

Delivered: 10 December 2019

ORDER

The Referral is dismissed with no order in respect of costs.

RULING

BURHAN J (GOVINDEN, DODIN JJ concurring)

[1] The applicant, Mr. Gianni Bordino, by notice of motion dated the 23rd of September 2019, made an application in the Supreme Court, requesting referral of a constitutional question to this court. The question subject to the referral was whether section 3(1) of the Proceeds of Crime (Civil Confiscation) Act 2008 (POCCCA) contravenes article 19(1) of the Constitution of the Republic of Seychelles (Constitution).

[2] The referral was made in terms of article 46(7) of the Constitution which reads:

“(7) Where in the course of any proceedings in any court, other than the Constitutional Court or the Court of Appeal, a question arises with regard to whether there has been or is likely to be a contravention of the Charter, the court shall, if it is satisfied that the question is not frivolous or vexatious or has already been the subject of a decision of the Constitutional Court or the Court of Appeal, immediately adjourn the proceedings and refer the question for determination by the Constitutional Court.”

[3] Accordingly, the matter was referred to this court. The referral emanates from an interlocutory application in terms of section 4 of the Proceeds of Crime (Civil Confiscation) Act, 2004. This provision empowers the court, in an inter partes application, to make an interlocutory order momentarily seizing property of a person who is in possession or control of specified property over the value of RS 50 000 and constitutes benefit from criminal conduct – whether directly or indirectly, or that was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes benefit from criminal conduct.

- [4] The interlocutory application was launched in the Supreme Court of Appeal on 3 April 2019 by the Government of Seychelles under case number 18/2019 before Twomey CJ. The Government sought an order to, inter alia, inhibit Mr. Bordino from disposing or dealing with certain specified property. The affidavit in support of the application, which was deposed by Superintendent Hein Prinsloo, made several allegations against Mr. Bordino and his wife. The gist of which was that Mr. Bordino and his wife were fugitives fleeing fraudulent bankruptcy charges in their home country of Italy, that they were engaged in concealment or disguising of the location of yachts that they did not own, and that they diverted huge sums of funds from accounts in Switzerland to Mahe, Seychelles and later purchased immovable property on the luxurious Eden Island in Mahe in the amount of USD 620 000. Mr. Bordino opposed the application, and filed detailed affidavits in opposition. His main defence was that the immovable property was purchased with his own savings, and with the help of his father in law. He also denied, in detail, to the allegations of charges against him and the claim that they were fugitives.
- [5] Hearings followed on 31 July 2019 during which Superintendent Hein Prinsloo and Mr. Bordino gave evidence. After these proceedings, the State delivered its submissions. Whereas Mr. Bordino submitted court proceedings and an affidavit by his attorney in Italy. Oral submissions were due to be heard by the Supreme Court on 25 September 2019, however, counsel for Mr. Bordino – Mr. Frank Elizabeth informed the court of its application to refer the constitutional question to this court. The Supreme Court reserved judgment in the seizure application pending this referral.
- [6] Before us, learned Counsel on behalf of the respondent filed preliminary objections prior to the hearing of the referral, on the basis that the Constitutional Court had no jurisdiction to hear this matter as:
- a) The referral had not arisen within the course of the proceedings as the application before the Supreme Court was a section 4 application for an interlocutory order under the POCCCA and not an ex-parte application under section 3 of POCCCA seeking an interim order.

- b) The question has not arisen as to whether there has been or likely to be a contravention of the Constitution.
- c) That the application for a referral is frivolous and vexatious in that the applicant is using the referral as a delaying tactic as the hearing of the case has been concluded and the matter was listed for judgment at the time the application for referral was made.

[7] At the hearing of the preliminary objection, counsel for the applicant, Mr. Frank Elizabeth, contended that the respondent was precluded from bringing a preliminary objection as he should have done so in the Supreme Court at the time the referral was made. Mr. Esparon, on behalf of the respondent, countered, saying that as both the Constitution and the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules, 1994 (Constitutional Court Rules) were silent on this issue, the Seychelles Code of Civil Procedure applied. The relevant provisions that Mr. Esparon seems to rely on are sections 90 and 91 of the Seychelles Code of Civil Procedure (SCCP) which read as follows:

“Any party shall be entitled to raise by his pleadings any point of law; and any point so raised shall be disposed of at the trial, provided that by consent of the parties, or by order of the court, on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.”

Section 91:

“If in the opinion of the court the decision of such point of law substantially disposes of the whole cause of action, ground of defence, set off or counterclaim, the court may thereupon dismiss the action, or make such other order therein as may be just.”

[8] Firstly, we are of the view on consideration of article 46(7) of the Constitution that the referred issue, clearly did not arise during the course of the proceedings in the Supreme Court as envisaged by article 46 (7). The referral seeks to challenge the constitutionality of section 3 of POCCCA. Section 3 of POCCCA deals with ex parte applicants to seize property. The application relating to Mr. Bordino was not ex parte. It was done inter

parties, in terms of section 4 of POCCCA. Section 3 of POCCCA does not have any relevance to the interlocutory application before the Supreme Court and therefore the objections have been properly raised and the referral fails.

- [9] Furthermore, the affidavit filed by Mr. Bordino in support of the referral has no factual basis. There is a general claim that section 3 of POCCCA violates article 19(1) of the Constitution, but no factual basis has been laid to substantiate the claim. The affidavit falls woefully short of the kind of detail and precision envisaged in rule 10 of the Constitutional Court Rules, which requires that the facts be stated in the application for referral.
- [10] Further, article 46(7), as mentioned above, provides that the Supreme Court shall, if it is satisfied that the question is not frivolous or vexatious or has already been the subject of a decision of the Constitutional Court or the Court of Appeal, immediately adjourn the proceedings and refer the question for determination by the Constitutional Court. This provision makes clear that there is a standard to be passed, before a matter is referred to this court. The referring court has to satisfy itself that the question is not frivolous or vexatious, nor should it already have been determined by this Court or the Court of Appeal. It is unclear, in this instance, to what extent the referring Court considered this threshold in referring the question to this Court.
- [11] We observe that the constitutionality of section 3 (1) of POCCCA has previously been challenged in the Constitutional Court in *Hackl v Financial Intelligence Unit* (2010) SLR 98, which was upheld by the Court of Appeal in *Hackl v Financial Intelligence Unit (FIU) & Anor* (SCA 10 of 2011) [2012] SCCA 17 (31 August 2012); (2012) SLR 225. These judgments found the provision constitutionally compliant. Thus, the question in the referral has already been the subject of a decision of the Constitutional Court and the Court of Appeal in accordance with article 46 (7). It may not be reconsidered.

[12] For the aforementioned reasons, we uphold the preliminary objections and dismiss the referral. No order is made in respect of costs.

Burhan J

Govinden J

Dodin J