ELLAYAH D & ORS V FINANCIAL INTELLIGENCE UNIT

2023 SCJ 359

Serial No. 492/2023

THE SUPREME COURT OF MAURITIUS

(Before the Judge in Chambers)

In the matter of:

1. **Mr Danesh Ellayah**
2. **Smita Adnarain Ellayah**
3. **DNS International Limited**

Applicants

v

FINANCIAL INTELLIGENCE UNIT

Respondent

JUDGMENT

On 5 April 2023, applicants Nos. 1, 2 and 3 made an ex parte application for the rescission of paragraphs B and C of a Restriction Order which I had previously made on 28 March 2023 in respect of their property. The Restriction Order was granted following an ex parte application made by the respondent pursuant to sections 27 and 30 of the Asset Recovery Act ("the ARA").

I refused to grant the rescission order and instead issued a summons on the respondent to show cause why the order prayed for should not be granted.

The respondent did not object to the rescission of the Restriction Order quoad the property of applicant No. 2 but is objecting to the application quoad the property of applicants Nos. 1 and 3. In the present proceedings, we are therefore only concerned with the application for a rescission of the Restriction Order quoad the property of applicants Nos. 1 and 3 (hereinafter referred to as "the applicants").

PRELIMINARY OBJECTIONS

At the outset I shall deal with preliminary objections in law which have been raised by the respondent. They are reproduced verbatim below –

> *"5. Applicant No. 3 purports to have duly authorised Applicant No. 1, by way of Board resolution, to affirm AA1 on its behalf. The Respondent avers that Annex E of AA1 (purporting to be the said Board resolution) is, in truth and in fact, a copy of shareholder resolutions and not a proper Board authorisation conferring the relevant authority to Applicant No. 1 to represent Applicant No. 3 in the present matter before the Honourable Judge in Chambers of the Supreme Court of Mauritius*.
>
> *6. In any event, the Respondent stands advised that any Board resolution and/or shareholder resolution emanating from a foreign entity and drawn up outside Mauritius is deemed to be a power of attorney or agency under private signatures which ought to be deposited with a Notary Public in Mauritius and be filed before the Registry of the Supreme Court in accordance with Section 2(1) and 3 of the Deposit of Powers of Attorney Act ("DPA").*
>
> 7. *The Respondent stands advised that Annex E of AA1 is not compliant with the provisions of the DPA, and is therefore null and void to all intents and purposes. Applicant No. 1 is therefore not properly authorised to affirm the present affidavit on behalf of Applicant No. 3.*
>
> 8. *The Respondent avers that the present application is therefore fundamentally flawed procedurally, and ought to be set aside with costs*."

It can be gleaned from the above that the preliminary objections can be summed up under two limbs: -

1. without a proper board authorisation conferring the relevant authority upon applicant No.1 to represent applicant No.3 in the present matter, the former cannot represent applicant No. 3 (a company) and swear an affidavit on its behalf;

2. any board resolution and/or shareholder resolution emanating from a foreign entity and drawn up outside Mauritius is deemed to be a power of attorney or agency. In the circumstances, the provisions of the Deposit of Powers of Attorney Act (sections

2 and 3. should have been adhered to. Since the applicants have not complied with the said sections, applicant No. 1 cannot represent applicant No. 3.

Learned Counsel for the applicants argued that the Companies Act allows for one-person companies. Further section 128(7)(b) of the Companies Act defines the word "Board" or "Board of directors", in relation to a company, as meaning where the company has only one director, that director. Applicant No.1 has averred that he is the sole shareholder and sole director of applicant No. 3 since 24 February 2022. The law confers the power on applicant No. 1, who is in law the board of directors, to represent the company. The present case is different from that of **ENL Limited & Anor v Independent Commission Against Corruption** **[2023 SCJ 190]** in that, here, applicant No. 1 is authorising himself to represent the company. He further argued that a shareholder's resolution has a much higher "value" than a board resolution and, since the shareholder's agreement allows applicant No. 1 to represent the company, there is no merit in the first limb of the preliminary objection.

With regard to the second limb of the preliminary objection, learned Counsel for the applicants submitted that the Deposit of Powers of Attorney Act ("the DPA") applies to acts drawn outside Mauritius and the documents which are attached to the applicants' affidavit was drawn up in Mauritius. He further submitted that the burden is on the respondent to prove that the Shareholders Resolution was drawn up outside Mauritius.

Learned Counsel for the respondent, for his part, argued that applicant No. 3 is a foreign company and is therefore outside Mauritius. The case of **ENL** (supra) clearly provides that there needs to be a Board resolution for a person to represent a company in court proceedings and this defect cannot be cured. He also submitted that even if the Shareholders Resolution validly confers power on applicant No. 1 to represent the company, before any use can be made of the Shareholders Resolution, it should, in accordance with the DPA, have been deposited with a notary and filed in the registry. He argued that since there has been no compliance with the provisions of the DPA, no reliance can be placed on the Shareholders Resolution.

I shall first deal with the second limb of the preliminary objection. It is undisputed that applicant No. 3 is a foreign company. The question that arises is whether the procedure set out under sections 2 and 3 of the DPA should be followed for the Court to be able to rely on the Shareholders Resolution.

Sections 2 and 3 of the DPA are reproduced below: -

"***2. Deposit of power of attorney***

(1) Where any person who has left or leaves Mauritius has appointed or appoints an attorney or agent in Mauritius to represent him in any capacity in any proceedings before a Court, by an authentic deed, or by a deed under private signatures, the notary who has drawn up such deed or who received or receives the deposit of such power of attorney, or the holder of any such power of attorney under private signatures, where it has not been deposited with a notary, shall within 15 days of the date of such power of attorney or of the date of the deposit thereof with the notary file in the Registry, where the same may be inspected on payment of the fee provided in the Legal Fees and Costs Rules 2000, an extract from such power of attorney relative to such powers of agency and to the names of such agents.

(2) No party to any proceedings before a Court shall pretend ignorance of any such power of attorney so deposited in the Registry.

3. Foreign deed of appointment

Where the power of attorney, whether authentic or under private signatures, appointing an attorney or agent has been or is drawn up outside Mauritius, the attorney or agent appointed shall deposit the same with a notary in Mauritius before any use is made of it and section 2 shall apply to it."

Section 2 of the DPA clearly concerns a person who has left or leaves Mauritius and who appoints an attorney or an agent in Mauritius while section 3 concerns a Power of Attorney drawn up outside Mauritius. Learned Counsel for the applicants submitted that the question of compliance with the provisions of the DPA does not arise as the Shareholders Resolution has been drafted in Mauritius and applicant No. 1, the sole shareholder and director of applicant No. 3, is in Mauritius.

Ex facie the affidavits which have been filed before me, the address of applicant No. 1 is stated as being in Moka. I also note that applicant No. 1 was even present in Court on a few occasions when the case was called before me. Further, there is no contradictory evidence before me from the respondent to support the contention that the Shareholders Resolution which bears the signature of applicant No. 1 (the sole shareholder and director of applicant No. 3) has been drawn up outside Mauritius.

In the circumstances, I am of the considered view that there is no need for compliance with the provisions of the DPA in the present case. I accordingly set aside the second limb of the preliminary objection in law.

In so far as the first limb of the preliminary objection is concerned, I note that in the case of **ENL** (supra), the Court of Civil Appeal stated that: –

> *"It is clear under our law, that in order for a person to represent a company in legal proceedings, unless he is so authorised under the Articles of the company, that person must be duly authorised by the Board pursuant to a Board Resolution. The Court must be satisfied that there has been a resolution duly passed by the Board to authorise the person to represent the company in legal proceedings which would entitle him to give evidence on behalf of and binding the company."*

In the case at hand, the applicants have attached the Amended Memorandum and Articles of Association of DNS International Limited (applicant No. 3) showing that applicant No. 1 is the sole shareholder of the applicant No. 3 (Annex B of affidavit dated 5 April 2023). The applicants have also annexed a Shareholders Resolution with the heading, "*Approving Director to represent the company before the Supreme Court of Mauritius*" (Annex E of affidavit dated 5 April 2023), which provides that the sole shareholder of the company, applicant No. 1 with effect from 4 April 2023 has agreed to –

1. authorise himself, the director of the company to represent the company before the Supreme Court of Mauritius; and

2. the company appoints and authorises applicant No. 1 as the authorised signatory with full powers and authority for any application before any Court with regard to the Judge's Order received from the Supreme Court dated 29 March 2023 (124333-SN: 431/2023).

The question that I need to determine is whether the Shareholders Resolution is sufficient for applicant No. 3 to authorise applicant No. 1 to represent applicant No. 3 despite the fact that there is no Board resolution before me.

I note that the respondent has not disputed that applicant No. 1 is the sole director and shareholder of applicant No. 3. Further, it is amply clear from the Shareholders Resolution (Annex E) that the sole shareholder, who is also the sole director, has authorised himself (applicant No. 1) to represent applicant No. 3 in all proceedings regarding the Restriction Order.

True it is that in the case of **ENL** (supra), the Court of Civil Appeal held that under our law for a person to represent a company in legal proceedings, he must be duly authorised by the Board pursuant to a Board Resolution unless he is so authorised under the Articles of the company, however, as stated in **Fuel Transport Holdings Ltd v Primefuels Holdings Limited** **[2018 SCJ 350]**, the Judicial Committee of the Privy Council has also "*time and again encouraged our courts to be less technical and more flexible in their approach to jurisdictional issues and objections (vide* ***M. Toumany and Anor V. M. Veerasamy*** ***[2010 PRV 17]****)".* In the present case since applicant No. 3 is a one-person company having applicant No. 1 as its sole shareholder and its sole director, I am of the view that the Shareholders Resolution is sufficient to allow applicant No. 1 to represent applicant No. 3 in the present proceedings.

For all the reasons given above, I find that there is no merit in the first limb of the preliminary objection raised by the respondent and I accordingly set it aside.

Both limbs of the preliminary objection having been set aside, I shall now turn to the merits of the application.

I must straightaway deal with the point raised by the respondent that if the preliminary objection is dismissed, applicant No. 3 being a foreign entity which does not possess immovable property in Mauritius must furnish security for costs in order to proceed with the present matter. The respondent therefore moves that applicant No. 3 furnishes security for costs in the sum of Rs.250,000.

All the assets of applicant No. 3 are restricted pursuant to my Restriction Order dated 28 March 2023. In the circumstances, I vary the Restriction Order dated 28 March to allow

applicant No. 3 to withdraw the sum of Rs 250,000 from any one of its accounts to provide security for costs in the present matter.

ON THE MERITS

I have duly considered the affidavits filed on record and the documents annexed thereto as well as the oral and written submissions of learned Counsel for the parties.

In their first affidavit dated 5 April 2023, the applicants have invoked the following grounds in support of the application –

A. "*The respondent is wrong in law as a 'Restriction Order' is an "action in rem";*
B. *The Respondent has failed to make a 'full and frank disclosure' to the Hon. Judge in Chambers;*
C. *There is no evidence and/or risk of dissipation of assets; and*
D. *There is no 'reasonable' suspicion or reasonable cause to believe in the present matter.*"

The applicants have also raised the following grounds in their written submissions ("the submissions grounds") –

(a) the respondent has acted ultra vires section 61 of the ARA;
(b) there has been a breach of section 27(5)(a) of the ARA with regard to applicant No. 3;
(c) an action under section 27 of the ARA is against an asset and not against an individual;
(d) there has been non-compliance with the "Consolidated National Procedures for Confiscation"
(e) there has been non-compliance with sections 27(1)(a) and (b) of the ARA;
(f) there has been a breach of section 15(3) of the FIAMLA;
(g) there have been breaches of section 20 of the FIAMLA and principle 32 of the "Egmont Principles of Exchange."

I shall deal with the above grounds seriatim before turning to grounds A to D.

(a). **<u>the respondent has acted ultra vires section 61 of the ARA</u>**

It is undisputed that the authorities in Dubai have frozen the applicants' assets in Dubai. It is in this respect that it was argued on behalf of the applicants that the respondent has acted ultra vires section 61 of the ARA.

The affidavits filed before me are silent as regards the steps that have been taken for freezing the applicants' assets in Dubai. In any event, it is important to stress that section 61 (which is reproduced below for ease of reference) simply confers a discretion on the Attorney General to initiate legal proceedings in a court of a foreign State.

"**61. Proceedings in foreign territory**

> *The Attorney-General may initiate legal proceedings in a court of a foreign State, subject to the provisions and requirements of the national law of the foreign State, in order to establish title to, or ownership of, property acquired through the commission of an offence which is also an offence in accordance with Part III of the UN Convention against Corruption 2003, and to seek recovery of that property.*"

Further, pursuant to section 61, the exercise of the discretion is subject to the provisions and requirements of the law of the foreign State. I am obviously not conversant with the law of Dubai and thus cannot pronounce myself on the question as to whether it was the Attorney General who should have initiated proceedings in Dubai for freezing the applicants' assets in Dubai.

It is relevant to note that section 61 applies in cases where the legal proceedings are being initiated to establish title to, or ownership of, property acquired through the commission of an offence which is also an offence in accordance with Part III of the UN Convention against Corruption 2003. There is clearly no evidence before me that any such proceedings were initiated in Dubai.

At any rate, it does not follow from a reading of section 61 that the Attorney General is the only authority that may take actions for initiating proceedings in a foreign State. In the circumstances I set aside ground (a).

(b). there has been a breach of section 27(5)(a) of the ARA with regard to applicant No. 3

Section 27(5)(a) of the ARA is reproduced below: -

"*(5)(a) Where a Judge grants a Restriction Order, the Enforcement Authority shall, within 21 days from the making of the Order or such longer period as the Judge may direct, give notice of the Order –*

(i) to every person known to the Enforcement Authority to have an interest in the property;

(ii) such reporting person as it considers appropriate, in such form and manner as it may determine; and

(iii) such other person as the Judge may direct."

Although the above ground was raised by learned Counsel for the applicants, he very fairly drew my attention to the fact that in the case of **Jeebun R S v Financial Intelligence Unit [2023 SCJ 173]**, it was observed by the learned Judge that the ARA does not provide for the consequence of a failure to serve the notice of the Restriction Order within the timeframe provided for under section 27(5). Taking the above into consideration, the learned Judge held that the:

"respondent's failure to comply with the time specified in section 27(5) of the ARA in so far as the giving of the notice to applicant of Restriction Order A is concerned, is not fatal <u>on the specific circumstances of the present case as no significant prejudice is caused to applicant</u>."

I fully subscribe to the views of the learned Judge in the above case. Further, I note that, in their affidavits, the applicants have not referred to any prejudice which they may have suffered as a result of non-compliance with section 27(5)(a). I accordingly set aside ground (b).

(c). <u>an action under section 27 of the ARA is against an asset and not against an individual</u>

Ground (c) which can conveniently be dealt with together with ground A will be dealt with when considering ground A below.

(d). there has been non-compliance with the "Consolidated National Procedures for Confiscation"

It was argued by learned Counsel for the respondent that the facts on which the applicants rely to raise the above ground have not been averred in their affidavit. In the circumstances, the Court cannot adjudicate thereon.

I entirely agree with the stand of Counsel for the respondent and fully subscribe to the views expressed by the learned Judge in the case of **Jeebun** (supra) that it is improper for learned Counsel to refer to facts and matters not averred in the affidavits. Ground (d) is set aside.

(e). there has been non-compliance with sections 27(1)(a) and (b) of the ARA

Ground (e) will be considered together with grounds B and D below.

(f). there has been a breach of section 15(3) of the FIAMLA

Learned Counsel for the applicants referred to the following extract at paragraph 15 of the respondent's first affidavit –

> *"…The Respondent also avers that a Suspicious Transaction Report was filed at its level when the Management Company of DNS Consultancy Services Ltd in Mauritius did not provide the requested supporting documents/information to the relevant bank in relation to two outward transfer instructions in USD in favour of the accounts of DNS International Limited held in the United Arab Emirates."*

It was his contention that Suspicious Transaction Reports ('STRs') "*are confidential as they deal with mere suspicion and this is precisely why section 15(3) of the FIAMLA prevents an STR from being admitted as evidence, in any court proceedings*".

The relevant extracts of the Financial Intelligence and Anti-Money Laundering Act ("the FIAMLA") are reproduced below-

"15. Lodging of reports of suspicious transactions

(1) Every report under section 14 shall be lodged with the FIU.

(2) …

(3) No report of a suspicious transaction shall be required to be disclosed, or be admissible as evidence, in any court proceedings."

It is amply clear from a reading of section 15(3) that the FIU **cannot be compelled** to disclose any report of a STR in any court proceeding. However, there is nothing in the said section which precludes the FIU where it considers it appropriate to do so from disclosing a report of an STR. It is for the FIU to decide whether it should do so.

Pursuant to section 15(3) of the FIAMLA, no report of a STR is admissible in evidence. However, as can be gleaned from the extract of the respondent's affidavit reproduced above, it has adduced evidence regarding a STR raised in relation to two outward transfer instructions in USD in favour of the accounts of DNS International Limited held in the United Arab Emirates.

Although adducing a report of a STR would be in breach of 15(3) of the FIAMLA, the FIAMLA is silent as regards the consequence of such a breach. I note that the applicants have not pointed to any prejudice caused to them through the above evidence. In the circumstances, I consider that the Court should simply ignore the evidence adduced. Ground (f) is set aside.

(g). there have been breaches of section 20 of the FIAMLA and principle 32 of the "Egmont Principles of Exchange"

It was submitted by learned Counsel for the respondent that in support of ground (g), the applicants make statements of fact at paragraphs 53 and 54 of their submissions which are not in evidence. I agree. For the reasons given when considering ground (d) above, ground (g) is dismissed.

A. The respondent is wrong in law as a Restriction Order is an "action in rem"

(c) an action under section 27 of the ARA is against an asset and not against an individual

Under grounds (c) and A, learned Counsel for the applicants argued that the restriction order should be rescinded because the respondent has brought the action *in*

personam while in fact a rescission order can only be brought *in rem*. He also argued that the Restriction Order should clearly identify the property in respect of which it is given.

It is clear from section 27(1)(a) of the ARA that where property is reasonably believed by the Enforcement Authority to be recoverable under Sub-Part B of this Part and to be proceeds, a benefit or an instrumentality or terrorist property, **it may apply to a Judge for a Restriction Oder in respect of that property**. [emphasis added]

The Order in so far as it concerns the applicants reads as follows: -

> "*It is hereby ordered that a Restriction Order, BE AND SAME IS GRANTED …*
>
> *B. requiring all banks and non-bank financial institutions to detain all sums of money held by Smita Ellayah, …, Danesh Ellayah, …, DNS International Limited ….in all accounts held by them;*
>
> *C. authorising and requiring the appointed and relevant company secretary and/or gérant and/or trustee(s) to detain all shares or interests which the abovenamed parties, namely Smita Adnarain Ellayah, … Danesh Ellayah…, DNS International Limited… may hold or may have in any company, société, partnership or trust*;"

I do not consider that the question before me is one that requires me to consider whether a Restriction Order is an action which is *in rem* or *in personam* but rather whether the Restriction Order is in breach of the provisions of the ARA. It is evident from a reading of the Restriction Order that, in line with section 27(1)(a) of the ARA, it is in respect of the applicants' property. Learned Counsel for the applicants simply submitted that the respondent brought the action *in personam*, while in fact a rescission order can only be brought *in rem*, without in any manner showing how the wording of the present Order fails to comply with section 27(1)(a). Further, contrary to the submission made on behalf of the applicants, section 27 does not require that the property subject matter of the Order be specifically identified. I am of the view that once the Order relates to property which is identifiable and which is recoverable, the Judge may grant the Order provided, of course, that the other conditions specified under section 27 are met. In the circumstances, I do not find any merit in grounds (c) and A which are set aside.

C. There is no evidence and/or risk of dissipation of assets

Learned Counsel for the respondent argued that there is evidence of a risk of dissipation of assets in the present case. He relied on the following averments made by the respondent which remained unrebutted by the applicants -

a. *"On 13 March 2023, after the press had leaked the information that the Respondent had unsuccessfully applied for a restriction order, the USD account of another party subject to a Restriction Order witnessed an outflow of a consequential amount in USD in favour of* ***Field Joiners Pty Ltd****, a foreign company holding a bank account with a foreign bank.*

b. *During its investigation on the 13 March 2023, the Respondent noted that the bank account of Anglomobility DMCC (with the Ultimate Beneficial Owner being Applicant No1) in United Arab Emirates had also witnessed outflows of a huge sum in USD in favour of Field Joiners Pty Ltd. The Respondent is reliably informed that shortly after the aforementioned transfer of funds from Anglomobility DMCC, the latter company became subject to a restriction/freezing order by the Financial Intelligence Unit of United Arab Emirates.*

c. *The Respondent avers that the abovementioned USD transfers in favour of the same foreign company namely Field Joiners Pty Ltd confirms a modus of dissipation of assets."*

With regard to the above averments, firstly we are completely in the dark as to who is the other party referred to in paragraph a. whose property is subject to a Restriction Order. It is also unclear what the respondent means by the term "consequential amount" in paragraph a. Further in paragraph b, the respondent refers to "outflows of a huge sum" which is very vague; what is huge for the common man in Mauritius may obviously not be huge for the applicants when one considers the sums of money which the documents annexed to the applicants' affidavit show has been credited into applicant No. 3's account.

All the above averments are very vague and the Court is in the dark as regards the role of the applicants in the above transfers and why the respondent considers that the applicants' property needs to remain under the purview of the Restriction Order. In any

event, before considering whether there is a risk of dissipation of assets, one has to determine whether the assets should first and foremost continue to fall within the purview of the Restriction Order. This will be determined under grounds (e), B and D below.

Grounds (e), B and D which will be considered together are set out below:

(e) there has been non-compliance with sections 27(1)(a) and (b) of the ARA

B. The Respondent has failed to make a "full and frank disclosure" to the Hon Judge in Chambers

D. There is no "reasonable" suspicion or reasonable cause to believe in the present matter

Under the above grounds, the submissions of learned Counsel for the applicants are to the effect that the Restriction Order should be rescinded as the respondent cannot have reasonable grounds to believe that the property referred to in the application is proceeds, a benefit, an instrumentality or terrorist property and that it has failed to make a full and frank disclosure when making the application for the Restriction Order.

Learned Counsel for the respondent, for his part, firstly submitted that the threshold for making an Order is that the authority has a good arguable case. In support of his submission, he relied on paragraph 7 of the case of "**In the matter of the Director of the Assets Recovery Agency and In the matter of Gerard Malachy Keenan and Terence Fergal Keenan and Claire Martin Keenan, Michelle Anne Keenan, Kilcluney Beverages Limited, Corrina Confectionary Limited, Moldova Wines Limited And in the matter of the Proceeds of Crime Act 2002 [2005] Northern Ireland Queen's Bench Division 67 (the Keenan case)**" which provides as follows: -

> "*In order to obtain an interim receiving order the Agency is required to satisfy the court, on the balance of probabilities, that there is a good arguable case that property to which the application for the order related is or includes recoverable property and, that, if any of it was recoverable property, it is associated property in accordance with the provisions of Section 246 (5) of POCA.[…] The "good arguable case" test corresponds with the test generally applied by the court with regard to applications for Mareva Injunctions which may be sought by the parties to civil litigation.*"

Learned Counsel for the respondent also relied on paragraph 32 of the case of **Director of the Assets Recovery Agency v Kean [2007] All ER 286 (the Kean case)** where the Court stated: -

> "*It is a precondition for the making of an order that the ARA* [Assets Recovery Agency] *has a good arguable case that the order relates to recoverable property or associated property[…].*"

I must straightaway state that I do not agree that the threshold for making an Order under section 27 of the ARA is that the authority has a good arguable case. The cases of **Keenan** and **Kean** which were referred to by learned Counsel for the respondent concern orders which were granted under section 246 of the Proceeds of Crimes Act 2002. The relevant part of section 246 of the said Act reads as follows: -

"246

…

…

…

4. The court may make an interim receiving order on the application if it is satisfied that the conditions in sub-sections (5) and, where applicable, (6) are met.

5. The first condition is that there is a good arguable case –

(a) that the property to which the application for the order relates is or includes recoverable property, and

(b) that, if any other is not recoverable property, it is associated property."

It can be gathered from the above that one of the conditions which the enforcement authority has to satisfy when making an application for an interim receiving order is that it has a good arguable case. However, the wording of section 27 of the ARA, with which we are here concerned, is different from that of section 246. Section 27 reads as follows: -

"27. Restriction Order

(1) (a) Where property is **reasonably believed by the Enforcement Authority** to be recoverable under Sub-Part B of this Part and to be proceeds, a benefit, or an instrumentality or terrorist property, it may apply to a Judge for a Restriction Order in respect of that property.

(b) ...

(c) …

(d) …

(2) The Judge shall, where he is satisfied that **there are reasonable grounds to believe** that the property referred to in the application is proceeds, a benefit, or an instrumentality or terrorist property, make a Restriction Order which may –

(a) authorise, require or secure the delivery up, seizure, detention or custody of the property; or

(b) …"

Thus, under section 27(2) of the ARA, the test that has to be applied by the Judge when deciding whether to grant a Restriction Order is whether there are reasonable grounds to believe that the property referred to in the application is proceeds, a benefit, or an instrumentality or terrorist property. The Judge obviously decides whether there are such reasonable grounds on the basis of the evidence adduced by the enforcement authority, in the present case, the respondent.

I find it relevant to refer to the following extract from the case of **Assets Recovery Agency (Ex-parte) (Jamaica) 2015 UKPC 1**, where the Judicial Committee of the Privy Council explained what is meant by the term reasonable grounds to believe –

"*Reasonable grounds for believing a primary fact, such as that the person under investigation has benefitted from his criminal conduct, or has committed a money laundering offence, do not involve proving that he has done such a thing, whether to the criminal or civil standard of proof. The test is concerned not with proof but the existence of grounds*

> *(reasons) for believing (thinking) something, and with the reasonableness of those grounds. Debate about the standard of proof required, such as was to some extent conducted in the courts below, is inappropriate because the test does not ask for the primary fact to be proved. It only asks for the applicant to show that it is believed to exist, and that there are objectively reasonable grounds for that belief. Nor is it helpful to attempt to expand on what is meant by reasonable grounds for belief, by substituting for 'reasonable grounds' some different expression such as 'strong grounds' or 'good arguable case'. There is no need to improve upon the clear words of the statute, which employs a concept which is very frequently encountered in the law and imposes a well-understood objective standard, of which the judge is the arbiter*."

In the case at hand, pursuant to section 27(2), I decided that there were such reasonable grounds on the basis of the affidavit of the respondent's director in support of the application.

Secondly, learned Counsel for the respondent argued that there is no necessity for a detailed specification of the offences resulting in proceeds. In this regard, he relied on paragraph 38 of the **Kean** case where Stanley Burton J states that: -

> *"[…] I reject the suggestion, made in correspondence by Mr Kean's solicitors, that it is necessary for the ARA to specify the offence or offences which it alleges resulted in the moneys invested in the Property. It is implicit in the provisions of section 242 (2) (b) that it is sufficient for the ARA to identify kinds of conduct, such as drug trafficking, as Sullivan J held in R (the Director of the ARA) v Green [2005] EWHC 3168 (Admin) at [17]."*

He argued that, in its application for the Restriction Order, the respondent did identify and explain two sets of offences concerning the applicants and also referred to 'recoverable property' as envisaged by the ARA. He therefore submitted that the respondent did comply with section 27(1) of the ARA and that there is no merit in the submissions made on behalf of the applicants that there was non-compliance with section 27(1) (a) and (b) of the ARA. Indeed, the respondent did identify two sets of offences concerning the applicants in its application.

However, it is important to underline that the application for the Restriction Order was made on an ex parte basis and, as stated above, it was granted solely on the basis of the affidavit sworn by the respondent's director to which documents were attached. Since I granted the Restriction Order, it stands to reason that I was satisfied on the basis of the affidavit evidence adduced before me, at that point in time, that the conditions for making an application under section 27(1) were satisfied and that there were reasonable grounds to believe that the property referred to in the application was proceeds, a benefit, or an instrumentality or terrorist property and that it was recoverable. However, it does not mean that simply because I granted the Restriction Order, the said Order cannot, in the light of the evidence now adduced, be rescinded or varied. I am at this stage of the proceedings in presence of affidavits from the applicants where they have set out their version regarding the property which was not before me when the Restriction Order was made. I also have before me the response of the respondent to the averments of the applicants. The question that I have to determine is whether there is merit in the applicants' contention that the Restriction Order should be rescinded in the light of the evidence now before me.

The gist of the averments of the applicants' first affidavit (dated 5 April 2023) in support of the application is as follows: -

1. applicant No. 1 is the sole shareholder and sole director of applicant No. 3 since 24 February 2022;
2. applicant No. 3 is a company incorporated on 15 August 2016 in the UAE and its activities consist of, inter alia, supplying specialised equipment and software for "Homeland Security and combatting organised crime" to the Government of Mauritius and the supply and representation of Fintech and banking software to private companies, namely intellect Design Arena FZ-LLC, Mauritius Telecom Ltd and DNS Consult Ltd;

3. applicant No. 3 has derived most of its income from payments received from the Government of Mauritius on behalf of the Security Division of the Prime Minister's Office, which amounts to **USD 15, 179, 737.39**;

4. since applicant No. 3's creation and the opening of both its bank accounts in USD and EUR, there have been 34 credit entries in those bank accounts;

5. the source, nature and description of the funds deposited into the bank accounts are as set out in Annexes G to G11 attached to their affidavit;

6. the Government of Mauritius has also effected payments from 28 June 2016 to 17 May 2017 for the total sum of **USD 9,300,000/-** and **EUR 525,215.52** which was paid to DNS Consultancy Services Ltd, with regard to purchase orders for the Security Division, Prime Minister's Office;

7. DNS Consultancy Services Ltd is now a defunct company which no longer operates any bank account and the funds available, after payments had been made to suppliers, were transferred as working capital to a newly set up company, i.e. applicant No. 3, DNS International Ltd, on 30 August 2016;

8. the only other amounts credited to both of applicant No. 3's bank accounts in USD and in EUR are mainly income derived from private sector client companies and refund of loans granted to related companies as explained in applicants' affidavit;

9. applicant No. 1 has only two sources of monthly income, firstly his salary of USD 10,000/- from Anglomobility DMCC and a monthly net salary of Rs 207,257/- as Executive Director of MobiMEA Ltd. He has also received dividends and bonuses from Anglomobility DMCC as well as refund of deposit which was paid out from his personal account. He attached a copy of his last bank statement (ANNEX J);

10. there are no proceeds, benefits, instrumentality or terrorist property with regard to them and/or their property and to suggest otherwise is preposterous, absurd, baseless and vexatious.

The applicants are relying on the above averments in support of their contention that there are no proceeds, benefits, instrumentality or terrorist property with regard to them and/or their property and are therefore praying that the Restriction Order be rescinded.

In reply to the above averments, the respondent has, in a nutshell, averred that: –

1. it denies that paragraphs B and C of the Order should be rescinded on the grounds of objection raised by the applicants (grounds A to D) and also avers that the objections in law will be addressed in submissions;

2. it **takes note of the averments** made by the applicants that:–

    (a) applicant No. 3 has derived most of its income from payments received from the Government of Mauritius on behalf of the Security Division of the Prime Minister's Office, which amounts to **USD 15, 179, 737.39**;

    (b) since applicant No. 3's creation and the opening of both its bank accounts in USD and EUR, there have been 34 credit entries in those bank accounts;

    (c) the source, nature and description of the funds are as set out in Annexes G to G11 attached to the applicants' affidavit,

and **puts the applicants to the proof thereof**, more specifically in relation to any contracts awarded (by way of tender or otherwise) to applicant No. 3 from January 2015 until March 2023 by the Government of Mauritius and Government related entities including Mauritius Telecom and the Mauritius Police Force; [emphasis added]

3. it denies that there is no evidence or risk of dissipation of assets and avers that after the press had leaked information that the respondent had applied for a Restriction Order: -

    (a) the USD account of another party subject to a restriction order witnessed an outflow of a consequential amount in USD in favour of Field Joiners Pty Ltd a foreign company holding a bank account with a foreign bank;

    (b) during its investigation on 13 March 2023, the respondent noted that the bank account of Anglomobility DMCC (with the ultimate beneficial owner being applicant No. 1) in United Arab Emirates had also witnessed outflows of a huge sum in USD in favour of Field Joiners Pty Ltd;

    (c) the respondent is reliably informed that shortly after the aforementioned transfer of funds from Anglomobility DMCC, the latter company became subject to a restriction/freezing order by the Financial Intelligence Unit of United Arab Emirates;

    (d) the abovementioned USD transfer is in favour of the same foreign company, namely Field Joiners Pty Ltd, confirms a modus of dissipation of assets;

(e) it denies that there are no proceeds, instrumentality or terrorist property with regard to them and/or their property.

In their second affidavit dated 2 June 2023, the applicants have averred that they have communicated the following documents to the respondent's legal advisers:–

(I) all relevant bank statements of applicant No. 3 which show that the Government of Mauritius has paid a total of **USD 15, 179,737.39** into applicant No. 3's bank account held at Emirates NED in the UAE and all relevant sums received and bank transfers are included therein to show the legitimate nature of the monies paid into the bank account (Annex A1);

(II) a letter from the Prime Minister's Office conforming that payments were effected by the Accountant General of the State of Mauritius. The applicants have also provided the bank statements of DNS Consultancy Services, from Afrasia Bank confirming that **USD 9, 300,000** were paid by the State of Mauritius (Annex A2);

(III) DNS Consultancy Services is now defunct and accordingly its funds were transferred to the applicant No. 3 as working capital;

(IV) the latest available bank statement of applicant No. 3 confirming the balance of USD 5,592,952.06 in the Emirates NBD account of applicant No. 3, in which the State of Mauritius has effected payments of **USD 15, 179, 737.39** (Annex A3).

I must straightaway observe that the annexures referred to in the applicants' affidavit ex facie support the contention of the applicants made in their affidavit. However, the applicants have not provided any documentary evidence to substantiate their averment that the funds of DNS Consultancy Services were transferred to the account of applicant No. 3.

In reply to the above averments, the respondent has in its affidavit dated 6 June 2023 averred that –

"*5.1. The letter from the Prime Minister's Office dates back to 23 June 2016 and only certifies that the Accountant General has been directed to pay **USD***

5,080,000 *to DNS Consultancy Services Ltd. No other information is provided and the purpose of the payment is unknown. There is ambiguity in respect of this payment made by the Government of Mauritius in 2016 and the alleged pressing need for payment now in 2023- this will require further investigation at the level of the Respondent;*

5.2 The Respondent can only ascertain the genuineness of the transactions contained in the bank statements for the United States Dollar ("USD") 00…21 account, and the Euro account 00…10 after a thorough analysis of all corresponding invoices and receipts.

5.3 Some of the transfers effected are doubtful, such as a payment made on 29 August 2016 of USD 2,075.090 (representing part of funds received from the Government of Mauritius) made by DNS Consultancy Services Ltd to DNS International Ltd (allegedly for working capital for a new company) during which time, DNS Consultancy Services Ltd continued to received payments from the Government of Mauritius and was making payments to Verint Systems Ltd and others. Similarly, DNS Consultancy Services on 29 August 2016 made a payment to DNS International Ltd (allegedly for working capital for a new company) of EURO 70,072.05.

5.4 The payments into the USD account come mostly from two sources:

- *i. Government of Mauritius – USD 9,300,000; and*
- *ii. Verint Systems Ltd – USD 84,428.07 (albeit, the purpose being unclear).*

5.5 Total debits from the account are USD 9,384,428.07/- and there are unexplained payments, as follows:

- *i. Smita Ellayah – Loan to Shareholder – USD 250,000*
- *ii. Sankara Lingam Krishnamoorthy – USD 5,080.00 (excluding bank charges)*
- *iii. Nilandri Biswas – USD 7,454.80 (excluding bank charges)*
- *iv. DNS International Ltd – USD 3,835,110*

5.6 The payments into the EURO account come mostly from two sources:

- *i. Government of Mauritius – EURO 525,215.52*

ii. Verint Systems Ltd – EURO 171,653.10 (albeit, the purpose is unclear is unclear since no contract has been provided)

5.7 Total deposits into the account are EURO 696,521 and there are unexplained payments totalling EURO 200,208.64/- as follows:

i. Smita Ellayah – Two loans to Shareholder, totalling EURO 130,136.59 (in respect of which there is no proof of repayment)

ii. DNS International Ltd – EURO 70,072.05"

There is, notably, before me the following evidence in support of applicant No. 3's contention that its property is not proceeds, benefits, an instrumentality or terrorist property –

1. Annex G which is a Purchase Order issued on 23 October 2017, bears the information which is being reproduced verbatim below:

"Supplier name: DNS International LTD
PO Box …
DUBAI, UAE

Customer name: Security Division
Prime Minister's Office
Government of Mauritius
MAURITIUS

Reference:
Verint's Proposal Rev 1.2 June 2017
Dated 05 June 2017

Scope of Order: Extension to new location

Item	*Description*	*Price (USD)*
Extension	*Deployment of new site, including 200 licenses, 5 additional users, installation, commissioning and training*	*850,000*

Total		*850,000*

This Purchase Order is subject to the Additional Terms and Conditions attached hereto as Annex A.

Unless otherwise set forth herein, the commercial and technical terms of this Purchase Order shall be as set forth in the Verint's referenced proposal.

Ship to: Security Division, Prime Minister Office,
Government House,
Port Louis, MAURITIUS

Shipment terms: CIP Mauritius Incoterms 2010
Payment Terms: 80% on Equipment Delivery, 20% on SAT
Warranty: 1 year from SAT Free of Charge. 30% of purchase price/year thereafter

Authorised Signature : …
Title:…
Name:…
Date: …"

The Purchase Order bears a signature which reads as "Madhow", the Title of the person signing the letter is "Officer in charge NSS", the name that appears thereon is "Mohunlall Madhow" and the date is "23 October 2017".

2. Annex G1 is an Invoice dated 22 December 2017 from DNS International Ltd to the Security Division of the Prime Minister's Office for the item "Deployment of New site, including 200 licenses, 5 additional users, installation, commissioning and training" for the sum of **USD 850,000** showing the Bank Name Emirates NBD with the Beneficiary being DNS International Ltd and with the applicant No. 3's USD account number 051xxxx;

3. Annex G2 is a purchase order issued on 15 January 2018 with the supplier name "DNS International Ltd" with its address in Dubai and the customer name "*Security Division, Prime Minister's Office, Government House, Po, MAURITIUS".* The purchase order is in respect of "ICT Server Upgrade described as GMZ EPIC and services" for the sum of **USD 3,700,000**.

The purchase order shows that the shipment address is as follows: -

"*N. Ramburuth (+230 5……)*
Security Division, Prime Minister's Office,
Government House,
Port Louis, MAURITIUS"

The above purchase order bears a signature which reads as

"Deal", the Title of the Officer who signs as the authorised signatory is "Officer in Charge CTU",
the name that appears thereon is "Deal L" and the date is "15 January 2018";

4. Annex G3 is an Invoice dated 18 March 2018 from DNS International Ltd to the Security Division of the Prime Minister's Office for the item "GMZ- STUDIO" for the sum of **USD 2,385,000,** showing the Bank Name Emirates NBD with the Beneficiary being DNS International Ltd and with the applicant No. 3's USD account number 051xxxx;

5. Annex G4 is an invoice dated 5 April 2018 from DNS International Ltd to the Security Division of the Prime Minister's Office for 2 items for which the sum of **USD 1,670,000** is payable showing the Bank Name Emirates NBD with the Beneficiary being DNS International Ltd and with the applicant No. 3's USD account number 051xxxx;

6. Annex G5 is an invoice dated 31 March 2019 from DNS International Ltd to the Security Division of the Prime Minister's Office for 3 items for which the total sum of **USD 2,390,000** is payable showing the Bank Name Emirates NBD with the Beneficiary being DNS International Ltd and with the applicant No. 3's account USD number 051xxxx;

7. Annex G6 is an invoice dated 19 June 2019 from DNS International Ltd to the Security Division of the Prime Minister's Office for an item for which the sum of **USD 84,000** is payable showing the Bank Name Emirates NBD with the Beneficiary being DNS International Ltd and with the applicant No. 3's USD account number 051xxxx;

8. Annex G7 is a receipt dated 4 November 2019 from DNS International Ltd to the Security Division of the Prime Minister's Office in respect of GMZ STUDIO for which the sum of **USD 2,950,000** was paid;

9. Annex G8 is an invoice dated 24 April 2020 from DNS International Ltd to the Security Division of the Prime Minister's Office for 2 items for which the sum of **USD 720,000** is payable showing the Bank Name Emirates NBD with the Beneficiary being DNS International Ltd and with the applicant No. 3's USD account number 051xxxx;

10. Annex G9 is an invoice dated 26 November 2020 from DNS International Ltd to the Security Division of the Prime Minister's Office for an item for which the sum of **USD 625,000** is payable showing the Bank Name Emirates NBD with the Beneficiary being DNS International Ltd and with the applicant No. 3's USD account number 051xxxx. The invoice also states that the sum is payable yearly in advance;

11. Annex G10 bears the same information as Annex G9 except that it is dated 22 March 2021;

12. Annex G11 is an invoice dated 24 March 2022 from DNS International Ltd to the Security Division of the Prime Minister's Office for maintenance in respect of which the sum of **USD 312,500** is payable showing the Bank Name Emirates NBD with the Beneficiary being DNS International Ltd and with the applicant No. 3's USD account number 051xxxx;

13. Annex H is a letter of award dated 10 July 2020 for MT FINTECH JOURNEY-LICENSE PART Mauritius Telecom Ltd to DNS International Ltd for the sum of **USD 4,500,000**;

14. Annex H1 is a purchase order dated 10 July 2020 for MT Fintech Journey-Licenses from Cellplus Mobile Communications Ltd to DNS International Ltd for the sum of **USD 2,250,000**;

15. Annex H2 is an invoice dated 21 July 2020 from DNS International Ltd to Cellplus Mobile Communications Ltd for MT Fintech Journey- Licenses for Core for the sum of **USD 2,250,000**;

16. Annex H3 is a purchase order dated 10 July 2020 for MT Fintech Journey- API Licenses from Cellplus Mobile Communications Ltd to DNS International Ltd for the sum of **USD 1,125,000**;

17. Annex H4 is an invoice dated 21 July 2020 from DNS International Ltd to Cellplus Mobile Communications Ltd for MT Fintech Journey- API Licenses for the sum of **USD 1,125,000**;

18. Annex H5 is a purchase order dated 10 July 2020 from Cellplus Mobile Communications Ltd for MT Fintech Journey- Licenses for features from to DNS International Ltd for the sum of **USD 1,125,000**;

19. Annex H6 is an invoice dated 21 July 2020 from DNS International Ltd to Cellplus Mobile Communications Ltd for MT Fintech Journey- Licenses for features for the sum of **USD 1,125,000**.

It can be gathered from the above documents that –

(a) numerous purchases were made by the Security Division of the Prime Minister's Office from applicant No. 3 and the Security Division of the Prime Minister's Office also sought the provision of services in relation to some of the items purchased. Invoices where the price of the items purchased and the payment due for the services in respect of some of the items were issued by applicant No. 3 to the Security Division of the Prime Minister's Office, wherein reference is made to applicant No. 3's USD account number 051xxxx showing that payment was to be effected into the said account. The payments due were for sums ranging between USD 84,000 and USD 3,700,000;

(b) applicant No. 3 was awarded a contract by Mauritius Telecom Ltd;

(c) there were a number of payments effected by Cellplus Mobile Communications Ltd to applicant No. 3;

(d) the respondent has not denied the above averments but taken note thereof and put the applicants to the proof thereof more specifically in relation to any contracts awarded (by way of tender or otherwise) to applicant No. 3 from January 2015 until March 2023 by the Government of Mauritius and Government related entities including Mauritius Telecom and the Mauritius Police Force.

The documents which the applicants have annexed to their second affidavit are as follows: -

1. Annex A1 is a letter dated 23 June 2016 signed for the Secretary for Home Affairs and which bears the letter head of the Prime Minister's Office. It certifies that the Accountant General, Government of Mauritius has been requested by the Prime Minister's Office to pay the sum of **USD 5, 080,000** to DNS Consultancy Services Ltd on an account number at Afrasia Bank Ltd. Attached to the letter is a Statement of Account from Afrasia Bank which shows that: -

   (a) there was an incoming transfer from the Government of Mauritius in the sum of **USD 5, 080,000** into the account of DNS Consultancy Services Ltd on 28 June 2016;

   (b) there was an incoming transfer from the Government of Mauritius in the sum of **USD 2,360,000** into the account of DNS Consultancy Services Ltd on 21 December 2016;

   (c) there was an incoming transfer from the Government of Mauritius in the sum of **USD 1,860,000** into the account of DNS Consultancy Services Ltd on 21 April 2017;

2. Annex A2 is statement of account of DNS International Ltd for its USD bank account number 051xxxx into which the payments referred to in Annexes attached to the applicant's first affidavit and which are set out above were effected. It relates to the period 21 April 2022 to 30 April 2022. It shows an inward remittance in the sum of **USD 312,485** by the Government of Mauritius into the said account on 9 April 2022;

3. The statement of account of applicant No. 3 for the period 1 January 2019 to 3 August 2021 is also attached to Annex A2. It shows:

(a) an inward remittance of **USD 1,669,985** by the Government of Mauritius on 7 March 2019;

(b) an inward remittance of **USD 1,753,985** by the Government of Mauritius on 18 September 2019;

(c) an inward remittance of **USD 719,985** by the Government of Mauritius on 1 July 2020;

(d) an inward remittance of USD 624,985 by the Government of Mauritius on 5 December 2020;

(e) an inward remittance of USD 624,985 by the Government of Mauritius on 18 May 2021.

It can be gleaned from the above that, on numerous occasions, various sums of money making a total of USD 5,706,410 have been credited into applicant No. 3's USD account number 051xxxx by the Government of Mauritius. Further, I note that –

(a) there is no averment in the respondent's affidavits denying the averments made by the applicants that applicant No. 1 has only two sources of monthly income, firstly his salary of USD 10,000/- from Anglomobility DMCC and a monthly net salary of Rs 207,257/- as Executive Director of MobiMEA Ltd and that he has received dividends and bonuses from Anglomobility DMCC as well as refund of deposit which was paid out from his personal account;

(b) notwithstanding the fact that no copy of any contract awarded to applicant No. 3 was produced there is prima facie evidence adduced by the applicants before me which would tend to show that applicants' respective property is from legitimate sources.

Learned Counsel for the applicants submitted that the applicants have made a full and frank disclosure regarding their sources of income, including the nature, description and explanation of funds credited into their bank accounts and that the applicants have shown that their monies were honestly derived from legitimate commercial activity. As rightly submitted by learned Counsel for the applicants, the respondent has merely taken note of the averments of the applicants which state that in fact and in truth, applicant No. 3 has received payments from the Government of Mauritius on behalf of the Security Division of the Prime Minister's Office, for a total sum of **USD 15,179,737.39**. It is noteworthy that Annex G of the applicant's first affidavit, clearly bears the signature of Mr M. Madhow, Officer in Charge of the National Security Service and Annex G2 of the said affidavit bears the

signature of Mr L. Deal, Officer in Charge of the Counter Terrorism Unit ('CTU').The respondent does not deny that the documents annexed to the applicants' affidavit are applicant No. 3's bank documents nor does it aver that the bank documents do not reflect a true picture regarding the sums of money credited therein or that the source of the applicants' funds are not legitimate.

In this regard, it is important to again set out the averments of the respondent in response to the bank documents of applicant No. 3. They are as follows -

"*5.1. The letter from the Prime Minister's Office dates back to 23 June 2016 and only certifies that the Accountant General has been directed to pay* ***USD 5,080,000*** *to DNS Consultancy Services Ltd. No other information is provided and the purpose of the payment is unknown. There is ambiguity in respect of this payment made by the Government of Mauritius in 2016 and the alleged pressing need for payment now in 2023- this will require further investigation at the level of the Respondent;*

5.2 The Respondent can only ascertain the genuineness of the transactions contained in the bank statements for the United States Dollar ("USD") 00…21 account, and the Euro account 00…10 after a thorough analysis of all corresponding invoices and receipts.

5.3 Some of the transfers effected are doubtful, such as a payment made on 29 August 2016 of USD 2,075.090 (representing part of funds received from the Government of Mauritius) made by DNS Consultancy Services Ltd to DNS International Ltd (allegedly for working capital for a new company) during which time, DNS Consultancy Services Ltd continued to received payments from the Government of Mauritius and was making payments to Verint Systems Ltd and others. Similarly, DNS Consultancy Services on 29 August 2016 made a payment to DNS International Ltd (allegedly for working capital for a new company) of EURO 70,072.05.

5.4 The payments into the USD account come mostly from two sources:

iii. Government of Mauritius – USD 9,300,000; and

iv. Verint Systems Ltd – USD 84,428.07 (albeit, the purpose being unclear).

5.5 Total debits from the account are USD 9,384,428.07/- and there are unexplained payments, as follows:

v. Smita Ellayah – Loan to Shareholder – USD 250,000

vi. Sankara Lingam Krishnamoorthy – USD 5,080.00 (excluding bank charges)

vii. Nilandri Biswas – USD 7,454.80 (excluding bank charges)

viii. DNS International Ltd – USD 3,835,110

5.6 The payments into the EURO account come mostly from two sources:

iii. Government of Mauritius – EURO 525,215.52

iv. Verint Systems Ltd – EURO 171,653.10 (albeit, the purpose is unclear is unclear since no contract has been provided)

5.7 Total deposits into the account are EURO 696,521 and there are unexplained payments totalling EURO 200,208.64/- as follows:

iii. Smita Ellayah – Two loans to Shareholder, totalling EURO 130,136.59 (in respect of which there is no proof of repayment)

iv. DNS International Ltd – EURO 70,072.05"

The above do not constitute denials of the averments made regarding the payment of money into applicant No. 3's USD account number 051xxxx. However more importantly, I note that the respondent does not aver that the said money is proceeds, a benefit, or an instrumentality or terrorist property. Thus, even after the applicants have -

1. averred that their property is not proceeds, benefit, an instrumentality or terrorist property;

2. explained applicant No.1's sources of income; and

3. averred that applicant No. 3's money in its USD account number 051xxxx was honestly derived from legitimate commercial activities and provided documents to support the above contention,

the respondent has simply made vague averments regarding the said money without in any manner explaining why I should consider the money to be proceeds, a benefit, an instrumentality or terrorist property. In the absence of any averment from the respondent challenging the bank documents produced by the applicants, I cannot but conclude that they

buttress the applicants' averments that the money found in applicant No. 3's USD account number 051xxxx is from legitimate sources.

I am also surprised by the respondent's averment (which is set out below) in response to the applicants' averments that –

(a) there is insufficient evidence for a Restriction Order to prevail;

(b) the respondent cannot have suspicions of criminal conduct to support a "reasonable' cause to believe when the respondent has neither sought any explanation for the applicants nor have they recorded any statement or even attempted to have the version of the applicants as to their alleged suspicion.

The respondent's averment in response to the above is as follows-
"*It [the respondent] applied for a non-conviction-based asset recovery. In this respect, the Applicants' paragraph 21 of AA1, page 11 of the brief is out of context. Sub Part A of Part IV of the Act read together with sections 4 and 5 of the Act show that (i) the Respondent has to satisfy the section 27 (2) test, **which it did**, (ii) the restriction order is of a temporary nature, (iii) there is a balance between the need for the completion of the investigation and the prevention of the disposal of the assets subject matter of the investigation and (iv) there are safeguards for the protection of the Applicants' rights."*[emphasis added]

It is important to underline that we are presently in the realm of civil proceedings. The purpose of obtaining the restraining order under section 27 was to "freeze" property of the applicants which the enforcement authority reasonably believes to be proceeds, a benefit, an instrumentality or terrorist property, ie. of tainted origin with a view to eventually forfeiting that property through a recovery order. As stated above, the procedure for obtaining the Restriction Order is made on an ex parte basis for obvious reasons. However, since the Restriction Order has already been issued, there is no longer any risk of dissipation of assets at this stage. The ARA provides that the owner of the property has to be notified of the order within 21 days (see section 27(5)). Pursuant section 31 of the ARA, the owner of the property has the right to seek a rescission of the Restriction Order and the applicants are presently exercising that right. The respondent has not specifically averred that this is so but it may be gathered that the investigation is ongoing.

In the case of **Manraj DD & Ors v ICAC** **[2003 SCJ 75]**, the Independent Commission Against Corruption (ICAC) which was conducting an alleged criminal fraud

probe had made an ex parte application before the Judge in Chambers for an attachment Order under section 56 of the Prevention of Corruption Act (POCA). When dealing with an application for a revocation of the original attachment Order issued by the learned Judge, he made the following observations –

> "*The concept of a fair hearing also implies the right to adversarial proceedings. The right to adversarial proceedings include the right to be present, the right to know what evidence one has to rebut, the right to comment on evidence and observations filed, with a view to influencing the Court's decision*."

Although the above observations were made with regard to an attachment Order obtained in connection with criminal proceedings, I am of the view that the said observations would be equally applicable in the present context since the right to a fair hearing also applies to civil proceedings. Section 10(8) of the Constitution provides –

> "*(8) Any Court or other authority required or empowered by law to determine the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial, and where proceedings for such a determination are instituted by any person before such a Court or other authority, the case shall be given a fair hearing within a reasonable time.*"

It is apposite to note that the equality of arms principle has been enunciated by the European Court of Human Rights as part of the right to a fair trial under Article 6 of the European Convention for the Protection of Human Rights (the "Convention") which is worded in similar terms to section 10(8) in so far as the right to a fair trial in civil proceedings is concerned. Article 6 of the Convention stipulates –

"***Article 6***

Right to a fair trial

1. *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the* parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

The following can also be read in **Halsbury's Laws of England/Rights and Freedoms (Volume 88A [2018])**:

"*The principle of equality of arms, which entails that each party must be afforded a **reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent**, has frequently been endorsed in relation to both civil and criminal proceedings. To this end, fairness under Article 6 requires that proceedings are truly adversarial, such that parties are entitled to make known evidence needed for their claims to succeed and to have knowledge of, and comment effectively on, all evidence adduced before or submissions filed with the court*." [emphasis added]

It is also noteworthy that in **Dzitse Robert Mensah Kordso v The State [2016 SCJ 236]**, the Court of Criminal appeal stated that section 10(2)(e) which concerns criminal cases also includes a requirement of "equality of arms" and that this implies a level playing field and fair balance between the parties.

It is also relevant to refer to the following excerpt from the **Guide on Article 6 of the Convention – Right to a fair trial (civil limb) of the European Court of Human Rights** –

"*222. The principle of "equality of arms" is inherent in the broader concept of a fair trial. The requirement of "equality of arms", in the sense of a "fair balance" between the parties, applies in principle to civil as well as to criminal cases (Feldbrugge v. the Netherlands, § 44).*
*223. Content: maintaining a "fair balance" between the parties. Equality of arms implies that each party must be afforded **a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis the other party**: Dombo Beheer B.V. v. the Netherlands, § 33.* [emphasis added]
- It is inadmissible for one party to make submissions to a court without the knowledge of the other and on which the latter has no opportunity to comment. It is a matter for the parties alone to assess whether a submission deserves a reaction (APEH Üldözötteinek Szövetsége and Others v. Hungary, § 42);
......."

It is clear from the above that a party to civil proceedings must have "*a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis the other party"*. Since we are here in civil proceedings, the onus is on the applicants to show that the Restriction Order should be rescinded. However, the Restriction Order was obtained on the basis of evidence of which the applicants are still unaware. They have explained that the source of their property is not tainted to which the respondent has simply averred that it satisfied the test under section 27 when making the application and that in its application for the Restriction Order, it did identify and explain two sets of offences concerning the applicants and also referred to 'recoverable property' as envisaged by the ARA. The applicants are thus still in the dark as to how the respondent satisfied the test under section 27 and what are the sets of offences concerning them which were identified by the respondent. Moreover, there is no averment in the respondent's affidavit indicating how it qualifies the property of the applicants, is it proceeds, a benefit, an instrumentality or terrorist property? In the circumstances, it can hardly be argued that the applicants have a reasonable opportunity of presenting evidence before me which does not place them at a substantial disadvantage vis-à-vis the respondent.

Further, the stand of the respondent seems to be that simply because at the time I granted the Restriction Order I was satisfied that there were reasonable grounds to believe that the property referred to in the application were proceeds…etc, the Restriction Order has to be maintained. The above stand makes total abstraction of the fact that, unlike what obtained when the Restriction Order was granted, currently there are before me two sets of averments: on the one hand, there are the averments made by the applicants which are backed up by documents which, prima facie, show that the money found into applicant No. 3's bank account and the money of applicant No. 1 are from legitimate sources, which, I note, has remained unrebutted, while on the other hand, there are the vague averments made by the respondent without specifically denying the applicants' averments regarding the legitimacy of the sources of their money and without in any manner whatsoever explaining why the applicants property should be considered to be proceeds, a benefit, an instrumentality or terrorist property.

The respondent has been conferred with important powers under the FIAMLA. In the discharge of its functions, it should be mindful that there are reasonable grounds to interfere with property rights in derogation of the constitutional protection afforded to those rights under our Constitution.

Now, since the applicants have, prima facie, established that the source of their funds is not tainted, the burden has shifted on the respondent to satisfy me that I should not act on the evidence adduced by the applicants but the respondent has failed to do so.

I am fully alive to the fact that the respondent may in some cases have to withhold information which is in its possession because, for example, disclosure of the said information may thwart an ongoing enquiry or the application may have been obtained on the basis of confidential information which the enforcement authority is precluded from disclosing or is unable to disclose so as to be able to complete its enquiry. However, if this were the case it should have been clearly averred and explained in the affidavits filed by the respondent. In the present case, no such averments were made before me and the respondent remained content to aver that "*the Respondent has to satisfy the section 27 (2) test, **which it did***".

Before concluding I find it important to deal with the question of full and frank or fair disclosure. Learned Counsel for the applicants argued that the respondent failed to make a full and frank disclosure while making the application. It was submitted that the respondent never disclosed that applicant No. 3 was supplying the Government of Mauritius with national security equipment which was paid for by the Accountant General.

I have carefully reviewed the affidavit which was filed in support of the application for the Restriction Order. Although it was stated in the respondent's affidavit (then applicant) that DNS Consultancy Services received two payments from the Government of Mauritius, there was no mention in the affidavit that applicant No. 3 was supplying the Government of Mauritius with national security equipment and that payment was effected by the Accountant General to it. Further, it was not averred that there were so many transfers of funds from the Government of Mauritius to applicant No. 3's accounts.

In this regard, I find it relevant to refer to the following extract from the Keanan case –

"*[13] there is a clear obligation imposed upon those seeking to make ex-parte applications to ensure that a full and fair disclosure of all material facts is made to the court. This duty is not limited to facts known to the applicant but extends to facts that the applicant ought to have known after making proper inquiries. The material facts are those which it is material for the court to know for the purpose of dealing properly and fairly with the application, materiality being an issue to be decided by the court and not by the applicant. These principles apply to ex-parte applications made by the*

> *Agency under the provisions of the POCA 2002. Both the principles and the relevant authorities have been set out in a clear and helpful summary form in paragraphs 42 and 43 of the judgment of McCombe J in Director of the Assets Recovery Agency v Singh [2004] EWHC 2335 and I gratefully adopt his observations as comprising an accurate statement of the law in relation to this application.*"

I am in entire agreement with the views expressed by the learned Judge in so far as the statement of the law regarding the issue of full and fair disclosure regarding applications which are made ex parte are concerned. I am of the considered view that the respondent had an obligation to make a full and fair disclosure while making the ex parte application under section 27. I am accordingly of the view that the information regarding the different payments effected by the Security Division of the Prime Minister's Office should have been disclosed by the respondent at the time of making the ex parte application.

For all the reasons given above, I am of the view that the Restriction Order issued in respect of the applicants' property should be rescinded. I accordingly rescind the paragraphs B and C of a Restriction Order which I had previously made on 28 March 2023 in respect of the property of applicant No. 1 and applicant No. 3.

With costs. I certify as to Counsel.

This 12th September 2023.

K. D. Gunesh-Balaghee
Judge

For Applicants	**:**	**Mr Y Balgobin, Attorney-at-Law**
	:	**Mr S Bhadain, of Counsel**
For Respondent	**:**	**Mr N Ramasawmy, Attorney-at-Law**
	:	**Mr R Chetty, Senior Counsel**
	:	**Mrs V Nursimhulu, of Counsel**