

**IN THE SEYCHELLES COURT OF APPEAL**

**[Coram: S. Domah (J.A) , M. Twomey (J.A) , J. Msoffe (J.A)]**

**Civil Appeal SCA 39/2013**

**(Appeal from MA 226/13 Arising out of CP11/2010)**

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Clive Lawry Allisop

Appellant

Versus

The Financial Intelligence Unit

1<sup>st</sup> Respondent

The Attorney General

2<sup>nd</sup> Respondent

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Heard: 11 April 2016

Counsel: Alexia Amesbury on pleadings, Frank Elizabeth at hearing for Appellant

Barry Galvin for Respondent

Delivered: 22 April 2016

**JUDGMENT**

**M. Twomey (J.A)**

[1] The Appellant on 1<sup>st</sup> December 2010 petitioned the Constitutional Court challenging the constitutionality of sections 3 (1) and 9 (1) of the Proceeds of Crime (Civil Confiscation) Act of 2008 (POCA) on the grounds that these provisions breached Articles 19 (1) 19 (2) and 26 (1) of the Constitution. In brief he argued that interim orders preventing him from disposing of, or dealing with specific properties belonging to him breached his right to property and that the fact that the order was based on the belief evidence of the Respondent amounted to a breach of his right to a fair hearing.

[2] Subsequent to filing the petition, the Appellant moved the Court to amend his petition to challenge the constitutionality of sections 3 (3), 4 (1) (b), 9 (3) in addition to section 9 (1)

which had already been pleaded in the previous petition, but also to seeking a writ mandating the redrafting of POCA, an award for damages and costs.

[3] In a decision given on 12<sup>th</sup> November 2013, the Constitutional Court refused leave to amend the petition on the grounds that the Constitutional Court Rules, although providing for circumstances where an amendment of a petition may be granted, precluded such amendment when it would amount to a new matter not sought in the original petition.

[4] He has now appealed this decision on the grounds summarised below:

1. The Constitutional Court erred in holding that section 146 of the Seychelles Code of Civil Procedure does not apply when specific and relevant provisions exist in the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules (The Rules).
2. The Constitutional Court erred in holding that the petition was time barred.
3. The Constitutional Court erred when it held that the amendment sought to introduce new matters.

We consider the grounds in the order in which they are raised.

### **Grounds 1 and 2**

[5] The Rules in relation to a petition before the Constitutional Court provides:

*3. (1) An application to the Constitutional Court in respect of matters relating to the application, contravention, enforcement or interpretation of the Constitution shall be made by petition accompanied by an affidavit of the facts in support thereof...*

*4. (1) Where the petition under rule 3 alleges a contravention or a likely contravention of a provision of the Constitution, the petition shall be filed in the Registry of the Supreme Court -*

*(a) in a case of an alleged contravention, within 3 months of the contravention;*

*(b) in a case where the likely contravention is the result of an act or omission, within 3 months of the act or omission;*

*(c) in a case where the likely contravention arises in consequence of any law, within 3 months of the enactment of such law*

*5. (1) A petition under rule 3 shall contain a concise statement of the material facts and refer to the provision of the Constitution that has been allegedly contravened or is likely to be contravened or in respect of which the application, enforcement or interpretation is sought.*

*(2) Where the petitioner alleges a contravention or likely contravention of any provision of the Constitution, the petition shall contain the name and particulars of the person alleged to have contravened that provision or likely to contravene that provision and in the case of an alleged contravention also state the date and place of the alleged contravention*

*(3) The Court shall not permit an amendment of a petition which seeks to include any new matter not pleaded in the petition. (Our emphasis)*

- [6] The Appellant submits that since Rule 5 (3) is silent on the question of the time delay within which an amendment to a petition before the Court can be made, recourse must be had to section 146 of the Seychelles Code of Civil Procedure which permits a party to amend its pleadings at any stage of the proceedings
- [7] The Respondents on the other hand submit that there was no ruling by the Constitutional Court on the question of time bar but rather an acknowledgment by the Court in passing that the proposed amended petition was sought to challenge the constitutionality of a legislative provision five years after its enactment.
- [8] They also submit that as regards new matters being introduced into a petition, it is Rule 5(3) (supra) that applies and not rule 4 (1) (c) as inferred by the Appellant's submissions.
- [9] In the Appellant's skeleton heads of argument, Counsel argues that one cannot be expected to challenge the constitutionality of laws within only ninety days of it coming into force as the circumstances of the case indicate a continuing breach of a constitutional provision. Counsel also takes issue with the reverse burden of proof. We fail to understand why these arguments are being made when what is being challenged is the fact that one cannot make an amendment to one's pleadings. This is a classical case of mixing issues to drown the essence.

- [10] In any case, it is our view that Rule 5 (3) is not silent on the issue of when an amendment can be made. It states simply that an amendment shall not be permitted where it seeks to include a matter not originally pleaded.
- [11] It is true that the word *shall* can be either imperative (mandatory) or directive (permissive) in any given situation and can only be ascertained by the context of its use. We are of the view that in the context in which it is used in Rule 5 (3), it indicates that if one seeks an amendment to include a new matter that has not been pleaded in a petition, such amendment cannot be made, not then, not ever. There is in other words no futurity in the word *shall* in this context and therefore no question of imposing a time bar.
- [12] In the circumstances we find no basis for the Appellant’s contention. Rule 5 (3) applies and there is therefore no need to resort to the Seychelles Code of Civil Procedure on this issue. These grounds of appeal have no merit whatsoever and are dismissed.

**Ground 3.**

- [13] Again the submissions of Counsel for the Appellant on this ground are equally confused as they do not seem to relate to or support the ground of appeal filed. The ground of appeal filed concerns the introduction of new material. However in the skeleton heads of argument Counsel argues the merits of the present case against the authority of *Hackl v FIU* (2012) SLR 225. She then goes on to pose the question of whether it might be permissible for “a litigant to amend his pleadings when new Counsel takes over.”
- [14] This is certainly want of seriousness in advocacy but in any event this Court cannot entertain arguments that have absolutely nothing to do with grounds of appeal filed.
- [15] This ground of appeal is devoid of merit and is dismissed.
- [16] This appeal was ill advised; in our view frivolous and vexatious and is a clear example of practices “bent upon dislocating the course of trial and prolonging the proceedings by every means”, vide *Prakash Boolell v The State of Mauritius* [2006] UKPC 46. We want to discourage such appeals in the future and do so by exercising our powers under Rule 31 (5) of the Seychelles Court of Appeal Rules which provides:

*In its judgment, the Court may confirm, reverse or vary the decision of the trial court with or without an order as to costs, or may order a re-trial or may remit the matter with the opinion of the Court thereon to the trial court, or may make such other order in the matter as to it may seem just, and may by such order exercise any power which the trial court might have exercised (Emphasis ours).*

- [17] We have on many occasions commented on the readiness with which some Counsel start frivolous and vexatious cases to in this Court, at the expense of their clients. Should this practice continue, a list may be made public on their notoriety.
- [18] The present matter has a long procedural history: in November 2008 cash amounting to SR551, 350 was found in spare wheels of a car, a rice cooker and a cash box in the Appellant's home. In June 2009 and December 2009, an interim order under section 3 of POCA and an interlocutory order under section 4 of POCA were granted respectively by the Supreme Court prohibiting the Appellant or anyone from disposing of the cash.
- [19] The Appellant appealed the interlocutory order on 6<sup>th</sup> December 2010. In April 2012, the Court of Appeal dismissed the appeal against the interlocutory order granted by the Supreme Court
- [20] In November 2010, the Appellant also filed an application challenging the constitutionality of POCA before the Constitutional Court. In December 2010 an amendment to the constitutional petition was sought.
- [21] In December 2010, the Appellant further applied for the partial release of the funds seized by the Court. This was declined by the Supreme Court on 4<sup>th</sup> March 2011.
- [22] The Appellant has had three attorneys (Juliette, Elizabeth, Amesbury).
- [23] The dates for the hearing of the Constitutional matter filed in 2010 were vacated on the request of the Appellants' attorneys in November 2012, February 2013, May 2013, July 2013, August 2013 and October 2013 for various reasons which this Court does not find satisfactory, legitimate or reasonable. Finally the Constitutional Court on 12 November

2013 gave its decision declining to allow the amendment to the petition sought by the Appellant.

- [24] The Appellant did not proceed to argue the merits of its original petition but instead chose to appeal the decision of the Constitutional Court on this interlocutory matter to this Court. This matter will still not be completed by our decision as our only option is to remit the matter back to the Constitutional Court to proceed on the original petition for argument of the case on the merits.
- [25] Hence, nearly seven and a half years after money was seized from Mr. Allisop's rice cooker and car wheels, the courts of Seychelles are also still seized of this matter. Yet, no counter affidavit has ever been filed explaining the provenance of the cash seized as Mr. Allisop was wont to simply do under POCA to have his funds released.
- [26] As we have pointed out, this appeal was ill advised. Under new POCA procedural rules published on 15<sup>th</sup> March 2016, interlocutory appeals are no longer permitted (vide Rule 12 Proceeds of Crime (Civil Confiscation) (Procedure) Rules, 2016.
- [27] Be that as it may, we are of the view that there has been an abuse of process in this case and we would like to send a warning in relation to wasted costs in the practice of law in the courts of Seychelles. Counsel should approach their work as officers of the court and with professionalism at all times. It is incumbent on them to advise their clients of the futility of frivolous actions which may also be perceived as delaying tactics and which result in costs being incurred by the opposing side.
- [28] Wasted costs are now granted by courts of many jurisdictions. In *Re a Barrister* (wasted costs order) [1994] 3 All ER 429 the court imposed a three-stage test to be adopted when considering a costs order: (1) Has there been an improper, unreasonable or negligent act or omission? (2) As a result, had any costs been incurred by a party? (3) Should the court exercise its discretion to order the lawyer to meet the whole or any part of the relevant costs?

[29] There is no statutory provision for wasted costs in Seychelles. However, we adopt the three stage approach of *Re a Barrister*. We are permitted to do this given our jurisdiction to make any order in the interests of justice based on our powers under Rule 31 (5) (supra).

[30] We find on limb 1 of the test that it was unreasonable to pursue this appeal. It was a hopeless case. As regards limb 2 it is clear that substantial costs were incurred by the FIU in defending this matter. In relation to limb 3 we are emphatic that this is a case that the Court should exercise its discretion to order the lawyers in this appeal to meet the whole of the costs of this case so far.

[31] As to which of the Appellant’s lawyers should be charged the costs, we leave this matter to be sorted out between them. In any event should they not come to an agreement they shall each bear half of the costs.

[32] In the circumstances we therefore dismiss this appeal and order that Counsel for the Appellant pay the costs of this appeal and of the court below.

**M. Twomey (J.A)**

**I concur:.** ..... S. Domah (J.A)

**I concur:.** ..... J. Msoffe (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 22 April 2016