

**SUPREME COURT OF SEYCHELLES**

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**Reportable**

[2023]

CM 47 of 2023

*SCSC 669*

In the matter between

**THE REPUBLIC**

*(rep. by Mr G Thachett)*

**APPLICANT**

and

**Faiz Ali Mubarak**

*(rep by Mr R Laporte)*

**RESPONDENT**

and

**The Development Bank of Seychelles**

*(rep by Mr S. Rajasundaram)*

**3<sup>rd</sup> PARTY CLAIMANT**

and

**Lydia Mubarak Ali**

*(rep by Mr J. Revera)*

**3<sup>rd</sup> PARTY INTERVENOR**

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**Neutral Citation:** *The Republic v Faiz Mubarak CM 47 of 2023 (Arising in CR 60 of 2021)*

**Before:** Govinden CJ

**Summary:** Application for forfeiture – Criminal Procedure Code – Fishing Vessel

**Heard:** By Written Submissions

**Delivered:** 11 September 2023

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**ORDER**

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**GOVINDEN CJ**

[1] This is an Application for the forfeiture of the vessel, namely ‘Baba Ali’ bearing registration No. SZ1419 (herewith referred to as ‘the Vessel’), with all its gears and

equipment, in terms of Section 153 of the Criminal Procedure Code (CPC). The Respondent is the owner and was in charge of the Vessel, that was used during the commission of the offence to which he pleaded guilty in terms of section 10 of the Misuse of Drugs Act, 2016.

- [2] The Respondent along with others were arrested for the importation of controlled drugs into Seychelles on the above named vessel. During the course of the investigation, the said vessel was seized by the Police and was kept under police custody. The Respondent was convicted by this Court on his own guilty plea and admission of facts on the 13<sup>th</sup> of April 2023. The Respondent admitted the fact that he was the owner of the vessel.
- [3] The Application was contested by the Respondent, the 3<sup>rd</sup> Party Claimant and 3<sup>rd</sup> Party Intervenor. The Respondent admitted to the fact that the Vessel was used for the importation of the drugs into Seychelles. The Respondent avers in his Affidavit in reply, at para 13, that the vessel is co-owned and that a loan was taken from the Development Bank of Seychelles (DBS) to purchase the Vessel. The DBS is liable to take possessory action against him and the 3<sup>rd</sup> Party Intervenor (his wife), should the co-owned vessel be forfeited to the Republic.
- [4] The 3<sup>rd</sup> Party Intervenor 's avers that the Applicant has erroneously construed the judicial admission of ownership as removing any prospect of co-ownership of the Vessel. It is respectfully submitted that this rationale is flawed in that the Applicant having made the application for forfeiture was not aware of the lien/or pledge on the vessel in favour of the 3<sup>rd</sup> Party Claimant, the DBS, as well as the fact that the vessel was the subject of co-ownership namely with the 3<sup>rd</sup> Party Intervenor herein being the Respondent's wife, who it is submitted is an innocent and good faith owner. The 3<sup>rd</sup> Party Intervenor avers that the Respondent has pleaded guilty to the amended charges, he has expressed remorse, and that his family should not be punished for his conviction by way of forfeiture of the sole property keeping DBS from commencing any action in relation to the matrimonial property of the 3<sup>rd</sup> Party Intervenor and the Respondent.

[5] The 3<sup>rd</sup> Party Claimant, DBS avers that the Vessel has been pledged (registered) as a guarantee to the development loan given to the owner, the Respondent. The loan advance is SR 4 223 000.00 and the balance payable on the date of notice of motion remains SR 4 609 906.63. The 3<sup>rd</sup> Party Claimant avers that the Court should invoke its equitable and inherent powers while there are no direct legal provisions towards the prayer of this Claimant for the sale proceeds of the boat to awarded as part of the loan repayment. The Claimant further avers that it is not an individual, while it is a part of the State, it is duly registered under the laws of Seychelles. The main Applicant shall not stand to lose anything in the event that the boat is confiscated. The 3<sup>rd</sup> Party Claimant on the other hand suffer serious financial prejudice and will suffer the loss of SR 4 609 906.63.

### **Law and Analysis**

[6] Section 153 of the Criminal Procedure Code provides that *‘In addition to any forfeiture specially provided for by this Code or any other law, the corpus delicti when it is the property of the offender and all the things produced by the offence or which may have been used or were intended to be used for committing an offence, shall on conviction of the offender become forfeited to the Republic’*.

[7] The latter part of section 153 provides for property *‘which may have been used or were intended to be used for committing an offence’*. This would imply that property used in the commission of the offence would also be subject to forfeiture on the conviction of the offender.

[8] In *De Souza & anor (MC 37/2020 arising from CO18/2020) [2020] SCSC 356 (30 June 2020)* the court held in para 8:

*‘it is useful to note that section 153 of the CPC provides for the forfeiture of the corpus delicti when it is the property of the offender and was used for committing an offence.’*

It is clear from the wording of this section that property that was used in the commission of the offence can also be subject to forfeiture under section 153 of the CPC.

[9] In *Republic v Balochi and ors (CO115/2021) [2022] SCSC 975* it was held that the vessel was “*a vital instrument to the importation of a controlled drug in Seychelles. It is therefore both a corpus delicti of the crime and an instrument used in the commission of the offence without which the offence who has been the subject matter of convictions will not have been committed*”

[10] The Applicant correctly pointed out that ownership is not the sole criterion for forfeiture under section 153 of the CPC. In the present application the owner of the vessel had pleaded guilty to the offence and the vessel was used in the commission of the offence and there both elements under section 153 of the CPC is present.

[11] In respect of the claim of the Third Party Claimant, section 153B (5) reads as follows:

*‘A person who, under this section, claims an interest in any property in respect of which an application for forfeiture has been made may—*

*a) before the court makes an order of forfeiture, or*

*b) when the court has made an order of forfeiture, within 30 days after the order was made, apply to the court against the granting of the order or, where the court has made an order of forfeiture, for an order declaring the nature, extent and value of the applicant’s interest and*

*c) directing the Republic to transfer the property to the applicant; or*

*d) declaring that there is payable to the applicant by the Republic an amount equal in value to the value of the applicant’s interest declared under this section’*

[12] I find that the DBS has made a claim under Section 153(B) 5 albeit by way of responding to the application, the court will take it, therefore, that it falls within the ambit of ‘*A person who is making claims before the court makes an order of forfeiture regarding an interest in a property in respect of which an application for forfeiture has been made*’, in terms of this provision.

[13] I however do not find merits in the Third Party claimant argument that the *‘Court can view both the Republic and the state owned bank are more or less, for the purposes of the matter before this Honourable Court, one and the same’* as it sets a dangerous precedent in respect of the independence of a state funded institutions. While DBS is a state funded institution, it is not a government institution and therefore cannot be regarded as ‘one and the same’ as the Republic in legal proceedings.

[14] The Third Party claimant was also not correct in citing the Proceeds of Crime (Civil Confiscation) Act, 2008, as this relates to matters arising from the Anti-Money Laundering Act, 2006 and the forfeiture in question is specifically provided for in the Criminal Procedure Code.

[15] In respect of the Third Party Intervenor, no evidence was lead before this court to prove that she has a claim for ownership of the vessel. The attached loan agreement for the vessel was done solely in the name of the Respondent. Further, no evidence was placed before the court in respect the ownership of the vessel by the company or that she is a partner in vessel named, ‘Baba Ali.’, something that could have placed her within the ambit of Section 153(B) 5.

[16] Section 153 (4) which provides the following *‘A court shall not make an order of forfeiture under this section in respect of any property where the court is satisfied that the person, not being the person who was convicted, who is in possession of the property or purports to be owner acquired the property—*

*a) for sufficient consideration, and*

*b) without knowing and in circumstances such as not to arouse a reasonable suspicion, that the property was, at the time of its acquisition, property which was used in or in connection with the commission of an offence under this section or the proceed of the offence.’*

Has also no application to this matter as the provision relates to innocent owners possessor and owners of corpus delicti.

## Order

[17] The Court therefore makes the following orders:

- a) orders the forfeiture to the Republic, the boat 'Baba Ali' bearing registration No. SZ1419, with all its gears and equipments, in terms of Section 153 of the CPC belonging to the Respondent, which were used for committing the offences for which the Respondent has been convicted and sentenced by this Court.
- b) order that all and any registrations of the vessel in the name of the Respondent be cancelled and the Republic of Seychelles be registered as the owner.
- c) order that in the event that the vessel be sold to any person by the Republic following the forfeiture, the sale must be done by public auction and to the highest bidder.
- d) order that the pledge in favour of the DBS shall remain on the vessel until the outstanding loan is fully and finally settled or the DBS waives it in favour of the new owner.

Signed, dated and delivered at Ile du Port 11 September 2023



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Govinden CJ