had centred, which investigation entailed, inter alia, in depth analysis by the FCIU of its findings, that led to its conclusion, that the source of the cash seized remains unknown, primarily, because of the Respondent continued concealment of the source of the cash seized.

[77] Some of the averments in the Applicant's affidavit sworn by Supt Neville Thaver that aroused the FCIU's suspicion about the Respondent's financial transactions, and that for the purposes of this discussion is worthy of mentioning are;

“... V. That as part of the investigation, it was found that the loan agreement which the Respondent referred to had nothing to do with the cash which was seized from her prior to leaving Seychelles

VI. that whilst she received some funds, analysis of her bank account showed that the funds that she had on her at the time of the declaration did not originate from the funds that she had obtained as part of the loan agreement.

VII. The Respondent was dishonest and misled the authority when she used the said loan agreement and bureau de change receipt at the time of her departure to make the custom officers believe that she had obtained the funds legitimately.

VIII. That the analysis of the loan agreement showed that it was not registered at the Registrar General.

IX. Analysis of her bank account showed that she had received funds from Double Click bureau de change not Marlu Seychelles as per the agreement produced.

X. That attempts were made to interview the cashier of Double Click but to no avail. That it was found that Double Click and Marlu Seychelles (Pty) limited are owned by the same individual, and

XI. That the Respondent was called on several occasions to clarify a number of matters, and she never turned up at the FCIU's offices".

[78] At this juncture, on account of the evidence laid before me, I have reasonable ground for suspecting that the cash seized directly or indirectly represents the Respondent's benefit from, or is intended to be used by her in connection with any offence. On that basis alone, I do have the discretion under Section 76(1) of the AMLCFT Act to order the forfeiture of the cash seized from the Respondent on the 27<sup>th</sup> June 2022 in the total sum of SCR 234,580.00.

[79] Furthermore, on account of the evidence laid before me, it appears to me, that the cash seized constitutes directly or indirectly the proceeds of crime or was intended by the Respondent to be used in connection with criminal conduct. On that basis, I have no alternative under Section 76(3) of the AMLCFT Act, other than to make an order of forfeiture in respect of the whole or part of the sum of SCR 234,580, seized from the Respondent on the 27<sup>th</sup> June 2022.



- [80] The proviso under Section 76(3) of the AMLCFT Act, mandatorily prevents me from making an order of forfeiture in this case if the Respondent or any person, had proved to me, that the cash seized does not constitute directly or indirectly the benefit from criminal conduct or was not intended by any person to be used in connection with criminal conduct. To make such a determination, therefore, I will now proceed to address the evidence, if any, put before this court by the Respondent proving that the cash seized does not constitute directly or indirectly the benefit from criminal conduct or was not intended by any person to be used in connection with criminal conduct.
- [81] In her written submission, learned counsel for the Applicant submits, that the Respondent's affidavit is defective which if that is proved to be the case, would render the affidavit inadmissible, and as a consequence, the Respondent would be unable to prove that the cash seized does not constitute directly or indirectly the benefit from criminal conduct or was intended by any person to be used in connection with criminal conduct.
- [82] Learned counsel contention is based on the fact that, amongst other things, the affidavit does not state the occupation of the Respondent as well as her address. Learned counsel relies on the case of *Beau Vallon Properties v Phillippe Cointy 2020 SCCA*, in which case the court said, that these omissions were blatant irregularities in the form of the affidavit, and refused to admit it in evidence. Learned counsel also submits, that the court must take note that the Respondent's affidavit is not supported by exhibits. Learned counsel adds, that in *Beau Vallon Properties limited (supra)* the court did say, that any relevant document must be exhibited to the affidavit, and reminded counsel, that affidavit evidence stands in lieu of the oral testimony of the Applicant.
- [83] Learned counsel also cited the case of *D.L de Charmoy v P.L de Charmoy, SCA MA 08/2019* as case law authority for the proposition that any document to be used in combination with an affidavit must be exhibited. On the law as regards to affidavit evidence, I find no room for disagreement with learned counsel for the Respondent, and I agree with learned counsel, for the Applicant that the affidavit is defective, and cannot therefore be admitted in evidence.

- [84] In the circumstances, the court has to have regards to the Respondent's oral testimony only. In her submission, learned counsel for the Applicant brings to the attention of the court, that in her oral testimony, the Respondent did admit that she did give the loan agreement to the customs officers, and then went on as to say that the cash were proceeds of sale of the goods imported which she sold on the local market. Learned counsel also brings to the attention of the court, that in her oral testimony, the Respondent had said, that all monies derived from the loan agreement were used and exhausted when she did the first trip to Nigeria.
- [85] Learned counsel submits, that the Respondent should have produced her sales record to custom officers instead of the loan agreement, knowingly, that the monies were proceeds of sales of goods. According to learned counsel, because the Respondent sought to mislead the customs officers, this in itself shows, that it was the Respondent's intention to conceal the source of the funds.
- [86] Learned counsel submits that the FCIU's suspicion was enhanced by the discrepancies surrounding the loan agreement and that this came to light in evidence. As per learned counsel for the Applicant's submission, that included, the fact that the loan agreement was between Marlu Seychelles (Pty) Limited but the loan money was credited into the Respondent's bank account by Double Click Exchange, that although the loan money had been disbursed, the 1<sup>st</sup> line charge has still not been registered, the unexplained transfer of excess funds by the Respondent to Double Click for the purchase of foreign currency in the sum of SCR 262,000 instead of SCR 237,000, and the Respondent's testimony that she had gone back to Muditha and requested that he sells her euro 15,000 and advance her SCR 25,000 which she said she had used the same to purchase excess luggage for the 1<sup>st</sup> trip of 23<sup>rd</sup> April 2022 to Nigeria which she did not mention in her affidavit. Learned counsel also brings to the attention of the court, that in his affidavit, Muditha did not provide any satisfactory explanation as to why the receipt is marked "cash in hand" when in fact, the Respondent made a bank transfer.

[87] Learned counsel for the Applicant alerts the court, that in cross examination, the Respondent was asked why she had not produced any sales record thus far to justify the source of the cash which the evidence had shown did not come from her bank account, nor the loan agreement, and the fact that she chose to avoid answering the question. Learned counsel calls on the court to find, that the Respondent has failed to provide proof of legitimate source of funds of the specified properties.

[88] Amid the evidence adduced before this court by the Applicant, I have given due consideration to the oral testimony of the Respondent in this case. I find that the Respondent's evidence is inadequate and lacks substance, leaving many questions unanswered, and as a consequence, the Respondent or any other person has not proved before this court, that the cash seized from the Respondent on the 27<sup>th</sup> June 2022 at the Seychelles International Airport does not constitute directly or indirectly the benefit from criminal conduct or was not intended by any person to be used in connection with criminal conduct.

[89] In the circumstances, in exercise of the powers conferred upon this court by virtue of Section 76 (1) and Section 76 (3) of the AMLCFT Act, I order the forfeiture of the entire sum of foreign currency as described in the table annexed to the Notice of Motion dated 20<sup>th</sup> September 2022, equivalent to SCR 234,580.00.

Signed, dated and delivered at Ile du Port 8 March 2023.

