

COURT OF APPEAL OF SEYCHELLES

Reportable

[2023] (18 December 2023)

SCA 11/2023

(Arising in MC 78/2022)

In the matter Between

The Anti-Corruption Commission of Seychelles
(rep. by Mr. Michael Skelly, Mr. Anthony Juliette and
Ms. Polly Dyer)

Appellant

and

Laura Valabhji
(self represented)

Respondent

Neutral Citation: *The Anti-Corruption Commission of Seychelles v Valabhji* (SCA 11/2023)
[2023] (Arising in MC 78/2022) (18 December 2023)

Before: Tibatemwa-Ekirikubinza, Gunesh-Balaghee, De Silva, JJA

Summary: An appeal against the judgment of the Supreme Court dated 3 March 2023 where it was held that section 60 of the Anti-Corruption Act 2016 (“ACA 2016”) extends the jurisdiction of the Anti-Corruption Commission of Seychelles (“ACCS”) to restrict property belonging to the person under investigation only and that it does not extend to properties of third parties who is not under investigation and had not received such notice.

Heard: 11 December 2023

Delivered: 18 December 2023

ORDER

The jurisdiction of the Anti-Corruption Commission of Seychelles extends to issuing a restriction notice, during the course of investigations, to include property within the control of the person who is under investigation although in fact it may be the property of third parties who are not under investigation and have not received such notice.

Appeal allowed with costs.

JUDGMENT

DE SILVA JA

(Dr. L. Tibatemwa-Ekirikubinza, JA concurring and Gunesh-Balaghee JA, concurring with the conclusion)

1. This is an appeal against the judgment of the Supreme Court dated 3 March 2023. The Court held that section 60 of the Anti-Corruption Act 2016 (“ACA 2016”) extends the jurisdiction of the Anti-Corruption Commission of Seychelles (“ACCS”) to restrict property belonging to the person under investigation only and that it does not extend to properties of third parties who are not under investigation and have not received such notice.
2. The Appellant is the ACCS which has been established pursuant to ACA 2016. Its functions include the power to enquire into and conduct investigation of offences, file cases on the basis of such enquiry or investigation and to conduct such cases.
3. The Respondent is an Attorney-at-Law qualified and licensed under the Legal Practitioners Act to practice until the license was either revoked or suspended on 21 January 2022. She was arrested and detained on 18 November 2021 on allegations of having committed offences of corruption and money laundering.
4. On 16 December 2021 the Respondent was charged with offences under the Anti-Money Laundering and Countering the Financing of Terrorism Act 2020 and the ACA 2016. On 19 May 2022, the ACCS moved Court to withdraw all the charges.
5. The Respondent operated several client’s accounts pursuant to the Control and Protection of Clients Account Act (“CPCAA”). Five such accounts were held with Mauritius Commercial Bank (Seychelles) Limited, Al Salam Bank (Seychelles) Limited and SIMBC (Nouvobanq). Soon after the arrest of the Respondent, the ACCS directed all banks in Seychelles to restrict all dealings with all accounts held

in the name of the Respondent or accounts to which she was a signatory including the five mentioned above.

6. The first such notice was issued on 17 December 2021. On 13 September 2022 this was extended for a further six months.
7. On or about 14 November 2022, the Respondent made an application to the Supreme Court, pursuant to Section 60(6) of the ACA 2016, seeking an order reversing/varying the directives of the Appellant. These directives were given in notices dated 14 September 2022 to the Respondent and 20 September 2022 to Mauritius Commercial Bank (Seychelles) Limited, Al Salam Bank (Seychelles) Limited and SIMBC (Nouvobanq).
8. The Supreme Court held that the actions of the Appellant in respect of the written notices issued to the said five bank accounts on or around 17 December 2021 and thereafter restricting all dealings in respect of the Respondent's clients' accounts were unlawful and ultra vires. Accordingly, acting pursuant to section 60(6) of the ACA 2016, the Supreme Court made an order reversing the directive given by the Appellant in notice dated 14 September 2022 to the Respondent and in notice dated 20 September 2022 to the above banks releasing all restrictions on the said clients' accounts.
9. The Appellant seeks the following orders:
 - a. An order reversing those parts of the learned Judge's ruling in paragraphs 27 to 29 and 39, that section 60 of ACA 2016 does not extend to restricting the client accounts of a person under investigation, and cannot extend to the imposition of a restriction on property belonging to a third party, albeit that the person under investigation is the custodian of and in control of such property;

- b. An order reversing the order in paragraph 41 of the Ruling that the actions of the Appellant on 17 December 2021 in issuing written notices in respect of the client accounts were unlawful and ultra vires;
 - c. A declaration that the Restriction Notices in respect of the named client accounts held and operated by the Respondent were lawfully issued pursuant to section 60 ACA 2016 on 17 December 2021 and that the Commissioner was not acting ultra vires when she issued the said Notices;
 - d. A declaration that a Restriction Notice can lawfully be issued by the Commissioner of the Anti-Corruption Commission Seychelles pursuant to section 60 ACA 2016 in respect of client accounts held and/or operated by a person who is subject to an investigation for a relevant offence.
10. The Appellant submits that the ACCS is not aware of any previous judicial exposition of the statutory power contained in section 60 of ACA 2016. It was further submitted that the Appellant has not been able to identify any similar provisions or jurisprudence in other jurisdictions. In this context, I wish to examine in some detail the antecedents of corruption and the background to the ACA 2016.

Antecedents of Corruption

11. Corruption in its myriad forms, including bribery, has plagued humanity from time immemorial. The evidence is found in the exhortations in many religious texts calling on humans to desist from corruption in all its forms. Let me quote a few which undoubtedly are familiar to Seychellois.
12. Christianity condemns corruption in no uncertain terms. *For I know how many are your transgressions and how great are your sins - you who afflict the righteous, who take a bribe, and turn aside the needy in the gate (Amos 5:12). Thou shalt take no gift: for the gift blindeth the wise, and perverteth the words of the righteous (Exodus*

23:8). *For oppression makes a wise man mad, and a bribe corrupts the heart* (Ecclesiastes 7:7). *You must not distort justice; you must not show partiality; and you must not accept bribes, for a bribe blinds the eyes of the wise and subverts the cause of those who are in the right* (Deuteronomy 16:19). *Who lends money to the poor without interest; who does not accept a bribe against the innocent. Whoever does these things will never be shaken* (Psalms 15:5).

13. Hinduism adopts a similar approach to bribery or corruption. *That king whose subjects are harassed by officials receiving bribes, by thieves in his kingdom, is roasted in hell* (Padma Purana, Bhoomi Khanda, Chapter 67). *He who takes unlawful gifts goes to the Adhomukha (or head-inverted) hell.* (Vishnu Purana: A System of Hindu Mythology and Tradition, H.H. Wilson, Vol. II, page 218). *Accepting bribe is a sin and those who accept the bribe are thrown to hell* (Vaman Purana Chapter 37). *Appointed to a task, one should not touch riches. Having obtained unearned riches, one faces imprisonment or death* (The Mahabharata, Translated by Bibek Debroy, Vol. 4, page 12).

14. The Holy Qur'an has many verses which discuss and condemn corruption. *Who break the covenant of Allah after contracting it and sever that which Allah has ordered to be joined and cause corruption on earth. It is those who are the losers* (2:27). *And [recall] when Moses prayed for water for his people, so we said, "Strike with your staff the stone." And there gushed forth from it twelve springs, and every people knew its watering place. "Eat and drink from the provision of Allah, and do not commit abuse on the earth, spreading corruption* (2:205).

15. Corruption will thrive unabated unless the leadership takes a strong and effective stand to fight corruption. Buddha in *Adhamma Sutta* of *Aṅguttaranikāya* explains how corrupt leadership has adverse consequences not only on the entire social order but also on nature and the physical environment:

“Monks, at a time the kings are unethical, the royal servicemen become unethical. When the royal servicemen become unethical, the Brahmin householders become unethical. When the Brahmin householders become unethical, those in the townships and provinces become unethical. When the townships and provinces become unethical, the moon and sun move unevenly. When the moon and sun move unevenly, the stars and the constellations move unevenly. When the stars and constellations move unevenly, then the night and day occur unevenly. When the night and day occur unevenly, the fortnights and months become uneven. When the fortnights and months become uneven, winds blow unevenly and in the wrong direction. When winds blow unevenly and in the wrong directions, deities become disturbed. When the deities become disturbed, the sky does not bring proper rainfall. When there is no proper rainfall, the grains ripen unevenly. When humans eat unevenly ripened grains, their life span is shortened, and they lose their beauty and power and are struck by many ailments. Monks, at a time the kings are ethical the opposite to the above happens. When cattle are crossing a (water way), if the leading bull goes crooked, all of them go crooked as the leading one has gone crooked. Even so, among humans, if one considered the chief behaves unethically, the rest will follow suit. If the king is unethical, the whole country rests unhappily. When cattle are crossing a (water way), if the leading bull goes straight, all of them go straight as the leading one has gone straight. Even so, among humans, if one considered the chief, indeed conducts oneself ethically all the rest follow suit. If the king is ethical, the whole country rests happily.”

16. In spite of such religious condemnation in all its manifestations, corruption has become a transnational phenomenon that affects all societies and economies. Corruption destabilizes state institutions and values of democracy resulting in endangering sustainable development and the rule of law. Corruption has become a cancer that is eating into the fabric of good governance.

United Nations Convention Against Corruption (UNCAC)

17. UNCAC is an attempt by the United Nations to address the debilitating impact of corruption on society at large. It is an international response to the concerns about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law.

18. UNCAC recognizes that corruption may involve vast quantities of assets, which may constitute a substantial proportion of the resources of States which threatens the political stability and sustainable development of those States. It acknowledges the links between corruption and other forms of crime, in particular organized crime and economic crime, including money laundering.

19. As at 10 October 2023 there are 190 State Parties to the UNCAC. Seychelles signed it on 27 February 2004 and ratified it on 16 March 2006. The ACA 2016 was enacted in 2016.

20. Section 60(1) of ACA 2016 reads as follows:

“The Chief Executive Officer or an officer of the Commission may, by written notice to the person who is subject to an investigation in respect of an offence alleged or suspected to have been committed under this Act, or against whom a prosecution for an offence has been instituted, direct that person not to dispose of, or otherwise deal with, any property specified in such notice

without the consent of the Chief Executive Officer or the officer of the Commission, as the case may be.”

21. A textual reading of this provision makes it clear that the following requirements must be fulfilled for any restriction order to be issued against a person:

- (i) A prosecution should have been instituted against such person for an offence;
- or
- (ii) That person must be subject to an investigation in respect of an offence *alleged or suspected* to have been committed under ACA.

22. As the factual circumstances in this matter falls within (ii) above and in view of certain observations made by the Supreme Court, I wish to examine it in greater detail.

23. An investigation pursuant to ACA 2016 can commence in two situations. Firstly, where pursuant to section 52(1) of ACA 2016, a complaint is lodged by a person with the ACCS. Here an investigation can commence only where the Chief Executive Officer of the ACCS determines pursuant to section 52(6) that an investigation into that allegation is warranted. In so doing, the Chief Executive Officer must be guided by the provisions in section 52(5).

24. Secondly, the ACCS may, pursuant to section 52(2), initiate an investigation on its own motion. Here too, the ACCS must be guided by section 52(5). These are safeguards that have been included to ensure that an investigation is not conducted arbitrarily or *male fide*.

25. Where an investigation has commenced, a restriction on disposal of property order can be issued to *any person who is subject to such investigation*. The use of the words *alleged or suspected* in section 60(1) of the ACA 2016 indicates that the only threshold to be reached to enable the issuance of such restriction notice is that there

is either an allegation against such person or he is suspected to have committed an offence under ACA 2016. Such an interpretation will further the object and purpose of ACA 2016.

26. Let me now elaborate a bit more on the purpose of making a restriction order. Article 31(1) of UNCAC requires each State Party to take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:

(a) Proceeds of crime derived from offences established in accordance with UNCAC or property the value of which corresponds to that of such proceeds;

(b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with UNCAC.

27. Article 31(2) of UNCAC requires each State Party to take such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of Article 31 *for the purpose of eventual confiscation*. Hence, measures such as tracing, freezing or seizure form part of an investigative process which seeks to identify and eventually confiscate proceeds of crime derived from offences established in accordance with UNCAC or property the value of which corresponds to that of such proceeds.

28. It is a long-standing rule of the common law that statutes must be interpreted consistent with the international obligations of the State. [See *Ceylon Tobacco Company PLC v. Minister of Health and Others* (C.A. 336/2012(Writ), C.A.M. 12.05.2014), *Vishaka v The State of Rajasthan* (1997) 6 SCC 241].

29. The rule applies with more force in this case as Seychelles has enacted ACA 2016 with a view to implement its international obligations after ratifying UNCAC. The provisions in ACA 2016 must be understood and interpreted in that context.

30. The powers of seizure of property (Section 58) and restriction on disposal of property (Sections 60 and 61) are all contained in Part IV of ACA 2016 which is entitled Investigation of Corrupt Practices. They are investigative tools provided to investigators for an effective investigation and are means to an end and temporary in nature.
31. This is evident upon a consideration of the definition of the word *seizure* in section 2 of the ACA 2016 which defines it to mean *temporarily prohibiting the transfer, conversion, disposition or movement of any property or temporarily assuming the custody or control of property on the basis of an order issued by a court or a notice by the Chief Executive Officer or an officer of the Commission* (Emphasis added). Such temporary measures are required to prevent property which may lawfully be forfeited from being taken outside the jurisdiction or dealt otherwise so as to make an investigation pursuant to ACA 2016 an exercise in futility. The final goal is to provide for the forfeiture of unexplained property pursuant to section 62 of ACA 2016.
32. Hence, the ACA 2016 does contemplate instances where property that is subject to a restriction notice may eventually be found, during or at the end of an investigation, to be property lawfully acquired. Nevertheless, the restriction order is not unlawful merely because it is found subsequently that the property was lawfully acquired.
33. The Supreme Court, at paragraph 27, concluded that section 60 of ACA 2016 by definition does not extend to clients' account maintained pursuant to the CPCAA. It was held that by implication the section extends the jurisdiction of the ACCS to restrict *property belonging to the person under investigation only* and does not extend to properties of third parties who are not under investigation and have not received such notice.

34. This statement overlooks complex methods by which proceeds of corruption or money laundering may be held through third parties. The process of money laundering usually takes place in three stages. Firstly, illegally derived funds are placed usually in the form of cash into the financial system. Secondly, many layers of transactions are performed such as transferring funds between several accounts to conceal the origin and movement of funds. Thirdly, the funds are used to make investments in different assets. In this context, it is important to observe that section 60(1) of the ACA 2016 does not specify that the property restricted must “belong” to the person under investigation.
35. It is quite naive to assume that persons involved in corruption and money laundering retain the ill-gotten wealth in an easily traceable way under their names. Moreover, it fails to interpret the ACA 2016 as a whole and overlooks the temporary nature of the provisions in sections 58, 60 and 61 of ACA 2016.
36. Besides, it fails to take into consideration the provisions in section 60(6) of the ACA 2016 which allow a *person aggrieved* with a directive restricting the disposal of property to apply to the Supreme Court for an order to reverse or vary the directive. The term *aggrieved* is of wider import and covers any third party who is aggrieved by the restriction order. *In re Sidebottom* [(1840) 14 Ch.Div. 458 at 465] it was held that a “person aggrieved” must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something.
37. The use of such wide term is evidence that the legislature did not intend to limit the right to make such an application to the party on whom notice was served. Such a wide right need not be granted if a restriction order can be made only against property belonging to the person under investigation.

38. That in my view is the correct interpretation and recognizes that such restriction orders are temporary in nature and are made in order to assist in the investigation. This is manifest upon a consideration of section 60(6) of ACA 2016 which provides for the issuance of a fresh notice for a further final six months to facilitate the conclusion of an investigation.
39. It is significant that section 61(1) of ACA 2016 allows restriction orders to be made on a third party's property where there are *reasonable grounds* to believe that he is holding property for, or on behalf of, or to the order of a person who is under investigation. Nevertheless, the restriction order is not unlawful merely because it is found, during or at the conclusion of the investigation, that such property is not in fact owned, beneficially or legally, by the person under investigation.
40. The Supreme Court appears to have been concerned about alleged unfairness to third parties. However, such concerns are devoid of merit when one considers sections 60(1) of ACA 2016, which provides for the administrative variance of restriction notices, and section 60(6) of ACA 2016 which vests power with the Supreme Court to vary any restriction order upon an application by any aggrieved party.
41. Moreover, the Supreme Court seems to have proceeded on the basis that moneys held in clients account belong to the client and not Scheduled Persons within the meaning of the CPCA. If that were the case, the only accounts that could be brought within a restriction order are accounts in the name of the person who is under investigation. Such an interpretation overlooks complex methods adopted in money laundering activities, defeats the purposes of the ACA 2016 and makes it toothless. Courts must give the ACA 2016 a purposive construction to defeat the mischief sought to be addressed.

42. Admittedly, the client accounts are held in the Respondent's name. The Respondent, who was under investigation, has custody and control of the relevant bank accounts and has the power to decide when, where and in what amounts the funds can be disbursed. The evidence on record shows that the Respondent was in full control of the client's accounts. She was able to deposit as well as withdraw funds. That, in my view, is sufficient to make such accounts amenable to a restriction order under the ACA 2016.
43. The Respondent in her speaking notes tendered to Court refers to the decision by the European Court of Human Rights in *Brito Ferrinho Bexiga Villa-Nova v. Portugal* (Application no. 69436/10) decided on 1.12.2015. The complaint was based upon the tax authorities' consultation of lawyer's bank accounts. It was held that, having regard to the lack of procedural guarantees and effective judicial control of the proceedings for lifting professional confidentiality, the Portuguese authorities had failed to strike a fair balance between the demands of the general interest and the requirements of the protection of Ms. Brito Ferrinho Bexiga Villa-Nova's right to respect for her private life. The facts and the legal framework in this matter are different. As explained above, the ACA 2016 provides for both administrative and judicial variation of the restriction notices.
44. No doubt, there are provisions in the CPCAA, such as sections 5 to 7, which regulate the deposit and use of monies in client accounts. Nevertheless, there can be no presumption that the said accounts are always operated in accordance with the provisions in the CPCAA. In fact, the evidence on record in this matter does raise a reasonable concern about the operation of client accounts by the Respondent.
45. The Respondent informed Court that she had made "personal payments" on behalf of her niece and nephew from her client account with Mauritius Commercial Bank (Seychelles) Limited which she said had been made from her own legal fees within

the account. There was an instance where the Respondent in effect informally loaned what was claimed to be her money from the client account pending receipt of funds from her husband's company. These are a few of the transactions which raise considerable reasonable concerns on the operation of the client accounts.

46. The Respondent drew the attention of Court to the opinion N° 20 (2017) of the Consultative Council of European Judges (CCJE) in THE ROLE OF COURTS WITH RESPECT TO THE UNIFORM APPLICATION OF THE LAW where it was held (paragraphs 5-6):

“The uniform application of the law is essential for the principle of the equality before the law. Moreover, considerations of legal certainty and predictability are an inherent part of the rule of law. In a state governed by the rule of law, citizens justifiably expect to be treated as others and can rely on the previous decisions in comparable cases so that they can predict the legal effects of their acts or omissions.

... Uniform application of the law contributes to public confidence in the courts and enhances the public perception of fairness and justice.”

I am in complete agreement with the principle articulated. That is one of the very reasons why client's accounts maintained by lawyers must be amendable to restriction notices issued pursuant to ACA 2016.

47. The Supreme Court referred to Article 26 of the Constitution which recognizes a fundamental right to property as paramount. Nevertheless, the Court overlooked the fact that the exercise of such right can, pursuant to Article 26(2), be subject to such limitations as may be prescribed by law *inter alia* in the public interest or in the case of property reasonably suspected of being acquired by the proceeds of drug trafficking or serious crime. Combatting corruption and money laundering is undoubtedly in the public interest.

48. For all the foregoing reasons, I hold that the jurisdiction of the ACCS extends to issuing a restriction notice, during the course of investigations, to include property within the control of the person who is under investigation although in fact it may be the property of third parties who are not under investigation and have not received such notice. However, I hasten to add that where during the course of the investigation, the property is found to be property falling outside the scope of the ACA 2016, the ACCS must forthwith take steps to release the property from the scope of any restricting order.

49. In conclusion, I must add that the preamble to the Constitution solemnly declares the unwavering commitment of the People of Seychelles to develop a democratic system which will ensure the creation of an adequate and progressive socialist order guaranteeing food, clothing, shelter, education, health and steadily rising standard of living for all Seychellois. The attainment of such laudable ideals will be fatally compromised if corruption in all its forms is not eradicated. The ACA 2016 must be interpreted to provide for an effective investigatory process towards eradicating corruption and money laundering.

50. I make the following orders:

- a. Order reversing those parts of the ruling of the Supreme Court in paragraphs 27 to 29 and 39, that section 60 of ACA 2016 does not extend to restricting the client accounts of a person under investigation, and cannot extend to the imposition of a restriction on property belonging to a third party, albeit that the person under investigation is the custodian of and in control of such property;
- b. An order reversing the order in paragraph 41 of the Ruling that the actions of the Appellant on 17 December 2021 in issuing written notices in respect of the client accounts were unlawful and ultra vires;

- c. A declaration that the Restriction Notices in respect of the named client accounts held and operated by the Respondent were lawfully issued pursuant to section 60 ACA 2016 on 17 December 2021 and that the Commissioner was not acting ultra vires when she issued the said Notices;
- d. A declaration that a Restriction Notice can lawfully be issued by the Commissioner of the ACCS pursuant to section 60 ACA 2016 in respect of client accounts held and/or operated by a person who is subject to an investigation for a relevant offence.

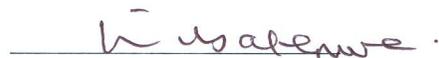
51. Costs awarded in favour of the Appellant.

Signed, dated and delivered at Ile du Port on 18 December 2023.



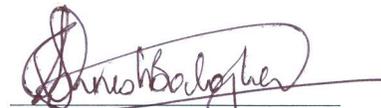
J. De Silva JA

I concur:-



Dr. L. Tibatemwa-Ekirikubinza JA

I concur with the conclusions :-



K. Gunesh-Balaghee JA